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Amendments to the *Manual for Courts-Martial*

The President of the United States recently approved the 1998 Amendments to the *Manual for Courts-Martial, United States*. The 1998 amendments address a broad range of substantive and procedural military criminal law issues. Areas affected by the 1998 Amendments include: pretrial confinement, speedy trial, sentencing proceedings, substantive criminal offenses and defenses, post-trial procedures, waiver and deferment of confinement and forfeitures, vacation of suspended sentences, authority of The Judge Advocate General to act on courts-martial that are not subject to review by the Courts of Criminal Appeals, and demands for new trial. The 1998 amendments also incorporate significant changes to the Military Rules of Evidence.

These amendments became effective on 27 May 1998, subject to the provisions contained in section 4 of the Executive Order reprinted below.

Executive Order 13086
1998 Amendments to the Manual for Courts-Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, Executive Order No. 12888, Executive Order No. 12936, and Executive Order No. 12960, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

a. R.C.M. 305(g) through 305(k) are amended to read as follows:

(g) *Who may direct release from confinement*. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsections (i) and/or (j) of this rule or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For the purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) *Notification and action by commander.*

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision*. Not later than 72 hours after the commander's ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander's compliance with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control.

Nothing in subsections R.C.M. 305(d), R.C.M. 305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

(B) *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 trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury to others, or other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(C) *72-hour memorandum*. If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement*.

(1) *48-hour probable cause determination*. Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) *7-day review of pretrial confinement*. Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review.*

(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

(ii) *Rules of evidence.* Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) *Standard of proof.* The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement*. The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the prisoner based upon any significant information not previously considered.

(j) *Review by military judge*. Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of the pretrial confinement upon motion for appropriate relief.

(1) *Release*. The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) *Credit.* The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of this rule.

(k) *Remedy.* The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit to which the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against adjudged hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7). For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeitures or a like amount of fine. The credit shall not be applied against any other form of punishment.

b. R.C.M. 405(e) is amended to read as follows:

(e) *Scope of investigation.* The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses.

c. R.C.M. 706(c)(2)(D) is amended to read as follows:

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense of the case?

d. R.C.M. 707(b)(3) is amended by adding subsection (E) which reads as follows:

(E) *Commitment of the incompetent accused.* If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

e. R.C.M. 707(c) is amended to read as follows:

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

f. R.C.M. 809(b)(1) is amended by deleting the last sentence, which reads:

In such cases, the regular proceedings shall be suspended while the contempt is disposed of.

g. R.C.M. 809(c) is amended to read as follows:

(c) *Procedure*. The military judge shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The military judge shall also determine when during the court-martial the contempt proceedings shall be conducted; however, if the court-martial is composed of members, the military judge shall conduct the contempt proceedings outside the members' presence. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the court-martial. Otherwise, the provisions of subsection (b)(2) shall apply.

h. R.C.M. 908(a) is amended to read as follows:

(a) *In general.* In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

i. R.C.M. 909 is amended to read as follows:

(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall commit the accused to the custody of the Attorney General.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in section 4241(d) of title 18, United States Code. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, action shall be taken in accordance with section 4246 of title 18, United States Code.

(g) *Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.

j. R.C.M. 916(b) is amended to read as follows:

(b) *Burden of proof.* Except for the defense of lack of mental responsibility and the defense of mistake of fact as to age as described in Part IV, para. 45c.(2) in a prosecution for carnal knowledge, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence, and has the burden of proving mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence.

k. R.C.M. 916(j) is amended to read as follows:

(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(2) *Carnal knowledge.* It is a defense to a prosecution for carnal knowledge that, at the time of the sexual intercourse, the person with whom the accused had sexual intercourse was at least 12 years of age, and the accused reasonably believed the person was at least 16 years of age. The accused must prove this defense by a preponderance of the evidence.

l. R.C.M. 920(e)(5)(D) is amended to read as follows:

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact as to age in a carnal knowledge prosecution is raised, add: The burden of proving the defense of mistake of fact as to age in car-

nal knowledge by a preponderance of the evidence is upon the accused.]

m. R.C.M. 1005(e) is amended to read as follows:

(e) *Required Instructions*. Instructions on sentence shall include:

(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;

(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances;

(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5).

n. The heading for R.C.M. 1101 is amended as follows:

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures

o. R.C.M. 1101(c) is amended as follows:

(c) *Deferment of confinement, forfeitures or reduction in grade*.

(1) *In general*. Deferment of a sentence to confinement, forfeitures, or reduction in grade is a postponement of the running of a sentence.

(2) *Who may defer.* The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused at any time after the adjournment of the court-martial, defer the accused's service of a sentence to confinement, forfeitures, or reduction in grade that has not been ordered executed.

(3) *Action on deferment request.* The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement, forfeitures, or reduction in grade. The accused shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment request shall be subject to judicial review only for abuse of discretion. The action of the authority acting on the deferment request shall be in writing and a copy shall be provided to the accused.

(4) *Orders*. The action granting deferment shall be reported in the convening authority's action under R.C.M. 1107(f)(4)(E) and shall include the date of the action on the request when it occurs prior to or concurrently with the action. Action granting deferment after the convening authority's action under R.C.M. 1107 shall be reported in orders under R.C.M. 1114 and included in the record of trial.

(5) *Restraint when deferment is granted*. When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(6) *End of deferment*. Deferment of a sentence to confinement, forfeitures, or reduction in grade ends when:

(A) The convening authority takes action under R.C.M. 1107, unless the convening authority specifies in the action that service of confinement after the action is deferred;

(B) The confinement, forfeitures, or reduction in grade are suspended;

(C) The deferment expires by its own terms; or

(D) The deferment is otherwise rescinded in accordance with subsection (c)(7) of this rule. Deferment of confinement may not continue after the conviction is final under R.C.M. 1209.

(7) *Rescission of deferment.*

(A) *Who may rescind*. The authority who granted the deferment or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(B) *Action*. Deferment of confinement, forfeitures, or reduction in grade may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection (c)(3) of this rule. The accused shall promptly be informed of the basis for the rescission and of the right to submit written matters on the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement, forfeitures, or reduction in grade pending this action.

(C) *Execution*. When deferment of confinement is rescinded after the convening authority's action under R.C.M. 1107, the confinement may be ordered executed. However, no such order to rescind a deferment of confinement may be issued within 7 days of notice of the rescission of a deferment of confinement to the accused under subsection (c)(7)(B) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused shall be credited with any confinement actually served during this period.

(D) *Orders*. Rescission of a deferment before or concurrently with the initial action in the case shall be reported in the action under R.C.M. 1107(f)(4)(E), which action shall include the dates of the granting of the deferment and the rescission. Rescission of a deferment of confinement after the convening authority's action shall be reported in supplementary orders in accordance with R.C.M. 1114 and shall state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

p. R.C.M. 1101 is amended by adding the following new subparagraph (d):

(d) *Waiving forfeitures resulting from a sentence to confinement to provide for dependent support*.

(1) With respect to forfeiture of pay and allowances resulting only by operation of law and not adjudged by the court, the convening authority may waive, for a period not to exceed six months, all or part of the forfeitures for the purpose of providing support to the accused's dependent(s). The convening authority may waive and direct payment of any such forfeitures when they become effective by operation of Article 57(a).

(2) Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused’s family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused’s family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.

(3) For the purposes of this Rule, a “dependent” means any person qualifying as a “dependent” under 37 U.S.C. 401.

q. The following new rule is added after R.C.M. 1102:

Rule 1102A. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility

(a) *In general*. The military judge shall conduct a hearing not later than forty days following the finding that an accused is not guilty only by reason of a lack of mental responsibility.

(b) *Psychiatric or psychological examination and report*. Prior to the hearing, the military judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing.

(c) *Post-trial hearing*.

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

(3) An accused found not guilty only by reason of a lack of mental responsibility of an offense involving bodily injury to another, or serious damage to the property of another, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the accused has the burden of such proof by a preponderance of the evidence.

(4) If, after the hearing, the military judge finds the accused has satisfied the standard specified in subsection (3) of this section, the military judge shall inform the general court-martial convening authority of this result and the accused shall be released. If, however, the military judge finds after the hearing that the accused has not satisfied the standard specified in subsection (3) of this section, then the military judge shall inform the general court-martial convening authority of this result and that authority may commit the accused to the custody of the Attorney General.

r. R.C.M. 1105(b) is amended to read as follows:

(b) *Matters that may be submitted*.

(1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilt or to approve the sentence. The convening authority is only required to consider written submissions.

(2) Submissions are not subject to the Military Rules of Evidence and may include:

(A) Allegations of errors affecting the legality of the findings or sentence;

(B) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(C) Matters in mitigation that were not available for consideration at the court-martial; and

(D) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

s. R.C.M. 1107(b)(4) is amended to read as follows:

(4) *When proceedings resulted in a finding of not guilty or not guilty only by reason of lack of mental responsibility, or there was a ruling amounting to a finding of not guilty.* The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1102A.

t. The subheading for R.C.M. 1107(d)(3) is amended to read as follows:

(3) *Deferring service of a sentence to confinement.*

u. R.C.M. 1107(d)(3)(A) is amended to read as follows:

(A) In a case in which a court-martial sentences an accused referred to in subsection (B), below, to confinement, the convening authority may defer service of a sentence to confinement by a court-martial, without the consent of the accused, until after the accused has been permanently released to the armed forces by a state or foreign country.

v. R.C.M. 1109 is amended to read as follows:

Rule 1109. Vacation of suspension of sentence

(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension as provided in this rule.

(b) *Timeliness.*

(1) *Violation of conditions.* Vacation shall be based on a violation of the conditions of suspension that occurs within the period of suspension.

(2) *Vacation proceedings.* Vacation proceedings under this rule shall be completed within a reasonable time.

(3) *Order vacating the suspension.* The order vacating the suspension shall be issued before the expiration of the period of suspension.

(4) *Interruptions to the period of suspension.* Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts the running of the period of suspension.

(c) *Confinement of probationer pending vacation proceedings.*

(1) *In general.* A probationer under a suspended sentence to confinement may be confined pending action under subsection (d)(2) of this rule, in accordance with the procedures in this subsection.

(2) *Who may order confinement.* Any person who may order pretrial restraint under R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

(3) *Basis for confinement.* A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the suspension.

(4) *Review of confinement.* Unless proceedings under subsection (d)(1), (e), (f), or (g) of this rule are completed within 7 days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary hearing shall be conducted by a neutral and detached officer appointed in accordance with regulations of the Secretary concerned.

(A) *Rights of accused.* Before the preliminary hearing, the accused shall be notified in writing of:

(i) The time, place, and purpose of the hearing, including the alleged violation(s) of the conditions of suspension;

(ii) The right to be present at the hearing;

(iii) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(iv) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reimbursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings or, if a military witness, cannot be excused from other important duties.

(B) *Rules of evidence*. Except for Mil. R. Evid. Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to matters considered at the preliminary hearing under this rule.

(C) *Decision*. The hearing officer shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer shall issue a written order directing that the probationer be released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated the conditions of suspension, the hearing officer shall set forth that decision in a written memorandum, detailing therein the evidence relied upon and reasons for making the decision. The hearing officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

(d) *Vacation of suspended general court-martial sentence*.

(1) *Action by officer having special court-martial jurisdiction over probationer.*

(A) *In general.* Before vacation of the suspension of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall personally hold a hearing on the alleged violation of the conditions of suspension. If there is no officer having special court-martial jurisdiction over the probationer who is subordinate to the officer having general court-martial jurisdiction over the probationer, the officer exercising general court-martial jurisdiction over the probationer shall personally hold a hearing under subsection (d)(1) of this rule. In such cases, subsection (d)(1)(D) of this rule shall not apply.

(B) *Notice to probationer.* Before the hearing, the officer conducting the hearing shall cause the probationer to be notified in writing of:

(i) The time, place, and purpose of the hearing;

(ii) The right to be present at the hearing;

(iii) The alleged violation(s) of the conditions of suspension and the evidence expected to be relied on;

(iv) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(v) The opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses, unless the hearing officer determines that there is good cause for not allowing confrontation and cross-examination.

(C) *Hearing*. The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(D) *Record and recommendation*. The officer who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the officer exercising general court-martial jurisdiction over the probationer.

(E) *Release from confinement*. If the special court-martial convening authority finds there is not probable cause to believe that the probationer violated the conditions of the suspension, the special court-martial convening authority shall order the release of the probationer from confinement ordered under subsection (c) of this rule. The special court-martial convening authority shall, in any event, forward the record and recommendation under subsection (d)(1)(D) of this rule.

(2) *Action by officer exercising general court-martial jurisdiction over probationer.*

(A) *In general*. The officer exercising general court-martial jurisdiction over the probationer shall review the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(B) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall, subject to R.C.M. 1113(c), be ordered executed.

(e) *Vacation of a suspended special court-martial sentence wherein a bad-conduct discharge was not adjudged*.

(1) *In general*. Before vacating the suspension of a special court-martial punishment that does not include a bad-conduct discharge, the special court-martial convening authority for the command in which the probationer is serving or assigned shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) *Notice to probationer.* The person conducting the hearing shall notify the probationer, in writing, before the hearing of the rights specified in subsection (d)(1)(B) of this rule.

(3) *Hearing*. The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(4) *Authority to vacate suspension*. The special court-martial convening authority for the command in which the probationer is serving or assigned shall have the authority to vacate any punishment that the officer has the authority to order executed.

(5) *Record and recommendation.* If the hearing is not held by the commander with authority to vacate the suspension, the person who conducts the hearing shall make a summarized record of the hearing and forward the record and that officer's written recommendation concerning vacation to the commander with authority to vacate the suspension.

(6) *Decision.* The special court-martial convening authority shall review the record produced by and the recommendation of the person who conducted the vacation proceeding, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(7) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall be ordered executed.

(f) *Vacation of a suspended special court-martial sentence that includes a bad-conduct discharge.*

(1) The procedure for the vacation of a suspended approved bad-conduct discharge shall follow that set forth in subsection (d) of this rule.

(2) The procedure for the vacation of the suspension of any lesser special court-martial punishment shall follow that set forth in subsection (e) of this rule.

(g) *Vacation of a suspended summary court-martial sentence.*

(1) Before vacation of the suspension of a summary court-martial sentence, the summary court-martial convening authority for the command in which the probationer is serving or assigned shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) *Notice to probationer.* The person conducting the hearing shall notify the probationer before the hearing of the rights specified in subsections (d)(1)(B)(i), (ii), (iii), and (v) of this rule.

(3) *Hearing.* The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(4) *Authority to vacate suspension.* The summary court-martial convening authority for the command in which the probationer is serving or assigned shall have the authority to vacate any punishment that the officer had the authority to order executed.

(5) *Record and recommendation.* If the hearing is not held by the commander with authority to vacate the suspension, the person who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the commander with authority to vacate the suspension.

(6) *Decision.* A commander with authority to vacate the suspension shall review the record produced by and the recommendation of the person who conducted the vacation proceeding, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(7) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall be ordered executed.

w. R.C.M. 1201(b)(3)(A) is amended to read as follows:

(A) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, *sua sponte* or upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial that has been finally reviewed, but has not been reviewed either by a Court of Criminal Appeals or by the Judge Advocate General under subsection (b)(1) of this rule, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

x. R.C.M. 1203(c)(1) is amended to read as follows:

(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case.

y. R.C.M. 1210(a) is amended by adding at the end thereof the following sentence:

A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.

Sec. 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

a. M.R.E. 412 is amended to read as follows:

Rule 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition

(a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c) of this rule:

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions*.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) Evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subdivision (b) of this rule must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

b. M.R.E. 413 is added to read as follows:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offense of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (4).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

c. M.R.E. 414 is added to read as follows:

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "child" means a person below the age of sixteen, and "offense of child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved--

(1) any sexual act or sexual contact with a child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(3) contact between any part of the accused's body, or an object controlled or held by the accused, and the genitals or anus of a child;

(4) contact between the genitals or anus of the accused and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (5) of this subdivision.

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purpose of this rule, the term "sexually explicit conduct" means actual or simulated:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

d. M.R.E. 1102 is amended to read as follows:

Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.

Sec. 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

a. Paragraph 19 is amended to read as follows:

19. Article 95—Resistance, flight, breach of arrest, and escape

a. *Text.*

Any person subject to this chapter who--

(1) resists apprehension;

(2) flees from apprehension;

(3) breaks arrest; or

(4) escapes from custody or confinement shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Resisting apprehension.*

(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.

(2) *Flight from apprehension.*

(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 fled from the apprehension.

(3) *Breaking arrest.*

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to order the accused into arrest; and

(c) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

(4) *Escape from custody.*

(a) That a certain person apprehended the accused;

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

(c) That the accused freed himself or herself from custody before being released by proper authority.

(5) *Escape from confinement.*

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority. [Note: If the escape was from post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.

c. *Explanation.*

(1) *Resisting apprehension.*

(a) *Apprehension.* Apprehension is the taking of a person into custody. *See* R.C.M. 302.

(b) *Authority to apprehend. See* R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized that person to apprehend the accused is a question of law

to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the factfinder.

(c) *Nature of the resistance*. The resistance must be active, such as assaulting the person attempting to apprehend. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) *Mistake*. It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the accused's belief at the time that no basis existed for the apprehension is not a defense.

(e) *Illegal apprehension*. A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, such as assault, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed to be legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

(2) *Flight from apprehension*. The flight must be active, such as running or driving away.

(3) *Breaking arrest*.

(a) *Arrest*. There are two types of arrest: pretrial arrest under Article 9 (*see* R.C.M. 304), and arrest under Article 15 (*see* paragraph 5c.(3), Part V, MCM). This article prohibits breaking any arrest.

(b) *Authority to order arrest*. *See* R.C.M. 304(b) and paragraphs 2 and 5b, Part V, MCM, concerning authority to order arrest.

(c) *Nature of restraint imposed by arrest*. In arrest, the restraint is moral restraint imposed by orders fixing the limits of arrest.

(d) *Breaking*. Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) *Illegal arrest*. A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

(4) *Escape from custody*.

(a) *Custody*. "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) *Authority to apprehend*. *See* subparagraph (1)(b) above.

(c) *Escape*. For a discussion of escape, *see* subparagraph c(5)(c), below.

(d) *Illegal custody*. A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) *Correctional custody*. *See* paragraph 70.

(5) *Escape from confinement*.

(a) *Confinement*. Confinement is physical restraint imposed under R.C.M. 305, 1101, or paragraph 5b, Part V, MCM. For purposes of the element of post-trial confinement (subparagraph b(5)(d), above) and increased punishment therefrom (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial, and not as a result of pretrial restraint or nonjudicial punishment.

(b) *Authority to order confinement*. *See* R.C.M. 304(b), 1101, and paragraphs 2 and 5b, Part V, MCM, concerning who may order confinement.

(c) *Escape*. An escape may be either with or without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. *See also* paragraph 20c.(l)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.

(d) *Status when temporarily outside confinement facility*. A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) *Legality of confinement*. A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. *Lesser included offenses*.

(1) *Resisting apprehension*. Article 128--assault; assault consummated by a battery

(2) *Breaking arrest*.

(a) Article 134—breaking restriction

(b) Article 80—attempts

(3) *Escape from custody.* Article 80--attempts

(4) *Escape from confinement*. Article 80--attempts

e. *Maximum punishment*.

(1) *Resisting apprehension*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Flight from apprehension*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Breaking arrest*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(4) *Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(5) *Escape from post-trial confinement*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications*.

(1) *Resisting apprehension*.

In that ____________ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___________, 19__, resist being apprehended by _______, (an armed force policeman) (________), a person authorized to apprehend the accused.

(2) *Flight from apprehension*.

In that _____________ (personal jurisdiction data), did (at/on board--location) (subject matter jurisdiction data, if required), on or about _____________ 19__, flee apprehension by ____________ (an armed force policeman) (___________), a person authorized to apprehend the accused.

(3) *Breaking arrest*.

In that _________ (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) (___________) by a person authorized to order the accused into arrest, did, (at/on board--location) on or about ________ 19__, break said arrest.

(4) *Escape from custody.*

In that __________ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about __________ 19__, escape from the custody of _______, a person authorized to apprehend the accused.

(5) *Escape from confinement.*
In that ______________ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order said accused into confinement did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__, escape from confinement.

b. The following new paragraph is added after paragraph 97:

97a. Article 134—(Parole, Violation of)

a. *Text*. See paragraph 60.

b. *Elements*.

(1) That the accused was a prisoner as the result of a court-martial conviction or other criminal proceeding;

(2) That the accused was on parole;

(3) That there were certain conditions of parole that the parolee was bound to obey;

(4) That the accused violated the conditions of parole by doing an act or failing to do an act; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation*.

(1) "Prisoner" refers only to those in confinement resulting from conviction at a court-martial or other criminal proceeding.

(2) "Parole" is defined as "word of honor." A prisoner on parole, or parolee, has agreed to adhere to a parole plan and

conditions of parole. A "parole plan" is a written or oral agreement made by the prisoner prior to parole to do or refrain from doing certain acts or activities. A parole plan may include a residence requirement stating where and with whom a parolee will live, and a requirement that the prisoner have an offer of guaranteed employment. "Conditions of parole" include the parole plan and other reasonable and appropriate conditions of parole, such as paying restitution, beginning or continuing treatment for alcohol or drug abuse, or paying a fine ordered executed as part of the prisoner's court-martial sentence. In return for giving his or her "word of honor" to abide by a parole plan and conditions of parole, the prisoner is granted parole.

d. *Lesser included offense*. Article 80--attempts.

e. *Maximum punishment*. Bad-conduct discharge, confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

f. *Sample specification*.

In that ____________________ (personal jurisdiction data), a prisoner on parole, did, (at/on board--location), on or about ______________, 19__, violate the conditions of his/her parole by _________________.

c. Paragraph 45.a and b are amended to read as follows:

45. Article 120--Rape and carnal knowledge

a. *Text*.

(a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person--

(1) who is not his or her spouse; and

(2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

(d)(1) In a prosecution under subsection (b), it is an affirmative defense that—

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

(2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence.

b. *Elements*.

(1) *Rape*.

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent.

(2) *Carnal knowledge*.

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c) That at the time of the sexual intercourse the person was under 16 years of age.

d. Paragraph 45c.(2) is amended to read as follows:

(2) *Carnal knowledge*. "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

e. Paragraph 54e.(l) is amended to read as follows:

(1) *Simple Assault*.

(A) *Generally.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(B) *When committed with an unloaded firearm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

Sec. 4. These amendments shall take effect on May 27, 1998, subject to the following:

(a) The amendments made to Military Rules of Evidence 412, 413, and 414 shall apply only to courts-martial in which arraignment has been completed on or after June 26, 1998.

(b) Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998, which was not punishable when done or omitted.

(c) The amendment made to Part IV, para. 45c.(2), authorizing a mistake of fact defense as to age in carnal knowledge prosecutions is effective in all cases in which the accused was arraigned on the offense of carnal knowledge, or for a greater offense that is later reduced to the lesser included offense of carnal knowledge, on or after 10 February 1996.

(d) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to May 27, 1998, and any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

THE WHITE HOUSE

Changes to the Discussion Accompanying the Manual for Courts-Martial, United States.

a. The Discussion following R.C.M. 103 is amended by adding the following two sections at the end of the Discussion:

(14) "Classified information" (A) means any information or material that has been determined by an official of the United States pursuant to law, an Executive Order, or regulation to require protection against unauthorized disclosure for reasons of national security, and (B) any restricted data, as defined in section 2014(y) of title 42, United States Code.

(15) "National security" means the national defense and foreign relations of the United States.

b. The Discussion following R.C.M. 405(e) is amended by adding the following paragraph at the end of the Discussion:

In investigating uncharged misconduct identified during the pretrial investigation, the investigating officer will inform the accused of the general nature of each uncharged offense investigated, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the investigation of any charged offense.

c. The Discussion following R.C.M. 703(e)(2)(G)(i) is amended by adding the following sentence at the end of the second paragraph:

Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court.

d. The following Discussion is inserted after the first two sentences of R.C.M. 707(c):

Periods during which the accused is hospitalized due to incompetence or otherwise in the custody of the Attorney General are excluded when determining speedy trial under this rule.

e. The following Discussion is added after R.C.M. 909(f):

Under section 4241(d) of title 18, the initial period of hospitalization for an incompetent accused shall not exceed four months. However, in determining whether there is a substantial probability the accused will attain the capacity to permit the trial to proceed in the foreseeable future, the accused may be hospitalized for an additional reasonable period of time.

This additional period of time ends either when the accused's mental condition is improved so that trial may proceed, or when the pending charges against the accused are dismissed. If charges are dismissed solely due to the accused's mental condition, the accused is subject to hospitalization as provided in section 4246 of title 18.

f. The Discussion following R.C.M. 916(j) is amended by inserting the following paragraph after the third paragraph in the Discussion:

Examples of offenses in which the accused's intent or knowledge is immaterial include: carnal knowledge (if the victim is under 12 years of age, knowledge or belief as to age is immaterial) and improper use of countersign (mistake as to authority of person to whom disclosed not a defense). However, such ignorance or mistake may be relevant in extenuation and mitigation.

g. The Discussion following R.C.M. 1003(b)(2) is amended by inserting the following paragraph after the first paragraph in the Discussion:

Forfeitures of pay and allowances adjudged as part of a court-martial sentence, or occurring by operation of Article 58b are effective 14 days after the sentence is adjudged or when the sentence is approved by the convening authority, whichever is earlier.

h. The Discussion following R.C.M. 1003(b)(2) is amended by adding the following at the end of the Discussion:

Forfeiture of pay and allowances under Article 58b is not a part of the sentence, but is an administrative result thereof.

At general courts-martial, if both a punitive discharge and confinement are adjudged, then the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only confinement is adjudged, then if that confinement exceeds six months, the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only a punitive discharge is adjudged,

Article 58b has no effect on pay and allowances. A death sentence results in total forfeiture of pay and allowances.

At a special court-martial, if a bad-conduct discharge and confinement are adjudged, then the operation of Article 58b results in a forfeiture of two-thirds of pay only during that period of confinement. If only confinement is adjudged, however, then Article 58b has no effect on adjudged forfeitures.

If the sentence, as approved by the convening authority or other competent authority, does not result in forfeitures by the operation of Article 58b, then only adjudged forfeitures are effective.

Article 58b has no effect on summary courts-martial.

i . The Discussion following R.C.M. 1101(c)(6) is amended to read as follows:

When the sentence is ordered executed, forfeitures or reduction in grade may be suspended, but may not be deferred; deferral of confinement may continue after action in accordance with R.C.M. 1107. A form of punishment cannot be both deferred and suspended at the same time. When deferment of confinement, forfeitures, or reduction in grade ends, the sentence to confinement, forfeitures, or reduction in grade begins to run or resumes running, as appropriate. When the convening authority has specified in the action that confinement will be deferred after the action, the deferment may not be terminated, except under subsections (6)(B), (C), or (D), until the conviction is final under R.C.M. 1209.

See R.C.M. 1203 for deferment of a sentence to confinement pending review under Article 67(a)(2).

j. The following Discussion is added after R.C.M. 1101(d):

Forfeitures resulting by operation of law, rather than those adjudged as part of a sentence, may be waived for six months or for the duration of the period of confinement, whichever is less. The waived forfeitures are paid as support to dependent(s) designated by the convening authority. When directing waiver and payment, the convening authority should identify by name the dependent(s) to whom the payments will be made and state the number of months for which the waiver and payment shall apply. In cases where the amount to be waived and paid is less than the jurisdictional limit of the court, the monthly dollar amount of the waiver and payment should be stated.

k. The Discussion following R.C.M. 1105(b) is amended by adding the following at the end of the Discussion:

Although only written submissions must be considered, the convening authority may consider any submission by the accused, including, but not limited to, videotapes, photographs, and oral presentations.

l. The following Discussion is added after R.C.M. 1107(b)(4):

Commitment of the accused to the custody of the Attorney General for hospitalization is discretionary.

m. The Discussion following R.C.M. 1109(d)(1)(E) is amended to read as follows:

See Appendix 18 for a sample of a Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455).

n. The following Discussion is added after R.C.M. 1109(f):

An officer exercising special court-martial jurisdiction may vacate any suspended punishments other than an approved suspended bad-conduct discharge, regardless of whether they are contained in the same sentence as a bad-conduct discharge.

See Appendix 18 for a sample of a Report of Proceedings to Vacate Suspension of a Special Court-Martial Sentence including a bad-conduct discharge under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455).

Changes to the Analysis Accompanying the Manual for Courts-Martial, United States.

1. Changes to Appendix 21, the Analysis accompanying the Rules for Courts-Martial (Part II, MCM).

a. R.C.M. 103. The analysis accompanying R.C.M. 103 is amended by inserting the following at the end thereof:

1998 Amendment: The Discussion was amended to include new definitions of "classified information" in (14) and "national security" in (15). They are identical to those used in the Classified Information Procedures Act (18 U.S.C. App. III § 1, *et. seq.*). They were added in connection with the change to Article 62(a)(1) (Appeals Relating to Disclosure of Classified Information). *See* R.C.M. 908 (Appeal by the United States) and M.R.E. 505 (Classified Information).

b. R.C.M. 405. The analysis accompanying R.C.M. 405(e) is amended by inserting the following at the end thereof:

1998 Amendment: This change is based on the amendments to Article 32 enacted by Congress in section 1131, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464 (1996). It authorizes the Article 32 investigating officer to investigate uncharged offenses when, during the course of the Article 32 investigation, the evidence indicates that the accused may have committed such offenses. Permitting the investigating officer to investigate uncharged offenses and recommend an appropriate disposition benefits both the government and the accused. It promotes judicial

economy while still affording the accused the same rights the accused would have in the investigation of preferred charges.

c. R.C.M. 703. The analysis accompanying R.C.M. 703(e)(2)(G)(i) is amended by inserting the following at the end thereof:

1998 Amendment: The Discussion was amended to reflect the amendment of Article 47, UCMJ, in section 1111 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 461 (1996). The amendment removes limitations on the punishment that a federal district court may impose for a civilian witness' refusal to honor a subpoena to appear or testify before a court-martial. Previously, the maximum sentence for a recalcitrant witness was "a fine of not more than $500.00, or imprisonment for not more than six months, or both." The law now leaves the amount of confinement or fine to the discretion of the federal district court.

d. R.C.M. 706. The analysis accompanying R.C.M. 706 is amended by inserting the following at the end thereof:

1998 Amendment: Subsection (c)(2)(D) was amended to reflect the standard for incompetence set forth in Article 76b, UCMJ.

e. R.C.M. 707(c). The analysis accompanying R.C.M. 707(c) is amended by inserting the following at the end thereof:

1998 Amendment: In creating Article 76b, UCMJ, Congress mandated the commitment of an incompetent accused to the custody of the Attorney General. As an accused is not under military control during any such period of custody, the entire time period is excludable delay under the 120-day speedy trial rule.

f. R.C.M. 809. The analysis accompanying R.C.M. 809 is amended by adding the following at the end thereof:

1998 Amendment: R.C.M. 809 was amended to modernize military contempt procedures, as recommended in *United States v. Burnett*, 27 M.J. 99, 106 (C.M.A. 1988). Thus, the amendment simplifies the contempt procedure in trials by courts-martial by vesting contempt power in the military judge and eliminating the members' involvement in the process. The amendment also provides that the court-martial proceedings need not be suspended while the contempt proceedings are conducted. The proceedings will be conducted by the military judge in all cases, outside of the members' presence. The military judge also exercises discretion as to the timing of the proceedings and, therefore, may assure that the court-martial is not otherwise unnecessarily disrupted or the accused prejudiced by the contempt proceedings. *See Sacher v. United States*, 343 U.S. 1, 10, 72 S. Ct. 451, 455, 96 L. Ed. 717, 724 (1952). The amendment also brings court-martial contempt procedures into line with the procedure applicable in other courts.

g. R.C.M. 908. The analysis accompanying R.C.M. 908 is amended by inserting the following at the end thereof:

1998 Amendment: The change to R.C.M. 908(a) resulted from the amendment to Article 62, UCMJ, in section 1141, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 466-67 (1996). It permits interlocutory appeal of rulings disclosing classified information.

h. R.C.M. 909. The analysis accompanying R.C.M. 909 is amended by inserting the following at the end thereof:

1998 Amendment: The rule was changed to provide for the hospitalization of an incompetent accused after the enactment of Article 76b, UCMJ, in section 1133 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464-66 (1996).

i. R.C.M. 916(b). The analysis accompanying R.C.M. 916(b) is amended by inserting the following at the end thereof:

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120, UCMJ, to create a mistake of fact defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age. The changes to R.C.M. 916(b) and (j) implement this amendment.

j. R.C.M. 916(j). The analysis accompanying R.C.M. 916(j) is amended by inserting the following at the end thereof:

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120, UCMJ, to create a mistake of fact defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age. The changes to R.C.M. 916(b) and (j) implement this amendment.

k. R.C.M. 920(e). The analysis accompanying R.C.M. 920(e) is amended by inserting the following at the end thereof:

1998 Amendment: This change to R.C.M. 920(e) implemented Congress' creation of a mistake of fact defense for carnal knowledge. Article 120(d), UCMJ, provides that the accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least

12 years of age, and that the accused reasonably believed that this person was at least 16 years of age.

l. R.C.M. 1005(e). The analysis accompanying R.C.M. 1005(e) is amended by inserting the following at the end thereof:

1998 Amendment: The requirement to instruct members on the effect a sentence including a punitive discharge and confinement, or confinement exceeding six months, may have on adjudged forfeitures was made necessary by the creation of Article 58b, UCMJ, in section 1122, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 463 (1996).

m. R.C.M. 1101. The analysis accompanying R.C.M. 1101(c) is amended by inserting the following at the end thereof:

1998 Amendment: In enacting section 1121 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462, 464 (1996), Congress amended Article 57(a) to make forfeitures of pay and allowances and reductions in grade effective either 14 days after being adjudged by a court-martial, or when the convening authority takes action in the case, whichever was earlier in time. Until this change, any forfeiture or reduction in grade adjudged by the court did not take effect until convening authority action, which meant the accused often retained the privileges of his or her rank and pay for up to several months. The intent of the amendment to Article 57(a) was to change this situation so that the desired punitive and rehabilitative impact on the accused occurred more quickly.

Congress, however, desired that a deserving accused be permitted to request a deferment of any adjudged forfeitures or reduction in grade, so that a convening authority, in appropriate situations, might mitigate the effect of Article 57(a).

This change to R.C.M. 1101 is in addition to the change to R.C.M. 1203. The latter implements Congress' creation of Article 57a, giving the Service Secretary concerned the authority to defer a sentence to confinement pending review under Article 67(a)(2).

n. R.C.M. 1101(d). The analysis accompanying R.C.M. 1101(d) is added as follows:

1998 Amendment: This new subsection implements Article 58b, UCMJ, created by section 1122, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 463 (1996). This article permits the convening authority (or other person acting under Article 60) to waive any or all of the forfeitures of pay and allowances forfeited by operation of Article 58b(a) for a period not to exceed six months. The purpose of such waiver is to provide support to some or all of the accused's dependent(s) when circumstances warrant. The convening authority directs the waiver and identifies those dependent(s) who shall receive the payment(s).

o. R.C.M. 1102A. The analysis accompanying R.C.M. 1102A is added as follows:

1998 Amendment: This new Rule implements Article 76b(b), UCMJ. Created in section 1133 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464-66 (1996), it provides for a post-trial hearing within forty days of the finding that the accused is not guilty only by reason of a lack of mental responsibility. Depending on the offense concerned, the accused has the burden of proving either by a preponderance of the evidence, or by clear and convincing evidence, that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. The intent of the drafters is for R.C.M. 1102A to mirror the provisions of sections 4243 and 4247 of title 18, United States Code.

p. R.C.M. 1107(b). The analysis accompanying R.C.M. 1107(b) is amended by inserting the following at the end thereof:

1998 Amendment: Congress created Article 76b, UCMJ in section 1133 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464-66 (1996). It gives the convening authority discretion to commit an accused found not guilty only by reason of a lack of mental responsibility to the custody of the Attorney General.

q. R.C.M. 1107(d). The analysis accompanying R.C.M. 1107(d) is amended by inserting the following at the end thereof:

1998 Amendment: All references to "postponing" service of a sentence to confinement were changed to use the more appropriate term, "defer".

r. R.C.M. 1109. The analysis accompanying R.C.M. 1109 is amended by inserting the following at the end thereof:

1998 Amendment: The Rule is amended to clarify that "the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge," permits the officer exercising special court-martial jurisdiction to vacate any suspended punishments other than an approved suspended bad-conduct discharge.

s. R.C.M. 1203(c). The analysis accompanying R.C.M. 1203(c) is amended by inserting the following at the end thereof:

1998 Amendment: The change to the rule implements the creation of Article 57a, UCMJ, contained in section 1123 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 463-64 (1996). A sentence to confinement may be deferred by the Secretary concerned when

it has been set aside by a Court of Criminal Appeals and a Judge Advocate General certifies the case to the Court of Appeals for the Armed Forces for further review under Article 67(a)(2). Unless it can be shown that the accused is a flight risk or a potential threat to the community, the accused should be released from confinement pending the appeal. *See Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990).

t. R.C.M. 1210. The analysis accompanying R.C.M. 1210 is amended by inserting the following at the end thereof:

1998 Amendment: R.C.M. 1210(a) was amended to clarify its application consistent with interpretations of Fed. R. Crim. P. 33 that newly discovered evidence is never a basis for a new trial of the facts when the accused has pled guilty. *See United States v. Lambert*, 603 F.2d 808, 809 (10th Cir. 1979); *see also United States v. Gordon*, 4 F.3d 1567, 1572 n.3 (10th Cir. 1993), *cert. denied*, 510 U.S. 1184 (1994); *United States v. Collins*, 898 F. 2d 103 (9th Cir. 1990)(per curiam); *United States v. Prince*, 533 F.2d 205 (5th Cir. 1976); *Williams v. United States*, 290 F.2d 217 (5th Cir. 1961). *But see United States v. Brown*, 11 U.S.C.M.A. 207, 211, 29 C.M.R. 23, 27 (1960)(per Latimer, J.)(newly discovered evidence could be used to attack guilty plea on appeal in era prior to the guilty plea examination mandated by *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) and R.C.M. 910(e)). Article 73 authorizes a petition for a new trial of the facts when there has been a trial. When there is a guilty plea, there is no trial. *See* R.C.M. 910(j). The amendment is made in recognition of the fact that it is difficult, if not impossible, to determine whether newly discovered evidence would have an impact on the trier of fact when there has been no trier of fact and no previous trial of the facts at which other pertinent evidence has been adduced. Additionally, a new trial may not be granted on the basis of newly discovered evidence unless "[t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(C).

2. Changes to Appendix 22, the Analysis accompanying the Military Rules of Evidence (Part III, MCM).

a. M.R.E. 412. The analysis accompanying M.R.E. 412 is amended by inserting the following at the end thereof:

1998 Amendment: The revisions to Rule 412 reflect changes made to Federal Rule of Evidence 412 by section 40141 of the Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796, 1918-19 (1994). The purpose of the amendments is to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether the sexual misconduct occurred. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct."

The term "sexual predisposition" is added to Rule 412 to conform military practice to changes made to the Federal Rule. The purpose of this change is to exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. It is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the accused believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless an exception under (b)(1) is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or lifestyle is inadmissible.

In drafting Rule 412, references to civil proceedings were deleted, as these are irrelevant to courts-martial practice. Otherwise, changes in procedure made to the Federal Rule were incorporated, but tailored to military practice. The Military Rule adopts a 5-day notice period, instead of the 14-day period specified in the Federal Rule. Additionally, the military judge, for good cause shown, may require a different time for such notice or permit notice during trial. The 5-day period preserves the intent of the Federal Rule that an alleged victim receive timely notice of any attempt to offer evidence protected by Rule 412, however, given the relatively short time period between referral and trial, the 5-day period is deemed more compatible with courts-martial practice.

Similarly, a closed hearing was substituted for the in camera hearing required by the Federal Rule. Given the nature of the in camera procedure used in Military Rule of Evidence 505(i)(4), and that an in camera hearing in the district courts more closely resembles a closed hearing conducted pursuant to Article 39(a), the latter was adopted as better suited to trial by courts-martial. Any alleged victim is afforded a reasonable opportunity to attend and be heard at the closed Article 39(a) hearing. The closed hearing, combined with the new requirement to seal the motion, related papers, and the record of the hearing, fully protects an alleged victim against invasion of privacy and potential embarrassment.

b. M.R.E. 413. The analysis accompanying M.R.E. 413 is added as follows:

1998 Amendment: This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of sexual assault where the accused has committed a prior act of sexual assault.

Rule 413 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g.

accused for defendant, court-martial for case). Third, the 5-day notice requirement in Rule 413(b) replaced a 15-day notice requirement in the Federal Rule. A 5-day requirement is better suited to military discovery practice. This 5-day notice requirement, however, is not intended to restrict a military judge's authority to grant a continuance under R.C.M. 906(b)(1). Fourth, Rule 413(d) has been modified to include violations of the Uniform Code of Military Justice. Also, the phrase "without consent" was added to Rule 413(d)(1) to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Last, all incorporation by way of reference was removed by adding subsections (e), (f), and (g). The definitions in those subsections were taken from title 18, United States Code §§ 2246(2), 2246(3), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters intend that the courts apply Rule 403 balancing to such evidence. Apparently, this also was the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 Cong. Rec. S12,990 (daily ed. Sept. 20, 1994)(Floor Statement of the Principal Senate Sponsor, Senator Bob Dole, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases).

c. M.R.E. 414. The analysis accompanying M.R.E. 414 is added as follows:

1998 Amendment: This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of child molestation where the accused has committed a prior act of sexual assault or child molestation.

Rule 414 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the 5-day notice requirement in Rule 414(b) replaced a 15-day notice requirement in the Federal Rule. A 5-day requirement is better suited to military discovery practice. This 5-day notice requirement, however, is not intended to restrict a military judge's authority to grant a continuance under R.C.M. 906(b)(1). Fourth, Rule 414(d) has been modified to include violations of the Uniform Code of Military Justice. Last, all incorporation by way of reference was removed by adding subsections (e), (f), (g), and (h). The definitions in those subsections were taken from title 18, United States Code §§ 2246(2), 2246(3), 2256(2), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible" the drafters intend that the courts apply Rule 403 balancing to such evidence. Apparently, this was also the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 Cong. Rec. S12,990 (daily ed. Sept. 20, 1994)(Floor Statement of the Principal Senate Sponsor, Senator Bob Dole, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases).

d. M.R.E. 1102. The analysis accompanying M.R.E. 1102 is amended by inserting the following at the end thereof:

1998 Amendment: The Rule is amended to increase to 18 months the time period between changes to the Federal Rules of Evidence and automatic amendment of the Military Rules of Evidence. This extension allows for the timely submission of changes through the annual review process.

3. Changes to Appendix 23, the Analysis accompanying the Punitive Articles (Part IV, MCM).

a. Article 95—Resistance, flight, breach of arrest and escape. The following analysis is inserted after the analysis to Article 95:

1998 Amendment: Subparagraphs a, b, c and f were amended to implement the amendment to 10 U.S.C. § 895 (Article 95, UCMJ) contained in section 1112 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 461 (1996). The amendment proscribes fleeing from apprehension without regard to whether the accused otherwise resisted apprehension. The amendment responds to the U.S. Court of Appeals for the Armed Forces decisions in *United States v. Harris*, 29 M.J. 169 (C.M.A. 1989), and *United States v. Burgess*, 32 M.J. 446 (C.M.A. 1991). In both cases, the court held that resisting apprehension does not include fleeing from apprehension, contrary to the then-existing explanation in Part IV, paragraph 19c.(1)(c), MCM, of the nature of the resistance required for resisting apprehension. The 1951 and 1969 Manuals for Courts-Martial also explained that flight

could constitute resisting apprehension under Article 95, an interpretation affirmed in the only early military case on point, *United States v. Mercer*, 11 C.M.R. 812 (A.F.B.R. 1953). Flight from apprehension should be expressly deterred and punished under military law. Military personnel are specially trained and routinely expected to submit to lawful authority. Rather than being a merely incidental or reflexive action, flight from apprehension in the context of the armed forces may have a distinct and cognizable impact on military discipline.

b. Article 120--Rape and carnal knowledge. The following analysis is inserted after the analysis to Article 120:

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120, UCMJ, to make the offense gender neutral and create a mistake of fact as to age defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age.

c. Article 128--Assault. The following analysis is inserted after the analysis to Article 128, para. e:

1998 Amendment: A separate maximum punishment for assault with an unloaded firearm was created due to the serious nature of the offense. Threatening a person with an unloaded firearm places the victim of that assault in fear of losing his or her life. Such a traumatic experience is a far greater injury to the victim than that sustained in the course of a typical simple assault. Therefore, it calls for an increased punishment.

d. Article 134—(Parole, Violation of). The following new analysis paragraph is inserted after paragraph 97:

97a. Article 134—(Parole, Violation of)

1998 Amendment: The addition of paragraph 97a to Part IV, Punitive Articles, makes clear that violation of parole is an offense under Article 134, UCMJ. Both the 1951 and 1969 Manuals for Courts-Martial listed the offense in their respective Table of Maximum Punishments. No explanatory guidance, however, was contained in the discussion of Article 134, UCMJ in the Manual for Courts-Martial. The drafters added paragraph 97a to ensure that an explanation of the offense, to include its elements and a sample specification, is contained in the Manual for Courts-Martial, Part IV, Punitive Articles. *See generally United States v. Faist*, 41 C.M.R. 720 (A.C.M.R. 1970); *United States v. Ford*, 43 C.M.R. 551 (A.C.M.R. 1970).

Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law

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Introduction

Criminal laws that prohibit the killing of a fetus have existed since the ancient Persian empire,[1] and the topic of fetal crime has evoked legal commentary since at least the 1200's.[2] Currently, the American justice system is seeing an increased effort to criminalize injuries inflicted on the unborn. These efforts have cast a wide net, targeting abusive spouses and boyfriends,[3] drunk and reckless drivers,[4] and pregnant women who abuse alcohol or drugs.[5] In 1996, approximately 200 criminal cases were brought against those who had allegedly killed or injured a fetus.[6] One of those criminal actions was an Air Force court-martial that resulted in the conviction of Airman Gregory L. Robbins for fetal manslaughter.[7]

This article examines the common law approach to fetal crimes, particularly feticide, and then compares fetal-related prosecutions in the state, federal, and military criminal systems. Finally, the article examines the cognizability of fetal prosecutions under the Uniform Code of Military Justice (UCMJ), examining several potential defenses to such efforts.

Common Law

At common law, the killing of an unborn child was not a homicide,[8] but possibly constituted some form of lesser crime.[9] Before the defendant could be convicted of any type of homicide, the government had to prove that the victim had been born alive and then died as a result of prenatal injury.[10] In his *Com-*

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1. *See* Louise B. Wright, *Fetus vs. Mother: Criminal Liability For Maternal Substance Abuse During Pregnancy*, 36 Wayne L. Rev. 1285, 1291 (1990) ("In the ancient Persian Empire, criminal sanctions for fetal abortion were severe."). In contrast, the criminal laws of the Greek and Roman Empires did not criminalize killing a fetus, "except possibly when the father's rights to the child had been violated." *Id.* However, early Roman law did require that upon the death of a pregnant woman, her fetus had to be removed and given a chance to live before the woman could be buried. Alan Watson, The Law of the Ancient Romans 12 (1970).

2. Thirteenth century English jurist Henry Bracton posited that acts or injury to a fetus that caused its death after an incident of fetal movement constituted homicide. Wright, *supra* note 1, at 1292.

3. Brent Whiting, *Killer of Unborn Child Gets 7 1/2 Years*, Ariz. Republic, Jan. 14, 1995, at B1 (reporting that an Arizona man pleaded guilty to manslaughter after punching his pregnant girlfriend, causing a stillborn delivery). National studies indicate that a quarter of all battered women receiving medical attention in emergency rooms are pregnant. Angela Rabago-Mussi, *Pregnant Women Often Abused, Hospital Says*, Ariz. Republic, July 23, 1994, at B1.

4. *See* Cuellar v. State, 957 S.W.2d 134, 136 (Tex. Ct. App. 1997) (involving a drunk driver who was convicted of intoxication manslaughter after hitting a car driven by a woman who was seven and one-half months pregnant); *Man Gets 3 1/2 Years in Feticide Case*, Saturday St. Time/Morning Advoc. (Baton Rouge, La), Oct. 26, 1996, at 3B (reporting that a driver hit a car driven by an eight-month pregnant woman, killing the fetus).

5. *See* Tony Mauro, *Abortion Battle, Medical Gains Cloud Legal Landscape*, USA Today, Dec. 12, 1996, at 1A. *See also* Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (reversing the conviction of a Florida woman who delivered cocaine to her newborn child through her unsevered umbilical cord immediately after birth; noting that courts in Michigan, Kentucky, and Ohio had ruled similarly); Don Terry, *Mom Tried to Kill Fetus Charge Says*, Ariz. Republic, Aug. 17, 1996, at A1 (reporting that a Wisconsin woman was charged with attempted murder after giving birth to a baby whose blood-alcohol level measured 0.199, twice the legal limit for intoxication); *Prenatal Drug Use Is Ruled Child Abuse*, NY Times, July 17, 1996, at A8 (reporting that an appellate court upheld the child abuse conviction of a South Carolina woman who smoked crack while pregnant). *But see* Pamela Manson, *Court: Actions That Harm Fetus Not Child Abuse*, Ariz. Republic, May 7, 1995, at B1 (reporting an unsuccessful attempt to prosecute a woman under state child abuse law for using heroin while pregnant). In 1992, approximately 222,000 babies were born to women who used illegal drugs during pregnancy. *220,000 Births to Moms Who Used Drugs*, Ariz. Republic, Sept. 13, 1994, at D3. A survey by the Center of Disease Control and Prevention indicated that as many as 140,000 pregnant women nationwide were heavy drinkers, consuming seven or more drinks a week or five or more drinks at one time during the previous month. *As Pregnant Women Drink More, Fetal Risk is Rising, Study Says*, Ariz. Republic, Apr. 25, 1997, at A12.

6. *See* Don Feder, *Fetal Homicide Should be a Crime*, Boston Herald, Jan. 3, 1997, at 29.

7. James Hannah, *Airman Becomes First Test of Ohio Fetus-Homicide Law*, Plain Dealer (Cleveland, Ohio), Dec. 10, 1996, at 5B.

8. *See* Rollin M. Perkins and Ronald N. Boyce, Criminal Law 49 (3rd ed. 1982) (citation omitted). *See also* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984) ("Since at least the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide."). Jewish criminal law did not view a fetus as a person for purposes of homicide. Daniel B. Sinclair, *The Interaction Between Law and Morality in Jewish Law in the Areas of Feticide and Killing a Terminally Ill Individual*, 11 Crim. Just. Ethics 76 (1992).

9. English jurists Cooke and Blackstone opined that acts that caused fetal death "constituted a significantly lesser crime, if a crime at all, than homicide." Wright, *supra* note 1, at 1292.

10. *See id.*; Perkins and Boyce, *supra* note 8, at 50 (citation omitted). *See also* State v. Ashley, 670 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1996), *quashed in part*, 701 So. 2d 338 (Fla. 1997); Jones v. Commonwealth, 830 S.W.2d 877, 879 (Ky. 1992); State v. Hammett, 384 S.E.2d 220, 221 (Ga. App. 1989).

mentaries on the Laws of England, Sir William Blackstone stated:

> To kill a child in its mothers womb, is now no murder, but a great misprison: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the greater opinion, to be murder in such as administered or gave them.[11]

However, the definition of "born alive" varied over time and by jurisdiction.[12]

Early in common law, to be considered a homicide victim, the baby "must have been fully extruded, have had an existence independent of its mother in that it possessed an independent circulation of its own and derived none of its power of living through any connection with her."[13] Additionally, many courts required that the child have survived for some period of time after the umbilical cord was severed.[14] The latter requirement was largely abandoned in England by the early 1800s, but the courts in the United States remained split over the issue.[15]

The common law rationale for the born alive rule was based on the difficulty of proving the fetus' cause of death.[16] The difficulty in proving causation was a function of the primitive level of medical knowledge.[17] Until the late 1800's, a woman and her physician or midwife could not conclusively determine the existence of the pregnancy until the fetus moved within the womb, and the health of the fetus could not be established until birth.[18]

Although the born alive rule existed since at least 1348, the rationale for the rule became firmly rooted in English, and subsequently American, common law after it was embraced by Lord Chief Justice Cooke in the 1600s.[19] Every American jurisdiction to consider the issue on the basis of common law, rather than a specific feticide statute, followed some form of the born alive rule until 1984, when the Supreme Judicial Court of Massachusetts extended its vehicular homicide statute to a viable fetus.[20]

In *Commonwealth v. Cass*,[21] the defendant struck an eight and one-half month pregnant pedestrian, killing her viable fetus.[22] In holding that the term "person" included a viable fetus for purposes of the Massachusetts vehicular homicide statute, the court strained to find supporting legislative intent for its holding. First, the court reasoned that since the criminal statute was enacted after Massachusetts courts had determined that a fetus was a person for civil wrongful death purposes, the legislature (being presumably aware of the prior holding) must have intended a like definition of person for the subsequent criminal statute.[23] Second, the court opined that a "person" was synonymous with a "human being," and the offspring of a human being is a human being itself, both inside and outside the womb.[24]

The court's third and final argument in support of its decision bears the most relevance to feticide prosecution under mil-

11. Sir William Blackstone, Commentaries on the Laws of England 944 (3rd ed. 1903).

12. *See* United States v. Gibson, 17 C.M.R. 911, 923 (A.F.B.R. 1954) ("The term 'born alive' has been subject to varying interpretations in England and the state courts of this country . . . .").

13. *Id.* at 923 (citations omitted). "The early view was that to be born alive the infant must be fully expelled from the body of the mother and have established a separate circulation." Perkins and Boyce, *supra* note 8, at 50.

14. *Gibson*, 17 C.M.R. at 923 (citations omitted); Perkins and Boyce, *supra* note 8, at 50 (citations omitted).

15. *Gibson*, 17 C.M.R. at 923-24. *See* Perkins and Boyd, *supra* note 8, at 50.

16. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 n.5 (Mass. 1984).

17. *See* Bicka A. Barlow, *Severe Penalties for the Destruction of 'Potential Life'—Cruel and Unusual Punishment?*, 29 U.S.F. L. Rev. 463, 467 (1995). Prior to the development of modern medicine, the cause of fetal death was difficult to determine, and, in many instances, medical authorities were unable to determine if a woman was pregnant. *Id*.

18. *See* Hughes v. State, 868 P.2d 730, 732 (Okla. Crim. App. 1994).

19. *See Cass*, 467 N.E.2d at 1328 n.5; Williams v. State, 561 A.2d 216, 218-19 (Md. 1988).

20. *See Cass*, 467 N.E.2d at 1325, 1328 n.5; Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L. Rev. 599, 602 (1986). In *Cass*, the Massachusetts court acknowledged that up until that point "the rule that a fetus cannot be the victim of a homicide is the rule in every jurisdiction that has decided the issue, except those in which a different result is dictated by statute." *Cass*, 467 N.E.2d at 1329. Interestingly, in a 1947 California case, the court extended the born alive rule to viable children who were in the process of being born, but not yet completely separate from their mothers. People v. Chavez, 176 P.2d 92 (Cal. Dist. Ct. App. 1947).

21. 467 N.E.2d 1324 (Mass. 1984).

22. *Id.* at 1325.

23. *Id.* (stating that "[t]he legislature is presumed to have had knowledge of the decisions of this court").

itary law. The court opined that, even if the legislature had never considered the issue, the court could interpret the statute's terms "by reference to established and *developing* common law."[25] Two additional nonfeticide codal states, Oklahoma and South Carolina, have joined Massachusetts in extending homicide laws by judicial decision to encompass the killing of a viable fetus, rejecting the born alive rule.[26] Significantly, the military judiciary has indicated that it too may be receptive to similarly reasoned advancements in the law.[27]

Case Law

State

Although the states are almost equally divided on the issue,[28] the legal trend has been to adopt feticide statutes that make the killing of a fetus a crime.[29] Slightly less than half of the states still follow the born alive rule.[30] However, even in states that follow the born alive rule, a defendant may be prosecuted for prenatal injuries that cause the subsequent death of a child after birth.[31]

In *Jones v. Commonwealth*,[32] an alcoholically impaired driver injured a thirty-two weeks pregnant woman, causing a premature delivery of the baby, who died fourteen hours later.[33] The driver was convicted under Kentucky's manslaughter statute, which is triggered when the defendant "wantonly causes the death of another person."[34] Affirming the conviction, the Supreme Court of Kentucky reasoned that a viable fetus is not considered a person for purposes of criminal homicide under common law, but, once the fetus is born, it becomes a person protected by the criminal statutes.[35] The common law only requires "person" status at the time of death, not at the time the precipitating injuries occur.[36]

The fetal homicide statutes that do not follow the born alive rule vary widely among states. One variance concerns the requisite stage of development before fetal death can be considered a crime. For example, Ohio follows the majority rule, which only criminalizes death or injury to a "viable" fetus.[37] A viable fetus is one who is capable of surviving outside the womb,[38] which usually occurs in approximately the twenty-fourth to twenty-eighth week of pregnancy.[39] Florida, Georgia, Michigan, Mississippi, and Rhode Island criminalize the willful kill-

24. *Id.*

25. *Id.* at 1326 (emphasis added).

26. *See* Alison Delsite, *When Does Life Begin?*, Harrisonburg Patriot and Evening News (Pa.), Dec. 15, 1996, at F1. *See also* Hughes v. State, 868 P.2d 730, 731 (Okla. Crim. App. 1994); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984).

27. *See* United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983), *petition denied*, 17 M.J. 22 (C.M.A. 1984).

28. *See* Mauro, *supra* note 5, at 1A-2A. The growth of feticide statutes is largely in response to the failure of the common law to punish fetal crime. *See* Robert H. Blank, Mother and Fetus 69 (1992).

29. In October 1997, Pennsylvania was added to the ranks of states that have enacted a feticide statute. *Ridge Signs New Law on Murder of Fetus*, Harrisonburg Patriot and Evening News, Oct. 3, 1997, at B5. An attempt to enact a feticide statute was defeated in Virginia. Spenser S. Hsu, *Fetal Homicide Measure Falls in Virginia House; Parental Notification on Abortions also Rejected*, Wash. Post, Mar. 5, 1996, at B4.

30. *See* Aaron Epstein, *Medicine Changing Legal View of Fetuses*, News & Observer (Raleigh, N.C.), Aug. 4, 1996, at A23. "At least 30 states allow prosecutions for criminally causing death or injury to someone else's unborn child." *Id.* North Carolina follows the born alive rule. "[T]he so-called 'born alive' rule is still in effect in roughly half the states." Mauro, *supra* note 5, at 2A.

31. In Texas, a drunk driver was convicted under the state's intoxication manslaughter statute for hitting a pregnant woman and causing the premature birth and subsequent death of her child. Bruce Tomaso, *Jurors Find Man Guilty in Fetus Case*, Dallas Morning News, Oct. 18, 1996, at A1. North Carolina courts hold that a fetus "cannot legally be considered a murder victim unless it was born alive and subsequently died of injuries inflicted before birth." Epstein, *supra* note 30, at A23. Applying a common law analysis, a driver who hit a pregnant woman and caused her child to survive only eleven hours may be prosecuted for vehicular homicide. State v. Hammett, 384 S.E.2d 220 (Ga. App. 1989).

32. 830 S.W.2d 877 (Ky. 1992).

33. *Id.* at 878.

34. *Id.* at 877.

35. *Id.* at 879.

36. *Id.* at 879-80.

37. *See Airman May Face Fetus-Homicide Charge*, Cincinnati Enquirer, Sept. 19, 1996, at B06. Most state fetal crime statutes require that the fetus be viable. *See* Epstein, *supra* note 30, at A23.

38. Black's Law Dictionary 1404 (5th ed. 1979); Epstein, *supra* note 30, at A23.

ing of an unborn "quick" child, which requires that the fetus be able to move within the mother's womb.[40] The "quickening" usually occurs in the fourth month of pregnancy.[41]

The fetal crime statutes of a handful of states extend to the early stages of development. The South Dakota criminal statute protects an "unborn child," beginning at "fertilization."[42] The Supreme Court of California interpreted its feticide law to cover a fetus who survived past the embryonic stage.[43] Some states, like Arizona, graduate the level of culpability with the age and viability of the fetus. The Arizona manslaughter statute extends to a fetus "at any stage of its development,"[44] but the first-degree homicide statute continues to follow the born alive rule.[45] Under Minnesota law, a defendant was convicted of murdering a twenty-eight-day-old embryo.[46]

Feticide statutes are not uniform in the treatment of who may be convicted of killing a fetus. Most states, including Minnesota, Pennsylvania, North Dakota, and Louisiana, preclude prosecution of the mother; other states do not.[47] Some statutes require that the defendant have knowledge that the woman was pregnant.[48] Additionally, in many states, feticide is defined as a lesser form of homicide or is subjected to a lesser degree of punishment.[49]

Seeking to expand the parameters of state criminal codes beyond homicide, prosecutors have attempted to use criminal law to punish women who endanger or injure their own unborn children through substance abuse.[50] In 1997, South Carolina became the first state to have its highest appellate court uphold the conviction of a woman for endangering the health of her own fetus.[51] The trial court convicted the woman, Cornelia Whitner, of child abuse for using crack cocaine during her third trimester.[52] Conversely, a Florida appellate court reversed the conviction of a woman for delivering illegal drugs to her unborn child through her umbilical cord immediately after birth.[53]

39. *See* Epstein, *supra* note 30, at A23.

40. *See* Susie Speckner, *Fetal-killing Case Provides Fuel for Abortion Debate*, Ariz. Republic, Apr. 13, 1997, at B4. A "quick child" is defined as "[o]ne that has developed so that it moves within the mother's womb." Black's Law Dictionary, *supra* note 38, at 1122 (*citing* State v. Timm, 12 N.W.2d 670, 671 (Wis. 1944)). *See* Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984).

41. *See* Epstein, *supra* note 30, at A23. *See also* Blank, *supra* note 28, at 25.

42. *See* Wiersma v. Maple Leaf Farm, 543 N.W.2d 787, 790 (S.D. 1996).

43. *See* Epstein, *supra* note 30, at A23.

44. *See* Speckner, *supra* note 40, at B3. *See also* Ariz. Rev. Stat. Ann. § 13-1103(A)(1)(5) (West 1997). In 1995, Darrin Love was sentenced to seven and one-half years in prison for manslaughter after killing the fetus of his eight-months pregnant girlfriend by punching her repeatedly in the abdomen. The fetus was delivered stillborn. Whiting, *supra* note 3. Louisiana's feticide statute covers an unborn child "from fertilization and implantation until birth." Kristen King, *Baton Rouge Police Apply Feticide Law*, Baton Rouge Advoc., Mar. 6. 1996, at 7B.

45. *See* Judi Villa, *Unborn Baby Dies: Mom Was Shot in Head*, Ariz. Republic, Aug. 19, 1994, at B1. C*f*. State v. Brewer, 826 P.2d 783 (Ariz.), *cert. denied*, 506 U.S. 872 (1992) (holding that the Arizona fetal manslaughter statute precluded the state from charging the defendant for the first degree murder of his girlfriend's unborn child).

46. *See* United States v. Merrill, 450 N.W.2d 318, 320 (Minn.), *cert. denied*, 496 U.S. 931 (1990).

47. *See* Delsite, *supra* note 26, at F1; Heidi Russell, *House Sends Ridge Fetus Murder Bill*, York Daily Rec., Sept. 23, 1997, at 2 ("Pregnant women who engage in behavior harmful to their fetuses also would not be prosecuted."). *See also* La. Rev. Stat. Ann § 14:32.5 (West 1996) ("Feticide is the killing of an unborn child by the act, procurement, or culpable omission of a person *other than the mother* of the unborn child." (emphasis added)); N.D. Cent. Code § 12.1 through 17.1-01 (Supp. 1997) (providing that the statute "does not include the pregnant woman").

48. *See* People v. Shoultz, 682 N.E.2d 446, 448 (Ill. App. Ct. 1997) (finding that the Illinois feticide statute requires "knowledge the woman is pregnant"); Speckner, *supra* note 40, at B3 (noting that the Arizona manslaughter statute requires knowledge of pregnancy). *But see* State v. Merrill, 450 N.W.2d 318 (Minn.), *cert. denied*, 496 U.S. 931 (1990) (Neither the defendant nor the mother need know of the pregnancy under the Minnesota feticide statutes.).

49. *See* Delsite, *supra* note 26, at Fl; *see also Brewer*, 826 P.2d at 805 (noting that feticide is punished as a form of manslaughter in Arizona).

50. *See* Epstein, *supra* note 30, at A23. "The Center for Reproductive Law and Policy estimates that at least 200 women in more than 30 states have been criminally charged with using drugs or engaging in other allegedly harmful conduct during their pregnancies." *Id.* "The heightened frequency of crack and cocaine abuse by women of child-bearing age, combined with the legal trends toward defining a maternal responsibility for fetal health, has led to a number of [criminal] actions against pregnant women for drug use." Blank, *supra* note 28, at 83.

51. Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

52. *Id.* at 778-79.

53. *See* Johnson v. State, 602 So. 2d 1288 (Fla. 1992). *See also* People v. Hardy, 469 N.W.2d 50 (Mich. 1991) (involving the transfer of cocaine to a baby through the umbilical cord).

An apparent inconsistency in the law arises when state feticide statutes co-exist with statutes that permit elective abortion during the same or similar period of fetal development. This apparent inconsistency reaches its zenith when the killer or injurer of the fetus is not a third-party, but the mother herself, and a viable fetus is killed in a state that permits partial birth abortions not premised on medical necessity.[54] Indeed, in some cases, defendants have challenged feticide prosecutions based upon the Supreme Court's determination in *Roe v. Wade*[55] that a nonviable fetus was not a "person" in the eyes of the law.[56]

In cases where a third party kills a fetus, states have little difficulty in distinguishing between feticide and abortion.[57] *Roe v. Wade* focuses on a woman's constitutionally protected privacy right to terminate the pregnancy without state interference, until the state's interest in fetal protection overrides that of the woman, which is normally at viability.[58] The Supreme Court of California reasoned that *Roe* only prohibits a state from protecting a nonviable fetus when the interests of the mother and fetus conflict.[59] Reasoning in a similar vein, the Supreme Court of Minnesota opined that *Roe* recognized the state's interest in protecting a fetus and, by extension, the state's right to protect "the woman's interest in her unborn child and her right to decide whether it shall be carried *in utero*."[60] Significantly, *Roe* did not confer upon a criminal defendant "a third-party unilateral right to destroy the fetus."[61]

When a government seeks to prosecute the mother for feticide, the law is unclear. The government's position appears weak, if not untenable, when a feticide statute is applied against the mother for killing her fetus during the first trimester of pregnancy, when she enjoys an almost unrestricted right to abortion.[62] Conversely, in the third trimester, when the state's interest in protecting the fetus is at its peak, a feticide prosecution enjoys its greatest chance of success.[63]

Federal

Fetal crime issues have made few appearances before the federal judiciary. In *United States v. Spencer*,[64] the only published case on point, the United States Court of Appeals for the Ninth Circuit upheld a murder conviction for fetal infanticide under 18 U.S.C. § 1111. The defendant beat a pregnant woman and stabbed her in the abdomen.[65] An emergency Caesarean was performed to save the fetus, but it died ten minutes after birth. [66]

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54. *See* Julia Duin, *Hickey, Lawmaker Join Foes of Partial-Birth Abortions*, WASH. TIMES, Sept. 9, 1996, at A5. Senator Daniel Patrick Moynihan, a pro-choice advocate, referred to partial-birth abortions as being "as close to infanticide as anything I have come upon." Steve Wilson, *Effort to Ban 'Partial Birth' Abortions Wins by Losing*, ARIZ. REPUBLIC, Sept. 27, 1996, at A2.

55. 410 U.S. 113 (1973).

56. *See*, *e.g.*, People v. Davis, 872 P.2d 591 (Cal. 1994); State v. Merrill, 450 N.W.2d 318, 321 (Minn.), *cert. denied*, 496 U.S. 931 (1990).

57. During the recent enactment of the Pennsylvania feticide statute, the governor's spokesman distinguished feticide from abortion by stating, "[i]t's different because abortion is about a woman's choice. This is about life being taken by a third party . . . ." Russell, *supra* note 47.

58. *See Merrill*, 450 N.W.2d at 332. In *Roe*, the Supreme Court recognized the state's interest in protecting "potential life" as compelling at the point of viability. *Roe*, 410 U.S. at 163. A state could prohibit abortion of a viable fetus unless "it is necessary to preserve the life or health of the mother." *Id*. at 163-66.

59. *See* People v. State, 872 P.2d 591 (Cal. 1994).

60. *Merrill*, 450 N.W.2d at 322. *See* People v. Campos, 592 N.E.2d 85, 97 (Ill. App. Ct.) ("The statute simply protects the mother and the unborn child from the intentional wrongdoing of a third party by imposing criminal liability."), *cert. denied*, 602 N.E.2d 460 (Ill. 1992); Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984) ("[H]ere we deal with the interest of the state in protecting both the mother and the fetus from the intentional wrongdoing of a third party who can claim no right for his actions."). In *Roe*, the Supreme Court acknowledged the state's "important and legitimate interest in protecting the potentiality of human life." *Roe*, 410 U.S. at 162.

61. *Merrill*, 450 N.W.2d at 322. *Accord* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 791 (S.D. 1996).

62. *See Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting) ("The court's opinion decides that a state may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy.") At common law, the expectant mother could not be convicted of abortion, even self-abortion, because she was considered the victim of the offense. State v. Ashley, 670 So. 2d 1087, 1090-91 (Fla. Dist. Ct. App.), *quashed in part*, 701 So. 2d 338, 340 (Fla. 1997).

63. *See Roe*, 410 U.S. at 163 (noting that a state's interest in protecting potential human life becomes "compelling" in the third trimester and that the state can prohibit abortion in the absence of medical necessity). In Wisconsin, a nine-month pregnant woman was charged with attempted murder after she drank excessive amounts of alcohol, attempting to kill her fetus. Don Terry, *Mom Tried to Kill Fetus Charge Says*, ARIZ. REPUBLIC, Aug. 17, 1996, at A1. The circuit court denied the preliminary motion to dismiss. State v. Zimmerman, No. 96-CF-525, 1996 WL 858598 (Wis. Cir. Sept. 18, 1996).

64. 839 F.2d 1341 (9th Cir. 1988).

65. *Id.* at 1342.

66. *Id.*

The federal statute defines murder as "the unlawful killing of a human being with malice aforethought."[67] In holding that fetal infanticide fell within the definition of murder, the *Spencer* court relied on congressional intent that the federal murder statute reflect the state and common law definition of murder.[68] Since at least 1908, the court posited, it was well established at common law and among the various states "that an infant born alive that later died as a result of fetal injuries was a human being."[69]

Military

In 1954, the military court system first confronted the issue of fetal crime in *United States v. Gibson*.[70] Lieutenant Elizabeth Gibson, an Air Force nurse stationed in Alaska, was convicted of unpremeditated murder after strangling her baby immediately after its birth.[71] As part of its review, the United States Air Force Board of Review had to determine whether the victim was a legally cognizable human being for purposes of Article 118 of the UCMJ. However, the evidence was unclear as to whether the child died before or after Gibson severed the umbilical cord.[72] After an extensive review of the common law definition of "human being" and of the "born alive" rule, the court determined that the evidence adduced at trial established that the child had lived for at least a few moments, satisfying the test of separate existence.[73] Significantly, the court held that severance of the umbilical cord was not required to meet this test.[74]

Not until 1990 did a military appellate court have another opportunity to review the status of a fetus in military law. In *United States v. Foreman*,[75] an Air Force staff sergeant pleaded guilty to using cocaine, in violation of Article 112a, and to child neglect, in violation of Article 134(2).[76] Addressing the second charge, the Air Force Court of Military Review found that the specification was proper and that the offense was generally viable under Article 134(2) as service discrediting, but held that the specific factual basis for the plea was insufficient to sustain the conviction.[77] Significantly, one basis for the child neglect conviction was the accused's use of cocaine during her final month of pregnancy.[78] In reviewing that misconduct, the court stated:

> As to prenatal drug use, we can find no legal basis, absent specific statutory authority, to suggest that an unborn fetus was intended as a potential victim of criminal neglect under Article 134, nor do we choose to create such a basis at this time, particularly where the fetus, once born, shows no discernible injury from the alleged neglect.[79]

In 1995, the United States Navy-Marine Corps Court of Criminal Appeals suggested that a fetus was a human being for some purposes. In *United States v. Thomas*,[80] the accused challenged the government's use, without adequate notice, of the pregnancy of his victim/spouse as an aggravating factor in a capital case.[81] The factor at issue provided "[t]hat the offense

67. 18 U.S.C. § 1111(a) (1994).

68. *Spencer*, 839 F.2d at 1343.

69. *Id.* A federal court's interpretation of what constitutes a human being for purposes of a murder prosecution is significant in the military context. Absent a definition of human being in the UCMJ, "the next best source for determining what Congress means when it uses a word is to examine the same word in a similar context elsewhere in the United States Code." United States v. Omick, 30 M.J. 1122, 1124 (N.M.C.M.R. 1989).

70. 17 C.M.R. 911, 919 (A.F.B.R. 1954).

71. *Id.* at 919. The baby was discovered in a paper bag in Gibson's footlocker, with pajamas wrapped around the baby's neck. *Id.*

72. *Id.* at 923.

73. *Id.* at 926-27. The court adopted the position of *People v. Hayner*, 90 N.E.2d 23 (N.Y. 1949), which did not require severance of the umbilical cord as a condition precedent to being recognized as a separate human being for purposes of murder. *Id.* at 926.

74. *Id.* The court reserved for future courts whether the military should embrace the rule that a fetus was a "human being" once in the process of being born. *Id.* at 925, 927.

75. No. ACM 28008, 1990 WL 79309 (A.F.C.M.R. May 25, 1990).

76. *Id.*

77. *Id.*

78. The remaining two bases were the accused's failure to bathe and to change the diapers of her newborn daughter and the accused's failure to clean her government quarters. *Id.*

79. *Id.* at 1-2.

80. 43 M.J. 550, 610 (N.M. Ct. Crim. App. 1995) (en banc), *aff'd in part and rev'd in part*, 46 M.J. 311 (1997).

was committed in such a way or under such circumstances that the *life of one or more persons other than the victim* was unlawfully and substantially endangered."[82]

After determining that the trial counsel had not used pregnancy as an aggravating factor, the Navy-Marine Corps court gratuitously opined that "had the prosecution considered the fetus a person for the purpose of the aggravator, it would have been logical to have charged the appellant separately for the murder of the unborn fetus."[83] While the court did not address the issue further, the comment suggests that the intermediate military court was at least receptive to the proposition that a fetus was a person for the purposes of Article 118 and for purposes of determining the existence of an aggravating factor under Rule for Courts-Martial 1004.[84]

In December 1996, in a case of first impression for the armed forces, an airman at Wright-Patterson Air Force Base pleaded guilty to the involuntary manslaughter of a fetus.[85] Airman Gregory L. Robbins punched his eight-months pregnant wife in the abdomen, rupturing her uterus and killing the fetus.[86] Originally charged with murdering the fetus, Robbins was convicted of involuntary manslaughter under Ohio's fetus-homicide law, which the government assimilated pursuant to Article 134.[87]

Cognizability as an Offense Under Military Law

Homicide: Articles 118, 119, and 134

Prior to the Civil War, Army courts-martial lacked jurisdiction over the offense of murder, except if prosecuted as conduct prejudicial to good order and discipline.[88] In 1863, Congress expanded the Army's jurisdiction to include serious civil crimes, such as murder, that military personnel committed in time of war.[89] In 1916, Congress expanded court-martial jurisdiction again to include murders committed in time of peace if committed outside the United States.[90] However, because such crimes were not defined by military law, they were interpreted in light of common law.[91] In his authoritative treatise, *Military Law and Precedents*, Colonel William Winthrop noted that the murder victim under common law was legally limited to "a living being (not an unborn child)."[92]

The current military homicide laws were enacted in 1951 as part of the UCMJ. Articles 118 and 119 were derived largely from the common law definitions of murder and manslaughter, respectively,[93] and were designed to clarify these crimes under military law.[94] Since the enactment of the UCMJ, military courts have used common law to interpret provisions of the

81. *Id.* at 610.

82. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004(c)(4) (1995) [hereinafter MCM] (emphasis added).

83. *Thomas*, 43 M.J. at 610.

84. MCM, *supra* note 82, R.C.M. 1004.

85. Hannah, *supra* note 7. Ironically, the court-martial conviction was the first conviction of any kind under the Ohio statute, which became effective in September 1996, the same month Robbins assaulted his wife. *Id.*

86. *Id.*

87. *Id.* Additionally, Robbins pleaded guilty to assault and aggravated assault. *Id.*

88. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1032 (2d ed. 1896). Early court-martial jurisdiction has been the subject of some debate. *Compare* O'Callahan v. Parker, 395 U.S. 258 (1969) (holding that court-martial jurisdiction is limited to prejudicial common law crimes), *with* Solorio v. United States, 483 U.S. 435 (1987) (noting that early jurisdiction may have been broader).

89. *See* WINTHROP, *supra* note 88, at 1033.

90. *See* JAMES SNECDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 796 (1953). From 1800 until 1945, naval court-martial jurisdiction over murder was limited to "a person belonging to a United States public vessel" for conduct occurring outside the territorial jurisdiction of the United States. *Id. See also* COMPILATION OF NAVY AND OTHER LAWS 16 (1875) (stating that Article 6 of the Articles for the Government of the Navy provided: "If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death.").

91. *See* WINTHROP, *supra* note 88, at 1040. *See also* United States v. Wells, 55 B.R. 207, 218-19 (1945) (holding that the court should look to common law to interpret a murder charge pursuant to Article 92 of the Articles of War).

92. WINTHROP, *supra* note 88, at 1041.

93. *See* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 1237-38 (1950) [hereinafter UCMJ HISTORY] (*Uniform Code of Military Justice, Hearing Before a Subcommittee of the House of Representatives Committee on Armed Services*, 81st Cong. (1949) (referencing the testimony of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense)). The Army's Articles of War generally followed the common law definitions for civil crimes, particularly the common law of Maryland. The Articles for the Government of the Navy provided no such definitions, but the naval courts and boards followed either federal statutory definitions or common law definitions. *Id.* at 1238.

UCMJ, including those punitive articles that address homicide.[95]

Both Article 118 (murder) and Article 119 (manslaughter) make the killing of a "human being" illegal, but the term "human being" is not defined in the *Manual for Courts-Martial* (*MCM*). Article 134 (negligent homicide) refers to the killing of a "person," which is also undefined, but which appears to be synonymous with "human being."[96] Should the courts follow, or seek guidance from, established common law, an accused could not be convicted of fetal homicide under these punitive articles, but could be convicted of fetal infanticide, the killing of a newborn, caused by prenatal injuries.

However, a compelling argument can be made for the military courts to reject the common law's born alive rule and permit feticide prosecutions. As state courts in Massachusetts, Oklahoma, and South Carolina have posited, the advancement in medical technology effectively eviscerates the rationale for this archaic legal precept[97] and justifies judicial efforts to "develop" the common law.[98] Medical personnel can diagnose a pregnancy early, can see the fetus through the use of ultrasound and fetoscopy,[99] and can usually determine the cause of a fetus' death.[100] Indeed, medical technology has advanced to the point that operations are successfully performed on fetuses.[101] As stated by the Supreme Judicial Court of Massachusetts:

> [T]he antiquity of a rule is no measure of its soundness. "It is revolting to have no better reason for a rule of reason than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[102]

The military judiciary alters and interprets military law to reflect evolving common law. In *Gibson*, the court's determination that severance of the umbilical cord was not required to prove the baby's separate existence reflects the "modern advancement in medical knowledge of human physiology."[103] Contrary common law decisions had relied on the erroneous

94. *See* United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979).

95. *See*, *e.g.*, United States v. Wilson, 26 M.J. 10, 13 n.1 (C.M.A. 1988); United States v. Harrison, 37 C.M.R. 104, 105 (C.M.A. 1967) (noting that "Congress intended that [manslaughter] be construed with reference to the common law"); United States v. Gibson, 17 C.M.R. 911, 923-27 (A.F.B.R. 1954). Pursuant to the military's hierarchical system of rights, duties, and obligations, a military court should look to the plain language of the UCMJ itself or guidance found in the *MCM* before turning to the common law. *Cf.* United States v. Romano, 46 M.J. 269, 274 (1997). "Normal rules of statutory construction provide that the highest source authority will be paramount." United States v. Marrie, 43 M.J. 35, 37 (1995). *See* United States v. Lopez, 35 M.J. 35, 39 (1992).

96. *See* Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (holding that "[i]n keeping with approved usage, and giving terms their ordinary meaning, the word 'person' is synonymous with the term 'human being'").

97. *See* Delsite, *supra* note 26. "Judges in those states overturned the born-alive rule, saying it was written into England's common law as early as 1400 and simply accepted as law in the United States, for reasons now contradicted by modern medicine." *Id.*

98. *See* Hughes v. State, 868 P.2d 730, 733 (Okla. Crim. App. 1994) (noting that "[t]his court also has the right and duty to develop the common law of Oklahoma to serve the evolving needs of our citizens"). *See also Cass*, 467 N.E.2d at 1326 (stating that "we may assume that the legislature intended for us to define the term 'person' by reference to established and developing common law"); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (finding that "[t]his court has the right and the duty to develop the common law of South Carolina to better serve an everchanging society as a whole"). *Cf.* Vo v. Superior Court, 836 P.2d 408, 413-14 n.4 (Ariz. Ct. App. 1992) (declining to address the wisdom of the common law born alive rule in light of medical advances "because we are statutorily restrained from construing our criminal statutes based on evolving common law"); United States v. Gomez, 15 M.J. 954, 960 (A.C.M.R. 1983) (reviewing the military judge's rejection of the common law definition of death in favor of one reflecting medical advances, the court noted that the "military judge correctly guided the "*evolution* of military law" (emphasis added)), *petition denied*, 17 M.J. 22 (C.M.A. 1984).

99. Ultrasound involves "high-frequency, nonionizing, nonelectromagnetic sound waves directed into the abdomen of the pregnant woman to gain an echo-visual image of the fetus, uterus, placenta, and other inner structures." BLANK, *supra* note 28, at 109. "Fetoscopy is an application of fiber optics technology that allows a direct view of the fetus *in utero*." *Id.* at 110. *See Vo*, 836 P.2d at 415 n.7 (noting that "[p]hysicians can now determine the existence and approximate age of a live fetus by fetal heart monitoring, sonography, and other methods").

100. *See* Delsite, *supra* note 26. "Medical science now may provide competent proof as to whether the fetus was alive at the time of a defendant's conduct and whether his conduct was the cause of death." *Cass*, 467 N.E.2d at 1328. "The cause of a fetal death can often be determined to a medical certainty." *Vo*, 836 P.2d at 415 n.7. *But cf.* Tamar Lewin, W*hen the Death of a Fetus is Murder*, N.Y. TIMES, May 20, 1994, at B20 (noting that because many women miscarry early in their pregnancies, proving causation would be difficult, at least in that early stage).

101. *See Baby Cured of Rare Disease While in Womb*, ARIZ. REPUBLIC, Dec. 12, 1996, at A9 (reporting that a four-month-old fetus received a bone marrow transplant); David Cannella, *A New Miracle: Pair Welcome Baby Girl After Risky Procedure*, Ariz. Republic, June 12, 1995, at A1 (reporting that a baby was born two months after doctors delivered its twin). The first reported successful fetal surgery occurred in April 1981 when a polyethylene catheter was inserted into the bladder of a thirty-one-week-old fetus to relieve a blocked urinary tract. BLANK, *supra* note 28, at 116.

102. *Cass*, 467 N.E.2d at 1328 (quoting *Address by O.W. Holmes*, 10 HARV. L. REV. 457, 469 (1897)). *See Hughes*, 868 P.2d at 733-34 (referring to the born alive rule as "an obsolete, antiquated common law rule").

103. United States v. Gibson, 17 C.M.R. 911, 924, 926 (A.F.B.R. 1954).

belief that a child was incapable of independent circulation until the umbilical cord was cut.[104]

In *United States v. Gomez*,[105] the accused challenged his premeditated murder conviction on the basis that his victim, whom the accused had bludgeoned into unconsciousness, was legally alive, albeit brain dead, at the time he was removed from a respirator. Gomez argued that the act of removing the respirator was an intervening cause of death, which relieved the accused of criminal responsibility.[106] Under common law, a person was considered dead when the heart and lungs were inoperative. If the heart and lungs continued to function, the common law considered the person to be alive, even if the brain and other bodily functions had ceased.[107]

Upholding Gomez's conviction, the United States Army Court of Military Review rejected the common law's definition of death for purposes of Article 118. Significantly, the court considered the impact of advances in medical technology on the common law rule[108] and opined that the common law definition of death could evolve.[109] In logic equally applicable to the issue of fetal homicide, the court posited: "In our view, the common law is sufficiently flexible and broad to take into account the technological advances in the area . . . and military law should be equally adaptable."[110] The court then held that the definition of "death" in a military homicide case was "the common law definition of death *in its modern form*."[111]

One potential problem associated with developing common law for the military is the failure of the UCMJ to place the accused on notice that feticide is a criminal act. A statute is void for vagueness if an accused "could not reasonably understand that his contemplated conduct is proscribed"[112] or if a statute's "wording leaves doubt as to which persons fall within the scope of the law."[113] Ultimately, the void for vagueness doctrine is concerned about basic fairness.[114] Similarly, an unforeseeable enlargement of the military's homicide articles by the courts may constitute an ex post facto violation if applied retroactively.[115] Arguably, the lack of such notice may render the military's homicide statutes, as applied to the killer of a viable fetus, void for vagueness.[116]

Military law has never previously defined a human being or person to include a fetus within the ambit of its homicide articles. Further, common law has not historically recognized a fetus as a human being until it existed independently of the mother.[117] While on notice that the infliction of harm to a pregnant woman is criminal, an accused would not have fair warning that the death of a fetus is criminal and would subject him to additional convictions and punishment.[118] To circumvent the problem of insufficient notice, after a judicial determination

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104. *Id.* at 924. Medical authorities had established that a child's pulmonary circulation started as soon as it began to breathe. *Id.*

105. 15 M.J. 954 (A.C.M.R. 1983), *petition denied*, 17 M.J. 22 (C.M.A. 1984). *Accord* United States v. Taylor, No. ACM 28572, 1991 WL 125274 (A.F.C.M.R. Apr. 23, 1991).

106. *Gomez*, 15 M.J. at 958.

107. *Id.*

108. "Indeed the [common law] rule itself envisions an evolutionary process of death as advances in medical technology and the learning of physicians explore the realities of life and death." *Id.* at 959. The military judge "was not required to ignore scientific fact." *Id.* at 960.

109. *Id.* at 958-59.

110. *Id.* at 959 (citation omitted).

111. *Id*. (emphasis added).

112. United States v. Boyett, 42 M.J. 150, 153 (1995), *cert. denied*, 116 S. Ct. 308 (1995). *See* United States v. Brown, 45 M.J. 389, 394 (1996).

113. State v. Merrill, 450 N.W.2d 318, 322 (Minn.), *cert. denied*, 496 U.S. 931 (1990) (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

114. United States v. McGuiness, 35 M.J. 149, 152 (C.M.A. 1972) (citing Colten v. Kentucky, 407 U.S. 104 (1972)).

115. *See* Hughes v. State, 868 P.2d 730, 735 (Okla. Crim. App. 1994) (citing Bouie v. Columbia, 378 U.S. 347, 353-54 (1964)).

116. However, if the government charged the accused with violating an assimilated state feticide statute under Article 134, the notice argument should fail. Further, if a feticide conviction is not sustainable elsewhere, a court might still uphold the conviction as service discrediting or prejudicial to good order and discipline, in violation of Article 134, pursuant to the closely-related offense doctrine. *See* United States v. Brown, 45 M.J. 389, 395 (1996); United States v. Epps, 25 M.J. 319, 323 (C.M.A. 1987); United States v. Eischeid, 36 M.J. 561, 562 (N.M.C.M.R. 1992).

117. Because common law recognizes fetal infanticide as a form of murder, a void for vagueness challenge to a prosecution based on the born alive rule should fail. *See* United States v. Spencer, 839 F.2d 1341, 1343 (9th Cir. 1988) (noting that "[t]his court has held that the common law meaning of a common law term used in a federal criminal statute is a source of statutory precision in determining whether a statute is impermissibly indefinite" (citation omitted)).

118. *Hughes*, 868 P.2d at 736 (citing Commonwealth v. Cass, 467 N.E.2d 1324, 1329 (Mass. 1984)).

that common law had evolved to encompass feticide as a cognizable crime, state courts have limited application of their holdings to crimes committed after the date of the decision.[119] Appellate military courts have placed service members on notice that certain conduct was proscribed in a similar fashion and could do so for purposes of feticide.[120]

Even if the military's homicide articles follow the common law's born alive rule, the UCMJ permits prosecution for the killing of a child whose death results from the infliction of prenatal injuries. This crime is cognizable at common law,[121] including the common law of Maryland,[122] and is consistent with the reasoning in *Gibson*; although, military courts will still be required to define what constitutes a legal birth.[123] Some support for this position is found in the *MCM*. Albeit failing to address this specific factual scenario, the *MCM* does explain that an accused can be convicted of killing a human being as a result of a previously inflicted injury.[124] What is legally significant for purposes of homicide law under common law is the status of the victim at the time that death occurs, not the status of the victim at the time of the injury.[125]

Transferred Intent

When an accused injures or kills a pregnant woman, he may be held accountable for the resultant death of the woman's born alive fetus under the doctrine of transferred intent.[126] In *United States v. Willis*,[127] the United States Court of Appeals for the Armed Forces posited that "where there is . . . an intent to kill and an act designed to bring about the desired killing, the defendant is responsible for all natural and probable consequences of the act, regardless of the intended victim."[128]

In *United States v. Black*,[129] the accused deliberately shot a member of his unit, Private Lewis, in the chest, but the bullet passed through Lewis and struck an innocent bystander, Private

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119. *See id.* (stating that "today's ruling will apply wholly prospectively to those homicides which occur after this date"). "A viable fetus is a 'person' for purposes of the vehicular homicide statute as applied to homicides occurring after the date of this decision." *Cass*, 467 N.E.2d at 1330. "From the date of this decision henceforth, the law of feticide shall apply in this state." State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984).

120. *See*, *e.g.*, United States v. Clarke, 25 M.J. 631, 635 (A.C.M.R. 1987), *aff'd on other grounds*, 27 M.J. 361 (C.M.A. 1989).

> Because of the uncertainty concerning notice, we believe the interests of justice dictate that the finding of guilty of the offense in question be set aside. In the future, however, the noncommissioned officers are on notice that fraternization with enlisted subordinates is an offense punishable under the provisions of Article 134, UCMJ.

Id.

121. *See* Jones v. Commonwealth, 830 S.W.2d 877, 879 (Ky. 1992); State v. Hammett, 384 S.E.2d 220, 221 (Ga. App. 1989); Williams v. State, 561 A.2d 216 (Md. 1988). "Appellate courts in other jurisdictions which have reviewed the issue of whether an individual can be convicted of homicide for injuries inflicted on a fetus that lead to the death of the child after it was born alive have, virtually without exception, decided this question in the affirmative." People v. Hall, 557 N.Y.S.2d 879, 884 (N.Y. App. Div. 1990). *See also supra* notes 10, 11, 31 and accompanying text.

122. *See* Williams v. State, 561 A.2d 216, 219 (Md. 1989) (noting that "it was indeed the law of Maryland in 1776"). The UCMJ's murder and manslaughter articles were derived from common law, particularly the common law of Maryland. *See* UCMJ History, *supra* note 93, at 1238. *See also* United States v. Romano, 46 M.J. 269, 274 (1997); United States v. Harris, 8 M.J. 52, 55 (C.M.A. 1979).

123. An "advanced view" of common law considers a fetus to be born alive once the birth process begins. Perkins and Boyce, *supra* note 8, at 50 (citations omitted). *See* United States v. Gibson, 17 C.M.R. 911, 926 (A.F.B.R. 1954) (citing People v. Chavez, 176 P.2d 92 (Cal. Dist. Ct. App. 1947)). The Court of Criminal Appeals of Oklahoma held that a fetus who was born with a weak heartbeat, but was braindead, lacked blood pressure, and exhibited no respiration, was not born alive. *Hughes*, 868 P.2d at 732. The Supreme Court of Kansas determined that a baby who, after ten minutes of resuscitation, developed a faint heartbeat for a short period of time, was not "born alive." State v. Green, 781 P.2d 678 (Kan. 1989). However, the Court of Appeals of Wisconsin held that a baby born with some brain stem activity and who had "not suffered an irreversible cessation of circulatory and respitory functions" was born alive. State v. Cornelius, 448 N.W.2d 434, 436 (Wis. Ct. App. 1989).

124. MCM, *supra* note 82, pt. IV, ¶ 43c(1). "Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission." *Id.*

125. "Murder and manslaughter are criminal acts that result in the death of a 'person' . . . and neither the common law nor our statutes require 'person' status at the time the act occurred." *Jones*, 830 S.W.2d at 878-80. "[I]t is not the victim's status at the time the injuries are inflicted that determines the nature of the crime . . . but the victim's status at the time of death which is the determinative factor." *Hammett*, 384 S.E.2d at 221.

126. *See* State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984). "When an accused with premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim." MCM, *supra* note 82, pt. IV, ¶ 43c(2)(b). At common law, it was understood that "if A by malice aforethought strikes at B and, missing him, strikes C whereof he dies, tho he never bore any malice to C yet it is murder, and the law transfers the malice to the party slain." Perkins and Boyce, *supra* note 8, at 922 (*citing* Lord Hale and Blackstone). "When an assault is committed with the intent to murder a certain person, and another person is killed thereby, it is murder." Lee S. Tillotson, The Articles of War Annotated 265 (5th ed. 1949). *See* Stephanie Stone, *Maryland High Court Rules Transferred Intent Applies When Intended Victim is Hurt and a Bystander Killed*, West's Legal News, 1996 WL 258535, Feb. 15, 1996, at 785.

127. 46 M.J. 258 (1997).

128. *Id.* at 260.

Kirchner, in the abdomen.[130] Both soldiers died of their wounds, and Black was convicted of the premeditated murder of Lewis and the unpremeditated murder of Kirchner. In affirming both convictions, the United States Court of Military Appeals held that "one who kills a person in a malicious effort to kill another is guilty of murder" and opined that the accused could have been charged with Kirchner's premeditated murder despite the absence of any ill-will, animosity, or intent to kill Kirchner.[131]

To achieve a conviction for fetal infanticide or fetal homicide, should the courts recognize such a crime, the government need not prove that the accused knew that the victim was pregnant.[132] The transferred intent doctrine is not premised on knowledge of a second person (for example, the mother or her fetus) being present.[133] In *State v. Merrill*,[134] the defendant was convicted of two murders after he shot and killed a woman who was carrying a twenty-seven or twenty-eight-day-old embryo.[135] The prosecution never established that the defendant knew that the woman was pregnant.[136] On appeal, the defendant argued that the intent to kill the woman should not transfer to the fetus because the harm to each was not the same.[137] The Supreme Court of Minnesota rejected this argument and found the harms substantially the same.[138] The court stated that "[t]he possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assault may not safely exclude."[139]

Article 134

As the Air Force court-martial of Airman Gregory Robbins illustrates, assimilation of a state criminal statute to prosecute fetal crimes remains a viable option for military prosecutors. The Federal Assimilative Crimes Act[140] permits the military to prosecute a service member under Article 134 for a violation of state law committed within an area of exclusive or concurrent federal jurisdiction, as long as "federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed."[141] Feticide is neither specifically defined by federal law nor made punishable by any enactment of Congress.

Assuming that reliance on the common law definition of a person or human being prevents the use of Articles 118 and 119 to prosecute feticide, the government must contend with a preemption doctrine challenge to the use of Article 134.[142] This doctrine precludes the use of Article 134 to charge an offense that is otherwise covered by Articles 80 through 132.[143] The

129. 11 C.M.R. 57 (C.M.A. 1953).

130. *Id.* at 59.

131. *Id.* at 61 (citation omitted). *See* United States v. Corey, 11 C.M.R. 461, 466 (A.B.R.), *petition denied*, 12 C.M.R. 204 (C.M.A. 1953) (holding that "[i]n military law, it is premeditated murder when an accused kills one person in a premeditated attempt to kill another").

132. As a general rule, "a perpetrator of illegal conduct takes his victims as he finds them." People v. Hall, 557 N.Y.S.2d 879, 885 (N.Y. App. Div. 1990) (holding that the defendant was properly convicted of fetal infanticide after missing the intended target and shooting a pregnant bystander). *See* Cuellar v. State, 957 S.W.2d 134, 136 (Tex. Ct. App. 1997).

133. *See Hall*, 557 N.Y.S.2d at 885 (ruling that "it is entirely irrelevant whether [the] defendant actually knew or should have known that a pregnant woman was in the vicinity and that her fetus would be wounded as a result of her actions"). *See also* Barlow, *supra* note 17, at 500 (stating that "[t]raditional transferred intent does not consider the defendant's knowledge of the victim's presence").

134. 450 N.W.2d 318 (Minn.), *cert. denied*, 496 U.S. 931 (1990).

135. *Id.* at 320.

136. *Id.*

137. *Id.* at 323.

138. *Id.*

139. *Id.*

140. 18 U.S.C. § 13 (1994).

141. MCM, *supra* note 82, pt. IV, ¶ 60c(4)(c)(ii).

142. In the only case addressing feticide under Article 134, the Air Force Court of Military Review opined that, absent specific legislative authority, no legal basis exists to treat an unborn fetus as a person for purposes of a child neglect prosecution under Article 134(2). United States v. Foreman, No. ACM 28008, 1990 WL 79309 (A.F.C.M.R. May 25, 1990). Despite the court's dicta in the unpublished *Foreman* case, clauses one and two of Article 134 remain a relatively unchartered alternative basis for prosecution. However, prosecutorial efforts under these two provisions would be subject to similar challenges under the void for vagueness and preemption doctrines.

143. MCM, *supra* note 82, pt. IV, ¶ 60c(5).

doctrine's rationale "is that, if Congress has covered a particular kind of misconduct in specific articles of the Uniform Code, it does not intend for such misconduct to be prosecuted under the general provisions of Article 133 or 134."[144] Congress and the courts are unwilling "to permit prosecutorial authorities 'to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.'"[145] Congress is deemed to have occupied the field "if it 'intended for one punitive article of the Code to cover the type of conduct concerned in a comprehensive . . . way.'"[146]

Although military courts have not created a "bright line" test for the applicability of the preemption doctrine,[147] they have articulated a two-pronged test to determine whether the preemption doctrine applies. First, did Congress intend "to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific areas of the Code."[148] The first prong asks "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code."[149] In other words, has Congress "occupied the field?"[150] The second prong is whether the charged offense is "composed of a residuum of elements of a specific offense and asserted to be a violation of one of the general articles?"[151]

Applying the preemption doctrine's basic rationale to fetal homicide, one could argue that the doctrine precludes the assimilation of a state feticide statute. The defense position would be that the UCMJ's homicide articles do not recognize a fetus as a human being[152] and that these articles cover the field in the area of homicide.[153] The Assimilative Crimes Act is inoperative "when 'any enactment of Congress' speaks to the conduct charged"; state criminal offenses may be assimilated only "when *nothing* in the federal criminal code [speaks] to the allegedly criminal conduct."[154] If the "generic" conduct (for example, homicide) is covered by *any* federal statute, the court lacks jurisdiction over an assimilated state offense; "otherwise, the Act would simply be a device enabling prosecutors a wider choice."[155] *United States v. Williams*[156] provides support for this argument.

In *Williams*, the United States Supreme Court reversed a conviction for the statutory rape of a sixteen year old girl that was based on the assimilation of an Arizona statute that criminalized sexual intercourse with a woman under eighteen. The

144. United States v. Reichenbach, 29 M.J. 128, 136-37 (C.M.A. 1989). *See* United States v. Ventura, 36 M.J. 832, 834 (A.C.M.R. 1993). A trial counsel "is not allowed to utilize the Assimilative Crimes Act as a means to apply local law which differs from federal criminal statutes applicable to the same conduct." United States v. Irvin, 21 M.J. 184, 188 (C.M.A.), *on remand*, 22 M.J. 559 (A.F.C.M.R.), *aff'd in part, dismissed in part*, 22 M.J. 342 (C.M.A.), *cert. denied*, 479 U.S. 852 (1986).

145. United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992) (quoting United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953)).

146. *McGuinness*, 35 M.J. at 151 (quoting United States v. Maze, 45 C.M.R. 34, 36 (C.M.A. 1972)). *See* United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979) (noting that for preemption to apply "it must be shown that Congress intended for the other punitive article to cover a *class* of offenses in a complete way" (emphasis added)). *Cf. Reichenbach*, 29 M.J. at 136-37.

147. *See* United States v. Taylor, 23 M.J. 314, 316 (C.M.A. 1987); United States v. Ventura, 36 M.J. 832, 834 (A.C.M.R. 1993).

148. *McGuiness*, 35 M.J. at 151 (noting that the doctrine applies only if both questions are answered affirmatively). *See* United States v. Wright, 5 M.J. 106, 110-11 (C.M.A. 1978); *Ventura*, 36 M.J. at 834 (citations omitted).

149. *Wright*, 5 M.J. at 110-11.

150. *McGuiness*, 35 M.J. at 152.

151. *Id.* at 151 (noting that the doctrine applies only if both questions are answered affirmatively). *See Wright*, 5 M.J. at 110-11; *Ventura*, 36 M.J. at 834 (citations omitted).

152. The existence of a "human being" is a vital element for the crime of murder under Articles 118 and 119, and the existence of a "person" is a necessary prerequisite to a conviction for negligent homicide. MCM, *supra* note 82, pt. IV, ¶¶ 43, 44, 85.

153. *See* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953) (stating that when Congress has "covered the entire field" with a particular article, an offense containing less than the elements of the specified article may not be punished under Article 134). *See also* United States v. Taylor, 23 M.J. 314, 316 (C.M.A. 1987) (noting that "[t]he Court [in *Norris*] perceived a danger in allowing Article 134 to be used as a basis for punishing conduct which was similar to that proscribed by specific articles but which lacked some element required by those articles").

154. United States v. Narciso, 446 F. Supp. 252, 274 (E.D. Mich. 1977) (emphasis in original). *But cf.* Lewis v. United States, 118 S. Ct. 1135, 1146 (1988) (noting that the language of the Assimilative Crimes Act should not be read too literally).

155. *Narciso*, 446 F. Supp. at 274-75.

156. 327 U.S. 711 (1946). *See* Captain John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, ARMY LAW., Dec. 1987, at 12, 17. "Some courts have interpreted *Williams* as being 'primarily concerned not with whether the *precise acts* [have] been made penal, but with the discernment of the intent of Congress to punish the *generic* conduct in question.'" *Id.* (*quoting* United States v. Butler, 541 F.2d 730, 735 (8th Cir. 1976)). The Court's holding in *Williams* "applies fully to cases tried by court-martial." United States v. Irvin, 21 M.J. 184, 188 (C.M.A.), *on remand*, 22 M.J. 559 (A.F.C.M.R.), *aff'd in part, dismissed in part*, 22 M.J. 342 (C.M.A.), *cert. denied*, 479 U.S. 852 (1986).

applicable federal carnal knowledge statute required proof that the victim was under sixteen years old.[157]

The Supreme Court held, in part, that the Assimilative Crimes Act did not make the state statute applicable because the same offense, statutory rape, had already been defined and prohibited by the federal statute.[158] The United States could not assimilate a state statute to redefine and to enlarge the crime, even though the federal offense resulted in a narrower scope for the offense.[159] Similarly, if the military definitions of murder, manslaughter, and negligent homicide do not include the death of a fetus, the government should not be permitted to enlarge the scope of the military's definitions of homicide by assimilating a state feticide statute.[160]

The government could argue that the military's homicide statutes simply do not address feticide at all, that there is no military feticide offense that preempts state law. By focusing on the specific conduct or precise acts involved (killing a fetus), rather than on the generic offense (murder), the preemption doctrine is inapplicable. Indeed, several military and federal cases that apply the Assimilative Crimes Act follow this line of reasoning.[161]

In at least one case, the United States Court of Military Appeals opined that the legislative history of Articles 118 and 119 did *not* indicate "a clear intent to cover all homicides."[162] In *United States v. Kick*,[163] the court held that negligent homicide was a cognizable offense under Article 134 and rejected the accused's argument that Congress intended that only murder and manslaughter be prosecuted as homicides under the UCMJ.[164] However, unlike feticide, negligent homicide had previously been prosecuted as a violation of the 96th Article of War prior to enactment of the UCMJ, a fact that the court assumed Congress knew of when it created the UCMJ.[165]

The second prong of the preemption doctrine asks "whether the offense charged is composed of a residuum of elements of a specific offense."[166] Little interpretive guidance exists to assist in the application of this prong, but this portion of the test fails when an accused is charged with the violation of a "specific penal statute," such as a state feticide statute.[167] Because case law indicates that *both* prongs must be satisfied for the preemption doctrine to apply,[168] prosecution of an assimilated state feticide statute should not be preempted.[169]

Double Jeopardy

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157. *Williams*, 327 U.S. at 715-16.

158. *Id.* at 717.

159. *Id*. at 717-18. "The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the state, does not mean that the congressional definition must give way to the state definition." *Id. Cf. Lewis*, 118 S. Ct. at 1142 (holding that "assimilation may not rewrite distinctions among the forms of criminal behavior that Congress intended to create").

160. *See Irvin*, 21 M.J. at 188. The Assimilative Crimes Act may not redefine a crime, enlarge the definition of a crime, or serve "as a means to apply local law which differs from federal criminal statutes applicable to the same conduct." *Id.* "It may not be used to extend . . . the scope of existing federal criminal law." United States v. Jones, 5 M.J. 579, 580 (A.C.M.R. 1978) (quoting United States v. Picotte, 30 C.M.R. 196 (1961) (Ferguson, J., concurring)).

161. *See Picotte*, 30 C.M.R. at 196 (holding that "the doctrine of preemption is not involved in the instant case because Congress has not made the *precise criminal conduct* of the accused punishable by Article 97 or any other specific article as distinguished from the general Article of the Code" (emphasis added)). *See also* United States v. Wright, 5 M.J. 106, 111 (C.M.A. 1978) (ruling that the Texas statute prohibiting burglary of automobiles is not preempted by Articles 129 and 130); United States v. Kaufman, 862 F.2d 236, 237 (9th Cir. 1988) (distinguishing between federal and state offenses on the basis of the "precise act" made penal); United States v. Eades, 633 F.2d 1075, 1077 (4th Cir. 1980) (holding that the state statute is not preempted when the federal statute does not proscribe the defendant's specific conduct). *Accord Lewis*, 118 S. Ct. at 1142 (noting that the "difference in the kind of wrongful behavior covered . . . will ordinarily indicate a gap for a state statute to fill"). *See generally* Garver, *supra* note 156, at 17-18 (discussing the split between the precise acts and generic conduct approaches). *But cf. Lewis*, 118 S. Ct. at 1146 (Scalia and Thomas, J.J., concurring) (noting that the precise acts test "in practice is no test at all but an appeal to vague policy intuitions").

162. United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979).

163. *Id.*

164. *Id.* at 84-85.

165. *Id*. at 85. *See*, *e.g.*, United States v. Rhimes, 69 B.R. 123 (1947); United States v. Groat, 34 B.R. 67 (1944).

166. United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992). *See Wright*, 5 M.J. at 111.

167. *See McGuinness*, 35 M.J. at 152 (upholding the Federal Espionage Act prosecuted as a violation of Article 134(3), which is not preempted by Article 92).

168. *Id*. at 151. *See Wright*, 5 M.J. at 110.

169. While subject to debate, this prong may be answered affirmatively in prosecutions under the first two articles of Article 134 because the government would essentially eliminate a vital element required by the homicide articles—the death of a legally cognizable person—and punish the remaining homicide elements as an offense under the general article. Phrased in this way, the charge would violate the underlying basis for the preemption doctrine. *See McGuinness*, 35 M.J. at 152.

Double jeopardy concerns arise when an accused who has killed both the pregnant mother and the fetus she carried is subject to prosecution and punishment for both deaths. The issue would arise in cases in which the accused, as a result of the same conduct, is either convicted or acquitted of killing one victim and then subsequently tried for killing the other or is convicted and punished in a single court-martial for killing both the mother and the fetus.

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[170] This constitutional prohibition against double jeopardy provides three forms of protection: "[1] against a second prosecution for the same offense after acquittal . . . [2] against a second prosecution for the same offense after conviction . . . [and] [3] against multiple punishments for the same offense."[171]

The military's double jeopardy statute, Article 44 of the UCMJ, merely prohibits multiple trials for the same offense.[172] However, R.C.M. 907(b)(3) permits the dismissal of a multiplicious specification. The *MCM* explains that a specification is multiplicious "if it alleges the same offense, or an offense necessarily included in the other," or if the two specifications "describe substantially the same misconduct in two different ways."[173] Case law has amplified this body of law to prohibit conviction or punishment twice for the same offense in a single trial, unless permitted by Congress.[174]

Ultimately, the question posed under any of the three scenarios mentioned above is whether the two killings constitute the same offense.[175] When the misconduct is charged under the same punitive provision,[176] the courts may query whether Congress intended for the two charged offenses to be treated as a "continuous course-of-conduct offense or an individual offense."[177] Assuming that a fetus is a human being for purposes of the military's homicide articles, or if the fetus is born alive, it seems clear that when a single act results in the death of two or more people, the accused may be convicted of separate homicides.[178]

When determining what constitutes the same offense when the prosecution is based on two separate punitive provisions, military courts apply the *Blockburger-Teters* test.[179] This test would be applied if the mother's murder were prosecuted pursuant to a traditional homicide article and a feticide statute were assimilated and charged under Article 134. The *Blockburger-Teters* test applies even when separate specifications, including an assimilated state statute, are each charged under Article 134, rather than under two distinctly separate punitive articles.[180]

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170. U.S. CONST. amend. V.

171. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

172. "No person may, without his consent, be tried a second time for the same offense." UCMJ art. 44(a) (West 1995).

173. MCM, *supra* note 82, R.C.M. 907(b)(3), discussion.

174. *See* United States v. Neblock, 45 M.J. 191, 195 (1996).

175. The inquiry assumes the existence of two legally cognizable human beings. Accordingly, the scenario is presumed on either the born alive rule being satisfied or the military courts rejecting the common law and holding that a fetus, either viable, quick, or embryonic, is a person for purposes of the UCMJ. If the courts determine that a fetus is not a legally recognized human being, and if such a fetus is not "born alive," an accused could only be charged with killing the mother.

176. For example, an accused is charged with one specification of killing the mother (in violation of Article 118) and one specification of killing the fetus (in violation of Article 118).

177. *Neblock*, 45 M.J. at 197.

178. *See*, *e.g.*, United States v. Sheffield, 20 M.J. 957 (A.F.C.M.R. 1985) (ruling that a drunk driver who killed two persons riding on a single motorcycle was properly convicted of two specifications of involuntary manslaughter because there is a distinct societal interest in the preservation of life which supports multiple convictions); United States v. Black, 11 C.M.R. 57 (C.M.A. 1953) (holding that although the accused fired one shot, the bullet killed two people and the government could have charged the accused with two specifications of premeditated murder); United States v. Brett, 25 M.J. 720, 721 (A.C.M.R. 1987) (stating that "in the case of offenses against the person, each homicide . . . against a different victim is a separately punishable crime"); United States v. Corey, 11 C.M.R. 461 (A.B.R.), *petition denied*, 12 C.M.R. 204 (C.M.A. 1953) (holding that an accused who fired into a small hut and killed two people was properly convicted of two specifications of premeditated murder). C*f.* Gardner v. Norris, 949 F. Supp. 1359, 1373 (E.D. Ark. 1996) (upholding convictions for separate murders committed during an "extended killing spree"); Williams v. State, 561 A.2d 216 (Md. 1989) (ruling that a defendant who hit a pregnant woman with an arrow was properly convicted of two counts of manslaughter); Ogletree v. State, 525 So. 2d 967 (Fla. Dist. Ct. App. 1988) (holding that a defendant who fired a single shot into a room containing nine people was properly convicted of nine counts of attempted murder). *Accord* People v. Shum, 512 N.E.2d 1183, 1202 (Ill. 1987) (holding that "separate victims require separate convictions and sentences"), *cert. denied*, 484 U.S. 1079 (1988).

179. The *Blockburger-Teters* test derives its name from the Supreme Court case that created the test and the military case that adopted the test for the armed forces. *See* United States v. Blockburger, 284 U.S. 299 (1932); United States v. Teters, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994). *See also Neblock*, 45 M.J. at 195 n.6; United States v. Oatney, 45 M.J. 185, 190 (1996) (Crawford and Gierke, J.J., concurring); United States v. Albrecht, 43 M.J. 65, 67 (1995).

180. *See* United States v. Wheeler, 40 M.J. 242 (C.M.A. 1994).

At least two intermediate appellate courts have suggested the following *Blockburger-Teters* methodology.[181] First, do "the coupled offenses arise out of the same act or course of conduct?"[182] Clearly, when the accused attacks a woman and concomitantly kills her fetus, the first prong of the test is satisfied. Second, did Congress intend that the accused "be subject to conviction and sentencing for the two different violations arising from the same course of conduct?"[183] This prong is satisfied if the evidence fails to show that Congress intended one single conviction or punishment for the different offenses.[184] Absent a clear expression of contrary legislative intent, the court will presume that Congress intended separate convictions and punishments if each charged offense requires proof of an element that the other does not.[185]

Since there is no indication that Congress considered feticide as a UCMJ offense at all, a court must compare the elements of the two offenses to determine legislative intent. Articles 118, 119, and 134 (negligent homicide) require the existence of a human being or person; a feticide statute requires only that the fetus existed or that a pregnancy was improperly terminated. This supports a determination that the two offenses may be separately prosecuted and punished.[186]

All the state courts to address such issues have held that homicide and feticide convictions do not violate double jeopardy.[187] However, in each case, the respective state legislatures had enacted a separate feticide statute, making the legislative intent on the issue relatively easy to ascertain. Absent specific legislative action to add some form of feticide punitive provision to the UCMJ, military courts must continue to rely on the *Blockburger-Teters* test, and double jeopardy is not found under that test.

Conclusion

The court-martial of Airman Robbins may be only a harbinger of future military feticide prosecutions. With the increase in state feticide statutes, the "development" of the common law, and the increased recognition of feticide as a potentially cognizable crime under the UCMJ, military courts will see a concomitant increase in feticide prosecutions.

The military justice system will eventually be required to elect between established or evolving common law to interpret its homicide articles, and the courts must determine if the preemption doctrine precludes the assimilation of state feticide statutes pursuant to Article 134. The latter question remains an open issue. However, in light of the extensive medical advances seen since the formation of the common law's born alive rule, a compelling argument exists for military courts to reject this antiquated legal maxim and bring viable fetuses within the ambit of the UCMJ's homicide articles.

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181. United States v. Britcher, 41 M.J. 806, 809-10 (C.G. Ct. Crim. App. 1995); United States v. Neblock, 40 M.J. 747, 749 (A.F.C.M.R. 1994), *decision set aside on other grounds*, 45 M.J. 191 (1996).

182. *Britcher*, 41 M.J. at 809.

183. *Id.* at 810.

184. *See Wheeler*, 40 M.J. at 245, 247.

185. *Id.* at 246-47 (citing United States v. Teters, 37 M.J. 370, 376-77 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994)).

186. *Cf.* Baird v. State, 604 N.E.2d 1170, 1190 (Ind. 1992), *cert. denied*, 510 U.S. 893 (1993) (noting that "[t]he element of 'termination of a human pregnancy' that is necessary to a feticide conviction, however, is not alleged in the murder information, although we do not dispute that appellant did cause the termination of his wife's pregnancy by strangling her"); People v. Shum, 512 N.E.2d 1183, 1202 (Ill. 1987), *cert. denied*, 484 U.S. 1079 (1988) (stating that there are different elements in the murder and feticide statutes).

187. *See* State v. Smith, 676 So. 2d 1068 (La. 1996) (considering the issue under both the United States and Louisiana constitutions); Ward v. State, 417 S.E.2d 130, 137 (Ga. 1992) (ruling that the defendant was properly convicted of murdering both a mother and a fetus), *cert. denied*, 113 S. Ct. 1061 (1993); Baird v. States, 604 N.E.2d 1170 (Ind. 1992), *cert. denied*, 510 U.S. 893 (1993) (upholding the defendant's convictions of strangling his pregnant wife and killing her fetus); *Shum*, 512 N.E.2d at 1201-02 (upholding the defendant's convictions of killing both the mother and her fetus).

Annual Review of Developments in Instructions—1997

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Introduction

This article reviews cases from the past sixteen months in which military appellate courts addressed issues involving courts-martial instructions. While the majority of the cases discussed in this article deal directly with instructional issues, counsel must recognize that any change in the law requires evaluation of the applicable instructions. This is especially true in the areas of crimes, defenses, and evidence. Early in their pretrial preparation, counsel should consult the *Military Judges' Benchbook*[1] (to include the recently published Change 1, dated 30 January 1998), as well as case law.

Crimes and Defenses

The Knowledge Requirement

In *United States v Maxwell*,[2] Colonel Maxwell was convicted, contrary to his pleas, of four specifications of violating Article 134 of the Uniform Code of Military Justice[3] (UCMJ). Specifically, he was convicted of two specifications of communicating indecent language; one specification of violating 18 U.S.C. § 1465[4] by knowingly transporting in interstate commerce, for purposes of distribution, obscene materials; and one specification of violating 18 U.S.C. § 2252[5] by knowingly transporting or receiving child pornography in interstate commerce.[6]

At trial, the military judge instructed the panel that, for the 18 U.S.C. § 2252 offense, they must find "[t]hat one or more of [the visual] depictions were of minors engaged in sexually

1. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) (C1, 30 Jan. 1998) [hereinafter BENCHBOOK]. The *Benchbook* is available in hard copy as well as in an MS Word computerized version, which may be downloaded from the Legal Automation Army-Wide Systems bulletin board service (BBS). *See* Lieutenant Colonel Lawrence M. Cuculic et al., *Annual Review of Developments in Instructions: 1996*, ARMY LAW., May 1997, at 52-53. The *Benchbook* is found in the Benchbook Download Library in the Files section on the BBS main menu. Changes are announced in the Benchbook Forum. Change 1, dated 30 January 1998, can be found in the Benchbook Library as file 27-9C1. An overview of the change and posting instructions can be found at file 27-9pgch. Both of these files are in Word 6.0 format. Counsel need to review and to post these changes immediately.

2. 45 M.J. 406 (1996).

3. UCMJ art. 134 (1994).

4. At the time of the offense (December 1991), the statute provided:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound, or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1465 (1988). In 1996, the statute was amended as follows: (1) "or an interactive computer service (as defined in § 230(e)(2) of the Communications Act of 1934) in or affecting such commerce" was added after "foreign commerce" the first place it appears; (2) "transports or travels in, or uses a facility or means of," was substituted for "transports in"; and (3) the provisions relating to travel and use of interstate commerce were struck out. *See* Pub. L. No. 104-104, § 507(b) (1996). The statute now provides:

> Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or *an interactive computer service* (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1465 (West Supp. 1997) (emphasis added). *See Maxwell*, 45 M.J. at 414 n.2. In *Maxwell*, the first granted issue was: Whether 18 U.S.C. § 1465 can be construed constitutionally to apply to the interstate distribution of allegedly obscene visual depictions transmitted via computer on-line services which use telephone lines. *Id*. The 1996 amendment to the statute settled this issue.

explicit conduct" and "[t]hat the receiving or transporting [of such depictions] was done knowingly: that is, that at the time the accused transported or received the visual depictions, he . . . . *knew or believed* that one or more of the persons depicted were minors."[7] Defense counsel had unsuccessfully objected to the "or believed" language at the pre-instruction Article 39(a)[8] session.

On appeal, Colonel Maxwell alleged that the military judge erred when he instructed the panel concerning the scienter element as to the age of the subjects depicted. The appellant argued that "a belief" concerning the minority of the individuals in the depictions was insufficient. Instead, he argued, "actual knowledge of the minority of the actors is an essential element of an offense under § 2252."[9]

The Court of Appeals for the Armed Forces[10] (CAAF) began its analysis by recognizing that the United States Supreme Court, in *United States v. X-Citement Video, Inc.*,[11] held that the knowledge requirement of 18 U.S.C. § 2252 extends to both the character of the material and the age of the individuals in the material.[12] Concerning the knowledge element for the age of those depicted, the CAAF held that Congress, when passing the statute, did not intend to require "that a recipient or a distributor of pornography must have knowledge of the actual age of the subject which could only be proved by ascertaining his identity and then getting a birth certificate or finding someone who knew him to testify as to his age."[13] Rather, the court held that "the crucial fact which the government had to prove was that the subjects were minors. That being the case . . . it then was only necessary to prove that [Colonel Maxwell] *believed* they were minors."[14]

Should military judges continue to include the term "belief" when instructing on the scienter requirement for the minority of the individuals depicted for alleged violations of 18 U.S.C. § 2252(a)(2)? Based on *Maxwell*, the answer appears to be yes; "belief" of minority appears sufficient. However, military judges should note that *Maxwell's* footnote seven indicates that different scienter standards have been used in § 2252(a)(2) prosecutions in federal courts.[15]

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5. 18 U.S.C. § 2252 provides:

> (a) Any person who—
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252

6. "Clause 3 offenses involve noncapital crimes or offenses which violate federal law, including law made applicable through the Federal Assimilative Crimes Act . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(1) (1995) [hereinafter MCM].

7. *Maxwell*, 45 M.J. at 424 (emphasis added).

8. UCMJ art. 39(a) (1994).

9. *Maxwell*, 45 M.J. at 424.

10. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), renamed the United States Court of Military Appeals and the United States Courts of Military Review. The new names are the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

11. 513 U.S. 64 (1994).

12. *Id.* at 81.

13. *Maxwell*, 45 M.J. at 424.

14. *Id*. (emphasis added). *See* United States v. Russell, 47 M.J. 412 (1998) (judge instructed members that they must find that the appellant knew or believed that the pictures depicted persons under 18). *But see Maxwell*, 45 M.J. at 424-25 n.7 (detailing how the federal appellate courts have dealt with the requirement for actual knowledge versus belief).

Nonetheless, trial defense counsel should continue to object to inclusion of the word "belief" in this instruction. Preserving the issue for appeal is important,[16] especially because the appellate process is not yet complete in *Maxwell*.[17] Defense counsel should argue that it is impermissible to lessen the government's burden simply because that burden may be difficult.

With few exceptions, UCMJ provisions that have a knowledge element require actual knowledge and do not permit conviction with the less onerous scienter "belief."[18] The law allows the government to use permissible inferences and circumstantial evidence to prove knowledge.[19] While proving what an accused is "thinking" is difficult in any prosecution, defense counsel should argue that difficulty of proof does not justify lessening the government's burden in § 2252(a)(2) prosecutions.[20] There is admissible circumstantial evidence from which the finder of fact can determine what the accused "knew," such as the alleged depictions (and appropriate expert opinion testimony[21] concerning the ages of the participants), the language of relevant advertisements or catalogues, and the titles of or electronic locations of the material.

As for guilty plea cases, during the providence inquiry, military judges should require that the accused admit that he actually knew of the minority of the depicted children.[22] This avoids the "knowledge versus belief" issue altogether.

Lawful Orders

In *United States v. Hill*,[23] the appellant had a long but tumultuous relationship with a fellow Air Force member, Staff Sergeant (SSgt) Spellman. Their "romance" included several alleged assaults that resulted from jealousy. Subsequent to one of the assaults, the appellant's chain of command and the security police became involved. A security police investigator, SSgt Lindley, gave the accused, a sergeant, an oral order "not to contact Spellman at her home or duty section or be within 100 feet of her."[24] Five nights later, the appellant was found in the dark at Spellman's back door "prowling in her backyard with a knife and an air pistol."[25] The convening authority later referred charges against the appellant, including a charge for willful disobedience of a noncommissioned officer's lawful order (SSgt Lindley's no contact order), in violation of Article 91.[26]

Prior to trial, the defense made a motion to dismiss the Article 91 charge because the order was allegedly unlawful. The defense argued that the order was unlawful because SSgt Lindley was not in the appellant's chain of command. The military judge denied the motion and held that the order was lawful. In an Article 39(a) session after the introduction of all of the evidence, the military judge informed the parties that he intended to instruct that the order, if given, was lawful.[27] When asked for

15. *Maxwell*, 45 M.J. at 424-25 n.7.

16. MCM, *supra* note 6, R.C.M. 920(f).

17. Colonel Maxwell's court-martial is not final under R.C.M. 1209. *See id.* R.C.M. 1209. The sentence rehearing has been held, and the case is once again at the Air Force Court of Criminal Appeals for review. Telephone Interview with Captain Mullen, Air Force Defense Appellate Division (Jan. 28, 1998).

18. *See*, *e.g.*, MCM, *supra* note 6, pt. IV, ¶ 11c(5) (providing that, for missing movement, the accused must have "actual knowledge" of the prospective movement missed); ¶¶ 13b(4), 14b(1)(c), and 14b(2)(c) (providing that, for disrespect, assault, or willfully disobeying a superior commissioned officer, the accused must know the victim's status as a superior commissioned officer); ¶ 37c(5). *See also* United States v. Mance, 26 M.J. 244 (C.M.A. 1988) (holding that, for possession, use, distribution, introduction, or manufacture of a controlled substance, the accused must know of the presence of the substance and its contraband nature). *But see* MCM, *supra* note 6, pt. IV, ¶ 16b(3)(b) (providing that, for dereliction in the performance of duties, the government need only prove that the accused "knew *or reasonably should have known* of the duties" (emphasis added)).

19. MCM, *supra* note 6, R.C.M. 918(c).

20. "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases, a youth is the prosecution's only eye witness. But '[t]his court cannot alter evidentiary rules because litigants might prefer different rules in a particular class of cases.'" Tome v. United States, 513 U.S. 150, 165-67 (1995), *quoting* United States v. Salerno, 505 U.S. 317, 322 (1992).

21. Examples of appropriate areas of expert testimony are: age, the corresponding physical development of children, and opinions that apply those principles to the depictions.

22. Military judges should discuss with the accused the available circumstantial evidence and then have the accused admit that he *knew* the ages of the depicted children.

23. 46 M.J. 567 (A.F. Ct. Crim. App. 1997).

24. *Id.* at 569.

25. *Id.* at 570.

26. UCMJ art. 91 (1994).

27. *Hill*, 46 M.J. at 571.

concurrence, the defense counsel responded "absolutely."[28] After findings instructions, the defense counsel stated that the defense had no objections to the instructions given. The panel found the accused guilty of violating SSgt Lindley's no-contact order.

The lawfulness of SSgt Lindley's order was one of the issues on appeal. As at trial, it was again alleged that this order was unlawful because SSgt Lindley was not in the accused's chain of command. Sitting en banc, the Air Force Court of Criminal Appeals held that "[t]here is simply no requirement in Article 91 that the NCO giving the order bear any particular relationship to the order's recipient, and no such relationship has ever been judicially grafted onto this offense." [29] Eight judges concurred in the opinion. Judge Dixon's dissent, however, contains lessons for counsel.

Judge Dixon wrote that the military judge erred when he held that the order was a legal order as a matter of law. Judge Dixon noted that, once the military judge determined that the order was lawful as a matter of law, "His precipitous ruling precluded the defense from contesting the lawfulness of the order before the members. Moreover, it relieved the government of its burden of proving beyond a reasonable doubt one of the essential elements of the offense, namely that appellant had a duty to obey the order."[30] Judge Dixon noted:

> Could reasonable men differ about the lawfulness of this order? You bet they could! This is clearly a situation in which the lawfulness of the order necessitates a factual determination. The factual issue is whether the order given by SSgt Lindley relates to a specific military duty and is one which he was authorized to give under the circumstances. There are no reported cases which address the authority of a security policeman or any other non-commissioned officer in the chain of command to issue a "no-contact" order. There is no precedent which holds this order lawful as a matter of law.[31]

Defense counsel should heed Judge Dixon's advice and consider the consequences of conceding that an order is lawful as a matter of law. Such a finding is tantamount to a directed verdict as to that element,[32] and the issue is taken from the factfinder. Defense counsel should carefully evaluate the lawfulness of any allegedly violated order and raise all challenges. Challenges that are not raised will ordinarily be waived (except for plain error).[33]

Resisting Apprehension

In *United States v. Poole*,[34] the accused was suspected of stealing stereo components. Military criminal investigators went to his room and lawfully began searching for the stolen stereos. As they were searching, the accused ran from the room. Three investigators chased after the accused. The accused ran to the parking lot, got into his car, and began backing out of the parking space. One of the investigators opened the passenger-side door and told the accused to stop. After the accused backed out, another investigator, SSgt Spanier, stood in front of the accused's car, put up his hands, and ordered the accused to stop. Resolute, the accused drove forward. The investigator jumped onto the hood of the car to avoid being struck. Seeing the investigator on the hood, the accused made a sharp right turn to throw the investigator off the hood.[35]

At trial, the accused testified that he did not hear anyone telling him to stop. Additionally, he testified that he did not see the investigator in front of the car until the investigator was already on the hood. He stated that he saw the investigator roll off the hood, but he did not stop at that point because he was afraid.[36]

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28. *Id.*

29. *Id.* at 570.

30. *Id.* at 579.

31. *Id.* at 581. Judge Dixon noted, "The law is clear that, without a valid military purpose, an order may not interfere with the recipient's personal rights and private affairs." *Id. See* MCM, *supra* note 6, pt. IV, ¶ 14c(2)(a)(iii). *See also* United States v. Stewart, 33 M.J. 519, 520 (A.F.C.M.R. 1991).

32. *See* BENCHBOOK, *supra* note 1, ¶ 3-15-2d n.1. Presumably, in most cases, the lawfulness of the alleged order will be an issue for the members to decide. It will therefore be correct to give the instruction that follows Note 3.

33. The majority opinion notes:

> Given the defense theory of the case at trial, the *only* issue for the members was whether the appellant understood the order's terms, and the appellant sought and received the pertinent jury instruction on that issue. There simply was no factual dispute for the members regarding the order's lawfulness, because the defense picked the ground for battle elsewhere—the order's source.

Hill, 46 M.J. at 571.

34. 47 M.J. 17 (1997).

35. *Id.* at 18.

Defense counsel requested the following instruction:

> To resist apprehension, a person must actively resist the restraint attempted to be imposed by the person apprehending. This resistance may be accomplished by assaulting or striking the person attempting to apprehend. The government has alleged that the accused resisted apprehension from SSgt Spanier by fleeing. The defense has put on evidence that the accused was trying to flee from SSgt Spanier. If you believe that the accused was only trying to flee from SSgt Spanier you may not convict him of the offense of Charge II, Resisting Apprehension.[37]

The military judge only gave the first two sentences of the requested instruction. However, the military judge allowed the defense to argue that the accused was only running away and that just running away was not sufficient to constitute active resistance to attempted apprehension. The military judge instructed the members that aggravated assault was a lesser included offense of the charged resisting apprehension.[38] The members found the accused guilty of resisting apprehension.

On appeal, the defense argued that the military judge erred when he refused to instruct that "mere flight does not constitute the active resistance required to establish the offense of resisting apprehension."[39] The government argued that mere flight was not raised by the evidence and that the military judge properly instructed the members concerning the resistance required for the offense.

The CAAF began their analysis with a historical perspective of the mere flight "defense." The court noted that it first recognized the mere flight defense in *United States v. Harris*,[40] when the court held that an accused who merely flees from apprehension without striking or assaulting the apprehending official has not "resisted" apprehension.[41] Likewise, in *United States v. Burgess*,[42] the court held that an accused who ignores a law enforcement official's announcement that "you're under arrest" and drives away has not "resisted" apprehension.

The court used a two-pronged analysis. First, was this requested instruction a Rule for Courts-Martial (R.C.M.) 916[43] special defense that must have been included? Second, was it a proper denial of a requested instruction under the criteria of *United States v. Damatta-Olivera*?[44] Specifically, the *Damatta-Olivera* criteria are: (1) Was the requested instruction correct?; (2) Was it substantially covered in the main charge?; and (3) Was it on such a vital point that the failure to give it deprived the accused of a defense or seriously impaired an effective presentation?[45]

Recognizing that military judges are required to instruct on any special defense in issue, the CAAF noted that "mere flight" is not a special defense listed in R.C.M. 916 and does not negate an element of the offense.[46] "Mere flight" is simply "conduct

36. *Id.*

37. *Id.*

38. *Id.* There was no defense objection to this instruction, and it was not raised as error on appeal. While holding that the military judge properly instructed the members that an assault was required for "resistance," the CAAF somehow supports its reasoning by noting that the military judge "told the members that aggravated assault was a lesser-included offense." *Id.* at 19. Assault and assault consummated by a battery under Article 128 are possible lesser included offenses of resisting apprehension. *See* MCM, *supra* note 6, pt. IV, ¶ 19(d). What is less clear is whether aggravated assault can be a lesser included offense, because the maximum punishment for aggravated assault exceeds that for resisting apprehension. *Compare id*. ¶ 19e(1) (stating that the maximum punishment for resisting apprehension is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for one year) *with id.* ¶ 54e(8)(b) (stating that the maximum punishment for aggravated assault with a means or force likely to produce death or grievous bodily harm is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years). For aggravated assault to be a lesser included offense, the maximum punishment for the aggravated assault would be limited to the maximum punishment for resisting apprehension. *See id.* R.C.M. 603.

39. *Poole*, 47 M.J. at 18.

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

41. *Poole*, 47 M.J. at 18 (citing *Harris*, 29 M.J. at 172-73). After *Harris*, Congress amended Article 95 of the Uniform Code of Military Justice to criminalize "flight" from apprehension. Under the amendment, there is no requirement for active resistance, such as assaulting or striking a person who is lawfully authorized to apprehend. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1112(a), 110 Stat. 461 (1996) (codified at 10 U.S.C.A. § 895 (West 1998)).

42. 32 M.J. 446 (C.M.A. 1991).

43. *See* MCM, *supra* note 6, R.C.M. 916 (listing special defenses, which are those where the accused does not deny that he committed the crime but denies criminal responsibility).

44. 37 M.J. 474 (C.M.A. 1993).

45. *Id.* at 478, *quoting* United States v. Winborn, 34 C.M.R. 57, 62 (C.M.A. 1963).

that falls short of active resistance."[47] Because it is not a special defense, the court held that the accused was not entitled to the instruction as a special defense under R.C.M. 920(e).[48]

Applying the *Damatta-Olivera* criteria, the court held that the military judge did not err when he gave only the first two sentences of the instruction proposed by the defense.[49] First, the requested instruction was not correct. The requested instruction misstated the issue by representing that the government's theory concerning "resistance" was the accused's fleeing when, in fact, the government's theory was that the accused resisted apprehension when he attempted to run over SSgt Spanier with his car. Second, the court held that the military judge "substantially covered in the main charge"[50] the correct portions of the requested instruction. The military judge correctly instructed the members that the accused's resistance "must rise to the level of an assault to constitute active resistance."[51] The court noted that even the accused admitted that his action threw SSgt Spanier from the hood of the car, "a level of resistance well beyond 'mere flight.'"[52] Third, the military judge's ruling did not deprive the accused of a defense or impair the defense's presentation of evidence. He allowed the defense to present evidence and to argue to the factfinders that the accused was merely fleeing.

Poole is helpful to practitioners because it reminds counsel of the distinction between resisting and fleeing apprehension. The 1998 amendments to the *Manual for Courts-Martial* align the *Manual for Courts-Martial's* Part IV, paragraph 95, with the 1996 amendment to UCMJ Article 95, which created the offense of fleeing apprehension. Additionally, the case is helpful in that it reminds counsel of the framework and analysis that they should apply when requesting proposed instructions—the *Damatta-Olivera* criteria.

Maltreatment

In *United States v. Goddard*,[53] the Navy-Marine Corps Court of Criminal Appeals held that the appellant's consensual sexual relationship with a subordinate could constitute maltreatment.[54] The court held that the victim's pain or suffering is determined using an objective standard. The fact that a particular victim did not feel maltreated or consented to the activity is irrelevant.[55] On this rule of law, the Navy court is at odds with the Army and Air Force appellate courts, which have held that consensual sex with a subordinate does not amount to maltreatment.[56]

The Navy-Marine Corps court looked at the historical development of the maltreatment offense and noted that, early on, it had nothing to do with relationships between members of the opposite sex.[57] The crux of the issue has always been whether a person in authority can induce a person who is subject to his orders to commit an illegal act.[58] The Navy-Marine Corps court criticized the encroachment of a subjective element into maltreatment, stating that such a change was due in part to an expanded discussion of maltreatment and sexual harassment in the *Manual for Courts-Martial*.[59] As the Navy-Marine Corps court views the issue, the offense of maltreatment exists to protect the sanctity of the senior-subordinate relationship. The court concluded that the appellant's "adulterous indecent sexual

46. United States v. Poole, 47 M.J. 17, 19 (1997). *See* MCM, *supra* note 6, pt. IV, ¶ 19b(1).

47. *Poole*, 47 M.J. at 19.

48. *Id.* at 18. Rule for Courts-Martial 920 provides that "[i]nstructions on findings shall include . . . a description of any special defense under R.C.M. 916 in issue." MCM, *supra* note 6, R.C.M. 920(e)(3).

49. *Poole*, 47 M.J. at 18.

50. *Id.*

51. *Id.*

52. *Id.*

53. 47 M.J. 581 (N.M. Ct. Crim. App. 1997).

54. *Id*. at 584-85. The accused was convicted of maltreatment of one private and fraternization with another private, though he had consensual sex with both. *Id.* at 583.

55. *Id.* at 584 (citing United States v. Palmiter, 20 M.J. 90, 96 (C.M.A. 1985)).

56. *See*, *e.g.*, United States v. Johnson, 45 M.J. 543 (Army Ct. Crim. App. 1997); United States v. Harris, 41 M.J. 890 (Army Ct. Crim. App. 1995); United States v. Garcia, 43 M.J. 686 (A.F. Ct. Crim. App. 1995), *rev'd on other grounds*, 44 M.J. 496 (1996). *See also* BENCHBOOK, *supra* note 1, ¶ 3-17-1.

57. *Goddard*, 47 M.J. at 583-84.

58. *Id.* at 585.

59. The court's cynicism towards the "cause de jure" is obvious, and the court made it clear that not all maltreatment is of the sexual-harassment variety. *Id.*

activity with a subordinate, on duty, at least partially in uniform, on the floor of his unit's administrative office" was maltreatment and had nothing to do with lawful orders or official business.[60]

With the service courts heading in different directions regarding maltreatment of subordinates, an offense that frequently gives rise to highly visible cases, perhaps the CAAF will establish one rule of law. Differences among the services in the area of fraternization can be more easily understood with Article 134 fraternization's "custom of the *service*" element, but the differing views on maltreatment, an enumerated Article 93 offense, are more problematic.

The Justification Defense

In a case that received substantial media attention, the Army Court of Criminal Appeals recently issued an opinion involving instructions on defenses. *United States v. Rockwood*[61] involved an Army captain who was deployed to Haiti with the 10th Mountain Division in support of Operation Uphold Democracy. The accused was court-martialed for offenses relating to his investigation of, and attempt to publicize, possible human rights violations at the National Penitentiary. These offenses included failure to repair, leaving his place of duty, disrespect, willful disobedience of a superior commissioned officer, and conduct unbecoming an officer.[62]

At trial, the defense presented evidence that the accused was justified in his actions because he was carrying out the President's intent and because he had a duty under international law to investigate human rights violations.[63] The defense requested instructions on both the duress and justification defenses.[64] The judge refused to instruct on justification but instructed on duress.

In reviewing the judge's instructions, the Army court noted that, to avail oneself of the justification defense, the person must have performed some legal duty. The court then explored whether Captain Rockwood had a duty in this case. The court observed that the existence of a duty is a question of law to be determined by the judge.[65] Discussing whether the accused had a duty based on the President's comments in a 1994 speech to the nation, the court concluded that a soldier does not derive his duties from public comments, but from the lawful orders of his superiors.[66] The court also rejected the accused's claim that he had a duty under international law to remedy the conditions at the prison.[67] The court concluded that any duty the accused had in this regard "was discharged when he reported the prison conditions to his superiors."[68]

The court found that the judge properly refused to instruct on justification.[69] Further, although he was not required to do so, the judge permitted the defense to present evidence on justification, which contributed to the duress defense.[70] *Rockwood* illustrates that, although a judge may properly refuse a certain instruction, he will often be more liberal concerning the defense presentation of evidence.

Evidence

In *United States v. Knox*,[71] a child sexual abuse prosecution, a private practice social worker who testified for the government offered the following opinion concerning drawings made by the alleged child victims: "I consider them an expression of what the child is telling me. *I believe the child*."[72] The defense immediately objected to this inadmissible opinion and

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60. *Id.* at 586.

61. 48 M.J. 501 (Army Ct. Crim. App. 1998).

62. UCMJ arts. 86, 89, 90, 133 (1994).

63. *Rockwood*, 48 M.J. at 504.

64. *See* MCM, *supra* note 6, R.C.M. 916(h) (providing that reasonable apprehension that the accused or another innocent person would be immediately killed or suffer serious injury is a defense to any offense except killing); *id*. R.C.M. 916(c) (death, injury, or other act done in proper performance of legal duty is justified).

65. *Rockwood*, 48 M.J. at 505.

66. *Id.* at 505-07. The court explained that televised presidential speeches are designed to explain to the American people why American soldiers are being sent to a dangerous area and to garner support for the President's action. *Id.*

67. The appellant argued that the United States was an "occupying power" and, therefore, had responsibility for the National Penitentiary. *Id.* at 507.

68. *Id.* at 509.

69. *Id.*

70. *Id.*

71. 46 M.J. 688 (N.M. Ct. Crim. App. 1997).

72. *Id.* at 691 (emphasis in original).

requested a mistrial. Denying the mistrial, the military judge instead provided the panel with a cautionary instruction that the members should disregard the social worker's opinion regarding the believability of the child. All of the members indicated that they understood the instruction and would follow it.[73]

On appeal, noting that the case was "a fully contested battle of credibility" with little or no corroborating evidence, the Navy-Marine Corps Court of Criminal Appeals held that the cautionary instruction could not overcome the prejudicial effect of this impermissible opinion.[74] The court held that it "will not indulge in '[t]he naive assumption that all prejudicial effects can be overcome by instructions to the jury . . . .'"[75]

Knox reminds counsel that they must prepare their witnesses carefully, especially "quasi-science"[76] experts. Witnesses may not offer opinions concerning the believability of witnesses, especially victims in child abuse and one-on-one credibility cases. *Knox* also warns practitioners that if counsel impermissibly wander down the vouching road, a cautionary instruction may not save the day. In *Knox*, four words—"I believe the child"—caused a mistrial.[77]

Procedural

Reasonable Doubt

Two cases decided last year by the Navy-Marine Corps Court of Criminal Appeals involved an instruction that is given in all contested cases: the reasonable doubt instruction. In the first case, *United States v. Jones*,[78] the military judge used language directly from the *Navy-Marine Corps Judiciary's Trial Guide*.[79] Concluding on reasonable doubt, he instructed the members that "[i]f . . . [they] think there is a real possibility the accused is not guilty," they must find him not guilty.[80] The appellant argued that the phrase "real possibility" improperly shifted the burden of proof to the appellant.[81] The appellant reasoned that such language implied that unless the appellant raised "a real possibility" of innocence, he should be convicted.

Before rejecting the appellant's argument, the Navy-Marine Corps court noted that although the government must prove the accused's guilt in a criminal trial beyond a reasonable doubt, the United States Supreme Court has not decreed any particular language for the instruction; rather, the instruction as a whole must correctly explain reasonable doubt.[82] Turning to the language used in this case, the Navy-Marine Corps court observed that the language came directly from the *Navy-Marine Corps Judiciary's Trial Guide*. The court further observed that the Court of Military Appeals recommended the use of such language in 1994 and that the language was drafted by the Federal Judicial Center.[83] The Navy-Marine Corps court cited other portions of the record where the judge also instructed on reasonable doubt and the burden of proof.[84] The court concluded that the instructions were proper and that the members understood the government's obligation to prove the accused guilty beyond a reasonable doubt.[85]

In the second case, *United States v. Wright*,[86] the appellant argued that the judge's use of the term "until" instead of "unless" in the phrase the "accused is presumed to be innocent 'until' his guilt is established beyond a reasonable doubt" was error. The Navy-Marine Corps court again turned to the *Navy-Marine Corps Judiciary's Trial Guide* and noted that the reasonable doubt instruction given substantially matched the version in the *Trial Guide*. The court then pointed out that even the statute which describes how the members should be instructed uses the word "until."[87]

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73. *Id.*

74. *Id.*

75. *Id.* (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

76. *Id.* at 696 (Wynne, J., concurring in result).

77. *Id.* at 691.

78. 46 M.J. 815 (N.M. Ct. Crim. App. 1997).

79. *Id.* at 818, *citing* U.S. DEP'T OF NAVY, NAVY-MARINE CORPS JUDICIARY'S TRIAL GUIDE 76 (1994).

80. *Jones*, 46 M.J. at 818. The full instruction was:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find the accused guilty. If, on the other hand, you think there is a real possibility the accused is not guilty, you must give the accused the benefit of the doubt and find the accused not guilty.

Id. at 817.

81. *Id.*

82. *Id.*, *quoting* Holland v. United States, 348 U.S. 121, 140 (1954).

The court once again relied on Supreme Court precedent to reject the appellant's argument. The court quoted *Coffin v. United States*,[88] in which the Supreme Court used both terms interchangeably.[89] The court also rejected the appellant's contention that the dictionary defines the terms differently. Acknowledging that the terms may have different meanings, the court nonetheless held that such distinctions would have been insignificant to the members in the context of all of the judge's instructions.[90] As it did in *Jones*,[91] the *Wright* court concluded by noting that the Supreme Court has never dictated what particular words must be used.[92] The only requirement is that a jury must be told that the defendant's guilt must be proven beyond a reasonable doubt before the jury can find him guilty.

Jury Nullification

In *United States v. Hardy*,[93] the CAAF addressed the interesting issue of jury nullification.[94] While recognizing that a court-martial panel, like a civilian jury, has the power to disregard the law and to acquit an accused, the court rejected the notion that the panel must be instructed on this power. The issue arose in a sexual assault case when the panel president, after several hours of deliberations, asked the judge whether the panel had to find the accused guilty if they found all of the elements present.[95] The judge answered the question by telling the members to consider all of his previous instructions. He then dis-

83. *Jones*, 46 M.J. at 818, *citing* United States v. Meeks, 41 M.J. 150, 157-58 n.2 (C.M.A. 1994). The judge's reasonable doubt instruction in *Jones* is nearly identical to the instruction that the Court of Military Appeals recommended for all of the services to use. The Federal Judicial Center is an agency within the federal court system that conducts research and continuing education. *About the Federal Judicial Center* (visited Mar. 10, 1998) <http://www.fjc.gov/AboutFJC.html>. *But see* BENCHBOOK, *supra* note 1, at 37, 52-53. The *Military Judges' Benchbook* provides:

> By reasonable doubt is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Id. at 52-53.

84. *Jones*, 46 M.J. at 818.

85. *Id.*

86. 47 M.J. 555 (N.M. Ct. Crim. App. 1997).

87. *Id*. at 559. The statute states that "the accused must be presumed to be innocent *until* his guilt is established beyond a reasonable doubt." 10 U.S.C. § 851(c)(1) (1994) (emphasis added). *See* BENCHBOOK, *supra* note 1, at 52 (stating that the "accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evidence beyond a reasonable doubt").

88. 156 U.S. 432 (1895).

89. *Wright*, 47 M.J. at 559, *quoting Coffin*, 156 U.S. at 459. After using the term "unless he is proven guilty," the Supreme Court quickly pointed out that "presumption of innocence is an instrument of proof created by the law in favor of an accused, whereby his innocence is established until sufficient evidence is introduced." *Coffin*, 156 U.S. at 459.

90. *Wright*, 47 M.J. at 559.

91. *See supra* note 82 and accompanying text.

92. *Wright*, 47 M.J. at 560. The court also applied the doctrine of waiver because the appellant did not object when the instruction was given. *Id.*

93. 46 M.J. 67 (1997).

94. The court noted that it had not directly confronted this issue before. The court cited several other cases which addressed related issues. *See* United States v. Smith, 27 M.J. 25, 29 (C.M.A. 1988) (holding that the judge could properly prevent defense counsel from questioning potential members about their opinions on the mandatory minimum life sentence for the offense of premeditated murder); United States v. Schroeder, 27 M.J. 87, 90 n.1 (C.M.A. 1988) (holding that jury nullification is not permitted in sentencing when punishment calls for a mandatory minimum); United States v. Jefferson, 22 M.J. 315, 329 (C.M.A. 1986) (prohibiting counsel from mentioning mandatory minimum in closing argument on findings); United States v. Mead, 16 M.J. 270, 275 (C.M.A. 1983) (questioning whether members need to be instructed on domestic law, including military regulations, because although panels and juries have the power to disregard instructions, they need not be informed of this power).

95. The panel had been instructed on the charged offenses (rape, forcible oral sodomy, and forcible anal sodomy), as well as the issues of consent, intoxication of the victim and the accused, and mistake of fact as to consent. *Hardy*, 46 M.J. at 68.

cussed an example in which the government failed to disprove an affirmative defense.[96] The judge then conducted an out-of-court session[97] at which the defense counsel requested that the judge instruct the panel on jury nullification.[98] The judge refused.

On appeal, the CAAF first noted that the power of nullification could exist either because the panel has the right to disregard the law or as a collateral consequence of other policies, such as the requirement for a general verdict, the absence of a directed guilty verdict, the ban on double jeopardy, and rules that protect the deliberative process of a court-martial.[99] The CAAF then conducted a thorough review of the state of the law in this area in the federal courts and examined the arguments for and against jury nullification.

The CAAF discussed in some detail cases from the U.S. Courts of Appeals for the Fourth and Sixth Circuits in which the courts rejected the idea that juries should be instructed on the power of jury nullification at the request of the defense.[100] The court then mentioned that the First, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have also rejected the idea.[101] The court noted that only two states recognize or encourage the power of jury nullification.[102]

One of the strongest arguments for jury nullification is that it provides a check against overzealous prosecutors.[103] It also allows citizens to limit lawmakers' discretion. In other words, it provides a way for the public in a democracy to register discontent with unpopular laws. The CAAF quickly dismissed these arguments, pointing out that existing rules already provide a means for limiting overzealous prosecutions. The theme throughout the opinion is that existing protective measures—such as the requirement for a general verdict, the prohibition against directing a guilty verdict, the protection against double jeopardy, and rules that protect the deliberative process of a court martial—are adequate.[104]

The court also pointed out the dangers of jury nullification. A jury which disregards the law could just as easily convict rather than acquit and could render a decision based on fear, prejudice, or mistake, in disregard of the judge's instructions. Dismissing the contention of some who insist that jury nullification exists to excuse crimes that involve "deeply held moral view[s]," the CAAF pointed out that it could also be exercised to excuse other conduct, such as sexual harassment, civil rights violations, and tax fraud.[105]

The court next turned to a comparison of the military and civilian legal systems. The court began its analysis by pointing out the similarities between the two systems.[106] In both systems, the judge and panel members or jurors have distinct roles. The judge decides interlocutory questions and questions of law and instructs the members or jurors. The members or jurors

96. *Id.* The judge told the members that, even if the government had proven every element of an offense beyond a reasonable doubt but failed to carry its burden on mistake of fact, the government had not proven its case. In such a situation, the panel should find the accused not guilty. *Id.* at 75.

97. UCMJ art. 39(a) (1994).

98. The defense counsel did not object to the judge's instruction but argued that it did not go far enough in answering the panel's question. The defense argued that the judge should tell the panel that, even if all of the elements of an offense have been proven and the defenses have been rebutted, the panel can still find the accused not guilty because it is also reviewing the decision to take the case to trial.

The trial counsel also requested additional instructions. Trial counsel wanted the judge to tell the members that they *must* convict the accused if all of the elements had been proven and the defenses had been rebutted. The judge refused this request, responding that he had already instructed the panel accordingly. As the CAAF pointed out, the judge had not used those precise words, nor should he, since the correct instruction is that the panel *should* find the accused guilty in that situation. *Hardy*, 46 M.J. at 69 n.5. *See also* BENCHBOOK, *supra* note 1, at 53.

99. *Hardy*, 46 M.J. at 70.

100. *Id.* at 70-71. *See* United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). In *Krzyske*, a tax evasion case, the trial judge refused a defense request to instruct on jury nullification but allowed the defense to use the term in argument. When the jury interrupted their deliberations to ask about the term, the judge instructed them that there was "no such thing as valid jury nullification." *Krzyske*, 836 F.2d at 1020. The appellate court found no error and distinguished between the jury's right to reach a verdict and the court's duty to instruct on the correct law. *Id.* at 1021. In *Moylan*, the appellate court held that the power of nullification is a result of the requirement for a general verdict and the inability to inquire as to the reasons for the jury's findings. *Moylan*, 417 F.2d at 1006. The court rejected the contention that jurors must be advised of this power. *Id.*

101. *Hardy*, 46 M.J. at 71-72. *See* United States v. Anderson, 716 F.2d 446, 449-50 (7th Cir. 1983); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974); United States v. Simpson, 460 F.2d 515, 518-20 (9th Cir. 1972); United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

102. *Hardy*, 46 M.J. at 72 (quoting Robert E. Korrock & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 139 (1993) (citing Maryland and Indiana as the only two states that recognize or encourage jury nullification)).

103. *Hardy*, 46 M.J. at 72.

104. *Id.*

105. *Id.*

determine guilt or innocence and a sentence, following the instructions of the judge. Jury deliberations, like those of a panel, are privileged to a great extent. In both systems, the judge cannot direct a guilty verdict, and the members or jurors must return with a general verdict. Finally, double jeopardy rules protect the military accused and the civilian defendant from a retrial once he has been acquitted. All of these protections allow a jury or panel to disregard the law. The court concluded, however, that the ability to disregard the law does not mean that the jury must be told of this power.[107]

The CAAF compared the military and civilian legal systems, stating that even if civilian juries had the power of jury nullification, such a right would be inappropriate for the military justice system.[108] The court pointed out that, unlike jurors, panel members are personally selected by the conveying authority. Allowing panel members to disregard the law would allow them to ignore unpopular laws, to violate the principle of civilian control over the military, to countermand discipline, and to foster a disrespect for the law.[109] For military members who are trained to uphold the law and to follow orders, an instruction on jury nullification would be heretical.

The court concluded that the ability of a court-martial panel to disregard the judge's instructions stems from the protective measures that limit overzealous prosecutions. There is no independent "right" to jury nullification, and the judge is not required to instruct on it. The court found no error in the trial judge's refusal of the defense request for a jury nullification instruction.[110]

A related issue in the case was the appellant's contention that the judge answered the panel's question incorrectly when part of his response included language that if the government failed to prove its case, the members "should vote not guilty."[111] The appellant contended that the proper language is "must" in place of "should." The court refused to isolate this one sentence and looked instead at the judge's instructions as a whole. Taken together, these instructions adequately covered the principles of reasonable doubt, the presumption of innocence, and the burden of proof.[112] In addition, the defense did not object at trial, suggesting that, in the overall context of the judge's instructions, there was nothing misleading or vague about them.[113]

Capital Courts-Martial

Capital courts-martial are different from other types of courts-martial.[114] One example of the difference is the requirement to mesh courts-martial rules used on a routine basis with those peculiar to death-penalty litigation. An example of what can go wrong with this integration is *United States v. Thomas*.[115]

In *Thomas*, the members found the accused guilty of the premeditated murder of his spouse. During sentencing instructions, the military judge instructed the members that they should vote as follows: first, they would vote on aggravating factors; second, if they unanimously found an aggravating factor, they would vote on death; and third, if they did not unanimously vote for death, they would propose lesser punishments, to include the mandatory confinement for life.[116]

106. *Id*. at 72-73.

107. *Id.* at 74.

108. *Id.*

109. *Id.*

110. *Id.* at 75.

111. The judge said:

> You have to determine in your own mind whether you believe that the government has proved [sic] it's [sic] case, that the accused is guilty beyond a reasonable doubt. If you believe that the government has proven each and every element of an offense beyond a reasonable doubt, but, as an example, on mistake of fact, the government has failed to carry its burden on mistake of fact, then the government has failed to prove its case, and you should find—you should vote not guilty. But you have to look at the elements and apply the defenses to the elements and determine whether the accused is guilty or not guilty to a particular specification and charge, and it's a combination of elements and the defenses that apply to those particular specifications.

Id.

112. *Id.*

113. *Id.* at 75-76.

114. For example, *United States v. Curtis* involves six separate appellate decisions: 28 M.J. 1074 (N.M.C.M.R. 1989); 32 M.J. 252 (C.M.A. 1991); 33 M.J. 101 (C.M.A. 1991); 38 M.J. 530 (N.M.C.M.R. 1993); 44 M.J. 106 (1996); and 46 M.J. 129 (1997). The *Curtis* opinions total 159 pages. The opinion in *United States v. Loving* is 123 pages. 41 M.J. 213 (1994).

115. 46 M.J. 311 (1997).

On appeal, the CAAF held that these procedural sentencing instructions were plain error. Reviewing the rules that apply at all courts-martial, the court noted that R.C.M. 1006(c) provides that any member may propose a sentence and that R.C.M. 1006(d)(3)(A) states that "All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing as necessary, with the next least severe . . . ." Noting that these rules apply to capital as well as non-capital courts-martial, the CAAF held that the members, who sentenced the accused to death, were never afforded an opportunity to propose lesser sentences and to vote on those lesser sentences. As a result, R.C.M. 1006 was violated, creating an intolerable risk that this ultimate sanction was erroneously imposed.[117]

The section on capital cases in the *Military Judges' Benchbook*[118] is being rewritten. Counsel who are detailed to a capital case should obtain a copy of the draft instructions from the detailed military judge. All participants in a capital case need to remember that these cases require special attention, because unfamiliar rules are integrated into the more routine instructions.

In the capital case *United States v. Simoy*,[119] the military judge incorrectly instructed the members concerning procedural sentencing instructions. The military judge instructed the members to begin voting first on proposed sentences, which included death if they unanimously found that an aggravating factor existed beyond a reasonable doubt.[120] The defense did not object. The Air Force Court of Criminal Appeals held that the instruction was error, but not plain error.[121] Because it was decided before *Thomas*, *Simoy* has a doubtful future.

Also in *Simoy*, the military judge instructed the panel members that they could not impose death unless they unanimously found beyond a reasonable doubt that at least one aggravating *factor* existed.[122] The military judge then instructed the members that, even if they found that one aggravating *factor* existed, they could not impose death unless they found that any and all extenuating or mitigating circumstances were substantially outweighed by any aggravating *circumstances*, including the aggravating *factors* that they had earlier considered.[123] On appeal, the accused argued that the military judge improperly mixed aggravating factors and aggravating circumstances. The accused argued that this mixing amounted to a constitutionally prohibited "double counting" of aggravators.[124]

The Air Force court held that the military judge had instructed the members properly. The court held that R.C.M. 1004(c) identifies "the class of murders eligible for the death penalty in courts-martial." [125] The members must unanimously find that the accused fits within that class of persons who are eligible for death by finding at least one aggravating factor. Once the members determine that the accused fits within the

116. The military judge instructed:

> In regard to the sentence that would include life imprisonment, again, should you not unanimously agree on the aggravating circumstances and should you not agree on a unanimous verdict of death, then the members may propose types of punishments as I have delineated, and you will vote on those types of punishments.

Id. at 314.

117. *Id.* at 316.

118. BENCHBOOK, *supra* note 1, at 134-39.

119. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

120. *Id*. at 614.

121. *Id*.

122. The military judge instructed the members that there were two possible aggravating factors: that the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered (R.C.M. 1004(c)(4)); and that only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the robbery was major and who manifested a reckless indifference for human life (R.C.M. 1004(c)(8)). See MCM, *supra* note 6, R.C.M. 1004(c)(4), 1004(c)(8).

123. The military judge instructed the members that, as for specific aggravating circumstances, they could consider:

> (1) the violent nature of the crimes; that is, the type of weapons used, such as the pipe on Sergeant LeVay, the knife on Sergeant Marquardt, a second pipe, and an assault rifle; (2) that Sergeant LeVay was beaten repeatedly after being knocked unconscious; (3) that Sergeant Marquardt continued to suffer physical injuries requiring medical treatment and cosmetic surgery, and suffered enduring psychological effects; (4) that Ms. Armour also suffered psychological effects; and (5) the LeVay family's grief.

Simoy, 46 M.J. at 613.

124. *Id*. *See* United States v. Curtis, 33 M.J. 101, 108 (C.M.A. 1991).

125. *Simoy*, 46 M.J. at 613. *See* MCM, *supra* note 6, R.C.M. 1004(c) (listing the aggravating factors that can warrant the death penalty).

class eligible for the death penalty, they may also constitutionally consider all aggravating *circumstances* of the case under R.C.M. 1001(b)(4)[126] when weighing the aggravation against mitigation and extenuation.

The Air Force court's ruling is consistent with R.C.M. 1004(b)(4)(C)[127] and the current version of the *Military Judges' Benchbook*. Additionally, it is logical that the members be allowed to consider all of the circumstances surrounding the offenses when determining if death should be adjudged. Nonetheless, there is a lesson to be learned—capital cases are different.

Sentencing

During the past year, there were several important non-capital cases that focused on sentencing instructions. In *United States v. Greaves*,[128] the CAAF revisited the subject of retirement benefits for an accused—in this case, a service member who was close to retirement eligibility. Like many of the instructions cases this year, the issue arose when the members interrupted their sentencing deliberations to ask questions. The members asked whether a bad-conduct discharge would result in loss of retirement benefits for the accused, who had nineteen years and ten months of active duty at the time of his trial.[129] The judge appropriately convened an Article 39(a) session to solicit counsel's views on a proper response. Defense counsel suggested that the judge simply answer in the affirmative. The judge disagreed, contending that such a response would be tantamount to telling the members not to consider a bad-conduct discharge. Trial counsel objected to anything other than the judge merely rereading the bad-conduct discharge instruction.[130]

After the parties discussed case law in the area,[131] the defense requested that the judge at least point out to the members that the accused's retirement benefits had not yet vested. The judge did not answer the members' questions directly but did tell them that the accused's retirement benefits had not vested. He also reread the punitive discharge instruction.[132]

In finding that the judge committed prejudicial error in the case, the CAAF first noted that, to the extent that the instructions suggested that a punitive discharge would not affect entitlement to retirement benefits, they were legally erroneous.[133] Further, the instructions were incomplete and non-responsive to the questions. Writing for the majority, Judge Sullivan distinguished *United States v. Henderson*,[134] where the judge refused to allow evidence on the potential loss of retirement benefits and declined to instruct the panel as to the effect a punitive discharge would have on retirement benefits. The CAAF pointed out that, in *Henderson*, the accused was still three years and at least one reenlistment away from retirement, whereas in the instant case, the accused was only nine weeks away from retirement and did not have to reenlist to reach retirement eligibility. The CAAF also pointed out that the defense in *Henderson* did not object to the proposed instruction.[135]

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126. MCM, *supra* note 6, R.C.M. 1001(b)(4). Matters that can be presented by the prosecution during presentencing can include aggravating circumstances directly relating to or resulting from the offenses of which the accused has been convicted. *Id*.

127. *Id.* R.C.M. 1004(b)(4)(C) (providing that death may not be adjudged unless "[a]ll members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule").

128. 46 M.J. 133 (1997).

129. The precise questions asked were: "First, does confinement, plus a BCD, equal loss of retirement benefits?" and "Second, does hard labor without confinement, plus a BCD, equal loss of retirement benefits?" *Id.* at 134.

130. The civilian defense counsel first expressed surprise that such an experienced panel would ask such questions. He proposed that the judge answer both questions with a simple yes. He opined that trial counsel's solution would not answer the members' questions. *Id.* at 135. The defense counsel then suggested that counsel be allowed to reopen their sentencing arguments, and the judge dismissed that approach outright. *Id.*

131. The parties identified the cases on point, but interpreted them differently. *Id. See* United States v. Henderson, 29 M.J. 221 (C.M.A. 1991); United States v. Griffin, 25 M.J. 423 (C.M.A. 1988). Trial counsel cited *Henderson* for the proposition that retirement benefits are collateral and should not be considered during sentencing. Trial counsel read *Griffin* as giving the judge discretion in instructing the panel concerning the impact of a punitive discharge on retirement. Defense counsel distinguished both cases on the grounds that the defense counsel did not object to the instructions given. The judge understood both cases to address the issue of when a military member's retirement vests. The judge concluded that it does so at twenty years. *Greaves*, 46 M.J. at 136. *See* United States v. Becker, 46 M.J. 141 (1997) (holding that the judge erred in excluding evidence of loss of retirement benefits for the accused, who was four months short of 20 years and did not have to reenlist before retirement).

132. After he finished this instruction, the judge asked the members whether they had any other questions and commented: "Okay. I am not trying to be evasive, but all I can tell the members is that there are certain effects that are collateral to your decision and what those effects are, you shouldn't speculate." *Greaves*, 46 M.J. at 137.

133. *Id.* The court observed that a punitive discharge terminates entitlement to retirement benefits. *Id.* (citing United States v. Sumrall, 45 M.J. 207, 208-09 (1996); Hooper v. United States, 326 F.2d 982, 988 (Ct. Cl. 1964)).

134. 29 M.J. 221 (C.M.A. 1989).

While recognizing that a judge is not required by statute to instruct on sentencing, Judge Sullivan nevertheless observed that both the *Manual for Courts-Martial* and the CAAF have mandated appropriate sentencing instructions.[136] The court concluded that the judge abused his discretion in failing to tailor an instruction concerning the collateral consequences of a punitive discharge in a case where the accused was close to retirement and the members posed the question. The court set aside the sentence and returned the case to the Judge Advocate General of the Air Force.[137]

In response to this issue, the *Military Judges' Benchbook* has been amended to include the following discretionary language that can be given at the conclusion of the punitive discharge instruction: "In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits."[138] The facts determine whether or not this instruction is appropriate.[139]

United States v. Hall[140] is another case that involved a question from the members during sentencing deliberations and the judge's instruction in response to that question. The accused, an Air Force captain who was married to a retired military member, was convicted of wrongful use of drugs.[141] During deliberations on the sentence, the members asked what benefits the accused would receive as a dependent if she was dismissed from the Air Force. The judge told the members that a dismissal would have no effect on her entitlements as a dependent.[142] He then asked whether counsel had any objections to that instruction. They did not.

The appellant contended that the judge misapplied the court's directions in *United States v. Griffin*[143] by failing to secure the defense's agreement before answering the question about collateral consequences.[144] The *Hall* court, in an opinion authored by Chief Judge Cox, began by observing that courts-martial should avoid discussing the collateral consequences of a court-martial conviction. However, the court stated that "it is only in a theoretical sense that the effect a punitive discharge has on retirement benefits can be labeled collateral."[145] The court held that the accused waived any objection by failing to raise it at trial or to request a curative instruction.[146]

In *United States v. Eatmon*,[147] an Air Force judge's instruction that military confinement is corrective rather than punitive was the subject of appellate litigation.[148] Defense counsel objected to the language during the discussion of sentencing instructions in an Article 39(a) session. The defense counsel contended that the instruction was misleading and that it inaccurately represented the true nature of confinement in the military.[149]

The Air Force Court of Criminal Appeals first found that objecting during the Article 39(a) session was sufficient to preserve the issue for appeal and rejected the government's conten-

135. *Greaves*, 46 M.J. at 138.

136. *Id*. (quoting United States v. Rake, 28 C.M.R. 383 (C.M.A.1960) (holding that a judge has an obligation to give sentencing instructions); MCM, *supra* note 6, R.C.M. 1005(a) (providing that a military judge is required to give appropriate sentencing instructions)).

137. *Greaves*, 46 M.J. at 140. The CAAF also recommended that the *Military Judges' Benchbook* instruction on punitive discharges be amended to clarify that a punitive discharge forecloses entitlement to retirement benefits. *Id.* at 139 n.2 (citing *Sumrall*, 45 M.J. 207; United States v. Griffin, 25 M.J. 423 (C.M.A. 1988)).

138. BENCHBOOK, *supra* note 1, at 97-98 (C1, 30 Jan. 1998).

139. *Id*. at 98.

140. 46 M.J. 145 (1997).

141. *Id.* at 146. In her unsworn statement, Captain Hall told the members that she was married to an Air Force retiree and that she would be eligible to retire in four months. She asked the court to punish her and not her family. *Id.*

142. The judge said:

> The response to that is, her conviction by this court or any sentence imposed by this court, including a dismissal, would not affect any benefits she would be entitled to as a dependent of a retired military person. In other words, those might be use of commissary, use of BX, medical benefits, as any other dependent of a retired military person.

Id. at 145.

143. 25 M.J. 423 (C.M.A. 1988).

144. *Hall*, 46 M.J. at 146 (citing *Griffin*, 25 M.J. at 424).

145. *Id.* at 146.

146. *Id*. at 147. In affirming the case, the CAAF also concluded that the appellant failed to show plain error. *Id.*

147. 47 M.J. 534 (A.F. Ct. Crim. App. 1997).

tion that the defense waived the issue by not objecting during the instructions themselves or when the judge asked if there were any objections to the instructions given.[150] Although some may disagree with the court's reasoning that such action would have been "discourteous" or "unprofessional," the court is correct in concluding that such action was not necessary to preserve the issue.

The court then addressed the propriety of the instruction itself. Although the court acknowledged that the instruction was not part of the standard script in the *Military Judges' Benchbook*,[151] the court found it fair to both sides and essentially accurate.[152] The court rejected the contention that such an instruction misled the members into believing that confinement in the military is "like summer camp."[153] The court noted that judges should not be chained to a script.

Conclusion

While the *Military Judges' Benchbook* is an invaluable tool, military justice practitioners should recognize that issues will arise that are not addressed in the *Military Judges' Benchbook*. The law is not fixed in time. It continuously changes. Members, trying their best to do their duty, may ask questions that cannot be answered by simply rereading portions of prepared instructions. Counsel need to know the law and use common sense in proposing answers to those questions. If counsel disagree with proposed instructions, they should object on the record, whether during an Article 39(a) session or, if necessary, after an instruction is given. Counsel share responsibility for instructions with the military judge.

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148. During the sentencing phase, the judge instructed the members as follows:

> A sentence to confinement is governed and served under the Department of Defense Corrections Program. Military confinement is corrective rather than punitive. Prisoners perform only those types of productive work which may be required of duty airmen. The confinement and correction program is intended to help individuals [to] solve their problems, [to] correct their behavior, and [to] improve their attitude toward themselves, the military, and society.

Id. at 538.

149. *Id*. The defense counsel requested that the judge instruct the members that military confinement is "designed as punishment." The Air Force court pointed out that the requested language was found in the Air Force manual, which has now been superseded by the *Military Judges' Benchbook*.

150. *Id.*

151. *See* BENCHBOOK, *supra* note 1, at 93-94.

152. *Eatmon*, 47 M.J. at 538. Earlier in the opinion, the court noted that the instruction was largely based on a Department of Defense directive. *Id.* at 538, *citing* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (19 May 1988).

153. *Eatmon*, 47 M.J. at 539. The court pointed out that the members must have certainly understood the seriousness of confinement because they "are neither children nor dullards." *Id*.

OTJAG'S China Initiatives: Past, Present, Future

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Introduction

In 1995, the Secretary of Defense directed the Secretary of the Army, as well as the other service secretaries, "to move forward in the area of functional exchanges" with the Chinese People's Liberation Army (PLA), particularly in the area of military jurisprudence. Toward this end, the International and Operational Law Division, Office of The Judge Advocate General (OTJAG), submitted to the Office of the Secretary of Defense (OSD) a proposed program of legal exchanges with the PLA. Shortly thereafter, however, world events caused upper level contact meetings with the PLA to be postponed, and all initiatives were temporarily tabled.

On 26 February 1997, the Chief of Staff of the Army met with his PLA counterpart. They agreed in principle to initiate military justice contacts pursuant to the program initiative previously submitted to the OSD by the OTJAG. In April 1997, the PLA notified the OSD that it was prepared to receive a U.S. Army military justice delegation in China during August 1997.

The Judge Advocate General Visits China

On 14 September 1997, The Judge Advocate General (TJAG) of the Army led a delegation to China for one week. The delegation consisted of TJAG and three Army judge advocates who are specialists in military justice and international/operational law. The purposes of the visit were to conduct senior level discussions and to develop the framework for future bilateral functional exchanges between the military attorneys of the People's Republic of China (PRC) and U.S. Army judge advocates.

The U.S. delegation began its visit in Beijing, a burgeoning city with vast amounts of construction juxtaposed with striking historical edifices, such as the Forbidden City. Initially, the U.S. delegation met with military attorneys from the PLA Military Court of Justice. The President of the Court offered an overview of the PLA Military Court structure and its jurisdiction, and a member of the U.S. delegation provided an overview of the U.S. military justice system. The PLA military attorneys also posed questions regarding the exercise of criminal jurisdiction over U.S. military personnel stationed overseas.

Overview of the PLA Military Court Structure and Its Jurisdiction

The organic law of the People's Law of the PRC provides for three levels of military courts: the PLA Military Court of Justice (highest); the Military Court of the Individual Service (Navy, Air Force, and Army); and the Regional Military Court of Justice (RMCJ). The military courts have in personam jurisdiction over criminal cases involving active duty military, staff and workers of a military unit, and any cases that the Supreme Peoples' Court determines that it should hear. The Supreme People's Court serves as the court of last resort, akin to the U.S. Supreme Court. There is a time limit of ten days to file an appeal. Generally, appellate decisions are rendered in five days.

The PLA Military Court of Justice has one president, one vice-president, one chief of court, and several clerks. It is the court of first instance for defendants who hold positions above the division commander level. This court also hears cases on appeal from the two lower courts. In cases in which the lower court has adjudged the death penalty, this court must review and approve such a sentence.

The intermediate level court (for example, the Military Court of Justice of the Army) is the court of first instance for defendants who hold positions between a vice-commander of a division and a vice-chief of regiment. Additionally, this court is authorized to hear cases on appeal from the RMCJ. The RMCJ is the court of first instance for defendants who hold positions under the vice-chief of regiment level and most other criminal cases.

Generally, judges are graduates of military institutions. They have earned law degrees and have a long history of military experience. All military schools have law departments.

Within the Chinese military justice system, there is no right to a trial by jury. The accused is tried by either a single military judge or a "collegiate branch," which is composed of several military judges. Each military tribunal also has a judicial committee—composed of the president, vice-president, and the chief of court—that may confer on difficult cases.

The PLA Central Military Commission and the General Political Department

The U.S. delegation also met with lawyers from the legal office of the Central Military Commission (CMC) of the PLA and the General Political Department (GPD). The CMC legal representative discussed the role of the CMC and provided an

overview of the Chinese National Defense Law (NDL). The GPD legal representative discussed the role of Chinese military attorneys.

The CMC is similar to the U.S. National Security Council; it establishes policy and implements the NDL. A principal function of the CMC has been the establishment of the Legal Affairs Office in the GPD. This was undertaken in conjunction with the creation of the military attorney system, which came into existence only five years ago. Currently, throughout China, there are 210 offices, with approximately 1200 military lawyers. The regulatory guidance for the roles and functions of Chinese military lawyers was promulgated in 1995 and approved in May 1996. The regulation includes a Code of Professional Conduct, the implementation of a system of attorney certification, and the rules governing the provision of legal services. The role of the PLA military attorney is to protect the legal rights of service members and their families, to advise service members to obey the law, and to provide legal guidance to the military chain of command.

The primary function of the GPD is to train military attorneys. The current challenge is to train PLA military attorneys in the NDL. Enacted on 1 October 1997, the NDL contains numerous reforms in the area of criminal procedure. In order to effect this educational effort, the PLA is making extensive use of videotapes and written publications. Each company-size unit has a legal director who is responsible for legal training. Each month, this individual attends a legal training course taught by a military attorney.

A senior research fellow of the Legal Affairs Bureau of the CMC also gave a presentation on the Civil Air Defense Law and legal provisions relating to the Reserve forces of the PLA. There are many similarities between the Reserve structure and functions of the United States and PRC militaries. For example, Reservists train regularly during peacetime to maintain technical expertise. Reserve mobilization procedures are also very similar to those of the United States. The Reserve component is composed of those individuals who have been released from active duty, graduates from non-military institutes of higher learning, and other citizens who meet the necessary requirements, to include age.

The Shandong Military Region

The U.S. delegation also visited the Shandong Military Region, southeast of Beijing. The delegation held discussions with the political commissar for the 67th Group Army and the staff of the PLA Military Court of the Shandong Military Region. Each military region has a regional military commander and a political commissar. As a practical matter, the political commissar is the lead decision-maker during peacetime, and the regional military commander exercises greater authority during combat.

The structure and jurisdiction of the RMCJ in the Shandong Military Region parallels that of the PLA Military Court in Beijing. A visit to the military region courthouse in Jinan revealed certain differences from U.S. military courtrooms. The PLA military courtroom uses a video camera to project documentary or physical evidence from a monitor to the entire court. The accused is seated in a segregated area, and the court reporter's table is equipped with a computer for immediate transcription of the record of trial. Recent military appropriations reflect a significant impetus to promote automation in all legal offices and courtrooms.

The U.S. delegation was also invited to visit the garrison of the 58th Regiment, an infantry unit. When the delegation arrived, TJAG conducted a formal review of troops with the division commander. The regiment then conducted a demonstration of hand-to-hand combat skills.

The success of this visit was measured not only by the diverse culinary fare (fried scorpions, fried locusts, steamed turtle shell, and chicken feet) on which the U.S. delegation dined during the week, but also by the tremendous interest and hospitality displayed by the PLA military attorneys. It became apparent that there exists a mutual interest between the PLA military attorneys and the U.S. judge advocates in addressing specific legal issues in future functional exchanges.

Reciprocal Visit of PLA Military Lawyers to the United States

In an effort to maintain the momentum of the military law initiative with the PRC, the OTJAG hosted five PLA attorneys (four Army and one Navy) in Washington, D.C. and Charlottesville, Virginia from 16-23 May 1998. In Washington, D.C., the PLA delegation met with various representatives of the U.S. Department of Defense legal structure. The OTJAG division chiefs gave briefings on the organization of Department of Defense legal services, military justice, and the process of recruiting and training judge advocates. The PLA delegation also visited the U.S. Supreme Court and the Court of Appeals for the Armed Forces.

As part of their visit, the PLA delegation traveled to The Judge Advocate General's School, where they received briefings on the curriculum and the methodology used to train U.S. Army judge advocates. As a result of the recent implementation of a military attorney system, the delegation members expressed great interest in the physical facilities and the operating budget of the school.

The delegation spent a portion of its final day at the Fort Belvoir Garrison Staff Judge Advocate office. After meeting the garrison commander, the delegation received briefings on the magistrate program, the claims operation, the trial defense service, and legal assistance service. The PLA delegation posed numerous questions. Of particular interest were the operating budget, the concept of free legal services for service members

and their families, and the fact that a governmental entity settles claims on behalf of service members. The delegation also expressed curiosity and interest in the sizable number of civilian attorneys who work in the Office of the Staff Judge Advocate at Fort Belvoir.

Future Initiatives: Unlimited Opportunities

As the PRC continues its economic reforms and its industrial base is further privatized, the PLA's military lawyers will become extensively involved in acquisition and contract law issues. As a result, the OTJAG plans to focus on this area in a future functional exchange. In the operational arena, the PRC is interested in the potential of becoming more actively engaged in peacekeeping missions. A functional exchange in the area of international and operational law will provide for a more detailed discussion of peace operations and the role of the military attorney.

Although significant judicial reforms were enacted only six months ago, PRC defense attorneys have embraced them. Military attorneys in the United States can learn from and assist those who are engaged in substantive reforms in their judicial system. Thus, discussions between trial attorneys in the United States and their counterparts in the PRC should prove to be productive.

The resounding success of TJAG's initial visit to China and the reciprocal visit of the PLA delegation has set the stage for future initiatives. Judge advocates who participate in future specialized functional exchanges will have a unique opportunity to share in the further development of the law, both in the United States and abroad.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School, U.S. Army

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL, Charlottesville, Virginia 22903-1781.

Family Law Note

Relocation After Initial Custody Determination

When most military families plan a permanent change of station (PCS), they do not usually add getting a court's permission to their checklist of things to do in preparation. Depending on where the family is located, this may be a legitimate concern that is often overlooked. Relocation of children who are subject to court ordered custody arrangements is a hot family law topic in the 1990's. An increasingly mobile society, dual career couples, the prevalence of joint legal custody, and fathers taking a more active role in their children's lives result in an increasing number of court cases that decide whether children will move with the custodial parent.[1] Each parent potentially faces a horrible consequence in relocation issues. The custodial parent risks either not being able to move or losing custody. The noncustodial parent risks losing the relationship and time with the child. As is the case in most family law issues, the laws of the state in which a parent lives can produce different outcomes.

There is no uniform approach to relocation. Some states have a statute that requires notice to the court and the noncustodial parent of an intent to remove the child from the state.[2] Other states govern the issue through court decisions. There are undeniable constitutional implications. Restrictions on a parent's right to travel interstate must be evaluated under strict scrutiny.[3] Some states side-step the constitutional question by ruling that a relocation restriction does not infringe the parent's right to travel interstate at all.[4] A majority of states, however, rule that furtherance of the best interests of the child constitutes a compelling state interest that justifies reasonable relocation restrictions.[5]

Complicating the relocation issue, the petition to relocate often leads to an attempt to relitigate custody by way of a modification case. The standards for relocation and modification are different. Relocation cases turn solely on the best interest of the child standard. In contrast, modification of custody requires not only a showing of the best interest of the child, but also a showing of a substantial change of circumstances since the prior court order.[6] Not all states recognize the intent to relocate as a substantial change in circumstances so as to warrant a hearing on custody modification.

The only constant among states is the desire to achieve a custody arrangement that is in the child's best interest. States use different methods to reach this objective. State courts weigh a series of factors that affect the relocation issue; these factors are listed in statutes or are defined by case law. While the particular phrasing may vary, the most quoted and followed relocation factors are set out in *D'Onofrio v. D'Onofrio*.[7] Generally, the court weighs: (1) the prospective advantages of the move in terms of its likely capacity to improve the general quality of life for both the custodial parent and the children; (2) the integrity of the custodial parent's motives in seeking the move to determine whether removal is inspired primarily to defeat or to frustrate visitation by the noncustodial parent; (3) whether the custodial parent is likely to comply with substitute visitation; (4) the integrity of the noncustodial parent's motives in resisting removal; and (5) if removal is allowed, whether there will be a realistic opportunity for visitation in lieu of the weekly pattern that can provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent.[8]

1. Nadine E. Roddy, *Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent*, 8 DIVORCE LITIG. 141, 142 (1996).

2. *See*, *e.g.*, 750 ILL. COMP. STAT. 5/609 (West 1993); NEV. REV. STAT. § 125A.350 (1992); MASS. GEN. LAWS ch. 208, § 30 (1987); N.J. STAT. ANN. § 9:2-2 (West 1993); CAL. FAM. CODE § 7501 (West 1994); TEX. FAM. CODE ANN. § 153.001 (West 1994).

3. The United States Supreme Court held that the right to travel interstate was a fundamental right and thus subject to the highest scrutiny before a state could impose restrictions on that right. Shapiro v. Thompson, 394 U.S. 618 (1969).

4. *See* Clark v. Atkins, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986).

5. *See*, *e.g.*, *In re* Marriage of Cole, 729 P.2d 1276, 1280-81 (Mont. 1986).

6. Roddy, *supra* note 1, at 148.

7. 365 A.2d 27 (N.J. 1976).

Which party has the burden of proof differs among the states as well. Often, whether the burden falls on the custodial or non-custodial parent shifts the outcome of the case.[9] The most restrictive states place the burden on the custodial parent to show that the move is in the child's best interest. Other states place the burden on the noncustodial parent to establish that the move is not in the best interest of the child.[10] In the latter case, there may be a presumption that the relocation is in the best interest of the child. The trend is for courts to allow more freedom of relocation.[11]

Louisiana recently passed a new restrictive statute on relocation.[12] Louisiana's statute covers an intent to relocate not only outside the state but also within the state if the intrastate move is more than one hundred and fifty miles from the other parent.[13] This statute applies to orders of custody or visitation issued on or after 15 August 1997.[14] It also applies to orders issued before 15 August 1997, if the original order did not address relocation.[15] A parent who wishes to relocate must provide sixty days notice of the intended move to the other parent.[16] If notice is not given and the child is relocated, the lack of notice is a factor in the determination of relocation and can be the basis for ordering the return of the child to the state pending the court's resolution of the issue.[17] More importantly, relocating without notice or in violation of a court order may constitute a change of circumstances that warrants modification of custody. Complying with the notice requirements is not a change of circumstance.[18]

The noncustodial parent has twenty days from receipt of the notice of intent to relocate to file an objection.[19] If an objection is filed, the state appoints a mental health professional to render an opinion as to whether the relocation is in the best interest of the child.[20] The burden of proof is squarely on the relocating parent to show that the move is made in good faith and is in the best interest of the child.[21]

In addition to the factors mentioned in *D'Onofrio*, Louisiana includes the following two additional factors: (1) the nature, quality, extent of involvement, and duration of the child's relationship with the parent who is proposing to relocate and with the noncustodial parent, siblings, and other significant persons in the child's life; and (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.[22]

8. *Id.* at 29-30.

9. Norma L. Trusch, *A Panoramic View of Relocation*, 20 FAM. ADVOC. 18 (1997).

10. *Compare In re* Marriage of Johnson, 660 N.E.2d 1370 (App. Ct. Ill. 1996), *with* Ormandy v. Odom, 459 S.E.2d 439 (Ct. App. Ga. 1995). Illinois places the burden on the relocating parent. In *Johnson*, the court refused to allow a mother to remove her eight-year-old daughter from Illinois to accompany her new husband and their child to Texas due to employment requirements. *Johnson*, 660 N.E.2d. at 1375-76. Georgia places the burden on the parent who opposes the relocation. In *Ormandy*, the Georgia court allowed a father to relocate with his children for employment purposes over the objections of the mother. *Ormandy*, 459 S.E.2d at 441.

11. Trusch, *supra* note 9, at 18. California and New York both had very restrictive relocation standards. In 1996, both states significantly eased their approaches to relocation by case law. *See* Burgess v. Burgess, 913 P.2d 473 (Cal. 1996); Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996).

12. LA. REV. STAT. ANN. §§ 9:355.1-9:355.17 (West 1997). The Louisiana statute is the first state statute based on a model relocation statute proposed and drafted by the American Academy of Matrimonial Lawyers. *See* Pamela Coyle, *A Parent's Moving Checklist*, A.B.A. J., Feb. 1998, at 26. Other states, including Texas and Michigan, expect to introduce similar legislation in their upcoming legislative sessions. *Id.* at 27.

13. LA. REV. STAT. ANN. § 9:355.1(4).

14. *Id.* § 9:355.2(1).

15. *Id.* § 9:355.2(2).

16. *Id.* § 9:355.4A(1). Notice must be in the form of registered or certified mail to the last known address of the noncustodial parent. If the custodial parent cannot reasonably give sixty days notice, the statute requires a minimum of ten days notice. The notice, whether it is ten days or sixty days, must provide: (1) the intended new residence, including specific address, if known; (2) the new mailing address, if not the same; (3) the home telephone number, if known; (4) the date of the intended move or proposed relocation; (5) a brief statement of the specific reasons for the proposed relocation of the child; and (6) a proposal for a revised schedule of visitation with the child. A parent has a continuing duty to provide the information as it becomes available.

17. LA. REV. STAT. ANN. § 9:355.6A & B.

18. *Id.* § 9:355.11.

19. *Id.* § 9:355.8A.

20. *Id.* § 9:355.8B.

21. *Id.* § 9:355.13.

22. *Id.* § 9:355.12.

Military members face this issue in different ways. Status as a military member may be a factor in the initial award of custody. If one parent plans to remain in the state and has stable employment, community ties, and family contacts, and the military member intends to remain in the military, it is an uphill battle for the military member to gain custody. Status as a military member can also affect custody in a way not considered at an initial custody determination. The military member may marry someone who has custody of her children from a previous marriage. When the family PCS's, the noncustodial parent may object to the removal of the children. Legal assistance attorneys need to be aware of the potential restrictions on relocation and advise their clients accordingly. Even in states that favor relocation, there is often a notice requirement. There is no national standard; therefore, legal assistance attorneys must be familiar with the rules of various states on this issue. Major Fenton.

Immigration & Naturalization Note

The INS Continues to Make Fingerprinting More Difficult

A critical item in any application for immigration or naturalization is a set of fingerprints.[23] The Immigration and Naturalization Service's (INS's) fingerprinting requirements have been in flux for several years, primarily due to the INS's efforts to increase the integrity of the fingerprinting process.[24] Just a few months ago, the INS dramatically overhauled its fingerprint policy.[25] Based on language in the Department of Justice Appropriations Act for 1998,[26] however, the INS is changing its policy again.[27] The latest change can be found in an interim rule, effective 29 March 1998.[28]

The interim rule ends the Designated Fingerprinting Services Certification Process.[29] Congress directed that the INS may accept fingerprint cards[30] only "for the purpose of conducting criminal background checks on applications and petitions for immigration benefits only if prepared by a Service office" or a few other specified offices that apply in limited circumstances.[31] Among the other offices that can provide fingerprint services are United States military installations abroad.[32] For legal assistance offices overseas, the interim rule has limited impact—overseas legal assistance offices can still provide the fingerprint services, and the INS should accept the cards prepared by those offices. For practitioners within the United States, however, the changes are significant.

All applications for immigration benefits that are filed after 29 March 1998 should *not* contain fingerprints.[33] Instead, applicants must wait until the INS informs them to report to an application service center (ASC)[34] for fingerprinting.[35] The fingerprinting service costs twenty-five dollars per family member submitting fingerprints.[36] Further complicating payment mat-

23. *See* 22 C.F.R. § 42.67 (1997) (containing immigration requirements); 8 C.F.R. § 316.4 (containing naturalization requirements).

24. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. 12,979, 12,980 (1998) (to be codified in various parts of 8 C.F.R.).

25. *See* Siskind's Immigration Bulletin, Visa Spotlight: New INS Fingerprint Rules (visited May 4, 1998) <http://www.visalaw.com/98apr/> [hereinafter Siskind Bulletin]. Mr. Siskind's bulletin is an excellent resource and is available by e-mail free of charge. To subscribe, send an e-mail message to visalw-request@listserv.telalink.net, with the body of the message stating "subscribe your e-mail address" and nothing else. Mr. Siskind's web page is consistently rated among the best attorney sites on the Internet for anyone who practices immigration law.

26. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997).

27. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980.

28. *Id.* at 12,979.

29. *Id*. at 12,979-80. The Designated Fingerprinting Services (DFS) program began in an effort to eliminate security problems identified by several audits of the INS's procedures. *Id*. Under the program, the INS certified and registered providers of fingerprint services. *Id*. at 12,890. As long as a provider was registered under the DFS program, the INS could accept fingerprints prepared by the provider. *Id.* It is unclear at this point whether fingerprint providers certified under the DFS will take legal action to protest the elimination of this program and, as a result, their business. *See* Siskind Bulletin, *supra* note 25.

30. The fingerprint card, known as Form FD-258, is available at all INS application service centers.

31. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980. The other offices authorized to provide fingerprint services are "registered state or local law enforcement agenc[ies], a United States consular office at a United States embassy or consulate, or a United States military installation abroad." *Id*.

32. *Id.*

33. *See* Siskind Bulletin, *supra* note 25. *See also* Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980. The INS indicates that the filing of applications without fingerprints actually began on 3 December 1997. *Id*.

34. Key to the INS's new program is the establishment of one hundred application service centers, about forty of which are currently open. Siskind Bulletin, *supra* note 25. The INS also plans to establish mobile fingerprinting centers and offer fingerprinting services at "certain Service field offices and, in less populated areas, [to enter into] co-operative agreements with designated state and local law enforcement agencies . . . ." Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980.

ters is a limitation on the INS computer system. According to the INS, its software cannot accept a single check to pay for the fingerprints and the requested action.[37] Thus, applicants must provide two separate checks—one for the application fees and one for fingerprints.[38]

The INS claims that fingerprinting will be scheduled within ninety days of the application.[39] It also offers first-come, first-served fingerprinting at its centers on Wednesdays.[40] Applicants are well advised to bring some form of photo identification (like their military identification cards) and their scheduling notice to the fingerprint service center.[41]

Legal assistance practitioners must be aware of this change. They must prepare their clients for the inconvenience that this change may cause, particularly at installations where the closest ASC is some distance away. In fairness to the INS, this change addresses a fairly major issue—under the old system, as many as sixty percent of the submitted fingerprint cards were rejected.[42] The new system uses electronic fingerprint scanners for better accuracy.[43]

Immigration law practitioners can only hope that this change will improve service as the INS promises. In any case, legal assistance clients must follow this system if they wish to immigrate and to naturalize into the country. Major Lescault.

Tax Note

Taking Advantage of Recent Tax Changes on the Sale of a Home

The Taxpayer Relief Act of 1997[44] allows taxpayers to exclude the gain[45] on the sale of property, provided they meet certain requirements.[46] The general rule is that the taxpayer must have owned and used the property as his principal residence for two years during the five-year period prior to the date of sale of the property.[47] The property does not have to be the taxpayer's principal residence on the date of sale, but merely has to have been the principal residence for at least two of the five years prior to the date of sale.

This is a significant difference from the old I.R.C. § 1034 rollover provision, under which the property had to be the principal residence on the date of sale. Not surprisingly, the old requirement created problems for military personnel who rented their homes prior to selling them. They had to show that they had attempted to sell the property and were only renting it temporarily, or they had to show that they always intended to return to the property. If they failed these two tests, they were unable to rollover the gain on the sale of the home because the property was business (rental) property and not their principal residence.[48]

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35. Fingerprinting Applicants and Petitioners for Immigration Benefits, 63 Fed. Reg. at 12,980.

36. *Id*. at 12,981. This fee only applies to applications filed on or after 29 March 1998. Applicants who filed before that date will not have to pay the fee, even if they are scheduled to have their prints taken after 29 March. *Id*.

37. Siskind Bulletin, *supra* note 25.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* The most common causes for rejection were "problems with the biographical information data or the poor quality of the fingerprints." *Id*.

43. *Id.*

44. Pub. L. No. 105-34, 111 Stat. 788 (1997) (codified in scattered sections of 26 U.S.C.).

45. The amount of gain that can be excluded is limited to $250,000 for most taxpayers. The gain is $500,000 for taxpayers who meet the following requirements:

(1) a husband and wife make a joint return;
(2) either spouse owns the home for the required two years; and
(3) both spouses use the property for two years.

See I.R.C. § 121(b)(2) (CCH 1997).

46. *Id.* § 121.

47. *Id.* § 121(a).

48. *See* Major Thomas K. Emswiler, *The Tax Consequences of Renting and Selling a Residence*, ARMY LAW., Oct. 1995, at 3. Unless these service members can meet the new test, they are arguably the only group of taxpayers who were hurt by the Taxpayer Relief Act of 1997.

Now, a taxpayer who sells property needs to show only that he owned and occupied the property for two years in order to exclude the gain on the sale of the property. For example, if a taxpayer owned and lived in a home from 1 June 1994 to 1 June 1996, the taxpayer would be able to exclude the gain on the sale of that property, so long as the taxpayer sells the property prior to 1 June 1999. This is true even if the taxpayer rents the property from 1 June 1996 until 31 May 1999. This is important because many service members rent property that they own because of frequent changes in assignment. Thus, many service members who currently own property that they previously lived in and have not been renting for very long can take advantage of this new change in the law.[49]

The number of taxpayers who can take advantage of this new change in the law grows substantially due to some exceptions to the requirement to own and to occupy the home for two years. The amount of gain excludable is prorated[50] when the taxpayer sells the property because "of a change in place of employment, health, or to the extent provided in regulations, unforeseen circumstances."[51] This provision provides relief to taxpayers who sell their current homes in which they have lived for less than two years, when they have to move due to permanent change of station orders. Unfortunately, this provision does not benefit taxpayers who are currently renting property that was previously their principal residence.

Fortunately, under certain circumstances, the amount of gain on the sale of a home can be prorated even when the sale of the home is not due to "a change of employment, health, or to the extent provided in regulations, unforeseen circumstances."[52] This exception provides relief to a taxpayer who owned a home on the date the Taxpayer Relief Act of 1997 was enacted and sells the home within two years of that date.[53] The Taxpayer Relief Act of 1997 was enacted on 5 August 1997. If a taxpayer owned a home on that date, the taxpayer can exclude a prorated amount of the excludable gain, provided: (1) the property was the taxpayer's principal residence for some period during the five-year period prior to sale and (2) the taxpayer sells the home prior to 5 August 1999. For example, if a single taxpayer who owned and occupied a home from 1 June 1994 to 1 June 1995 sold the home on 31 May 1999, the taxpayer would be able to exclude up to $125,000 of gain.[54] This exception to the two-year rule is not receiving much publicity, and tax law practitioners need to make taxpayers aware of the exception.[55]

Another way that military taxpayers can take advantage of this new tax law is to reoccupy their rental property. Obviously, if they live in it for two years, they will be able to exclude all of the gain. In addition, they will be able to exclude a prorated amount of the allowable gain, so long as they either owned it on 5 August 1997 and sell it before 5 August 1999 or sell it due to a change in place of employment, health, or for some unforeseen circumstances to be provided in future regulations. For example, if a taxpayer reoccupies his rental property for six months and sells it under the aforesaid changes in circumstances or for any reason before 5 August 1999, the taxpayer can exclude one-fourth of the allowable gain.

Legal assistance attorneys need to be aware of these rules so that they can properly advise clients on these issues. Many military personnel can take advantage of this new law and avoid paying taxes on the gain from the sale of their qualifying property. Lieutenant Colonel Henderson.

SSCRA Note

Federal Court Rules That Military Members Have a Private Cause of Action Under the Soldiers' and Sailors' Civil Relief Act

In the recent case of *Moll v. Ford Consumer Finance Co., Inc.*,[56] the U.S. District Court for the Northern District of Illinois ruled that service members may sue creditors who violate

49. Taxpayers who have rented property will have to recapture any depreciation taken on that property after 7 May 1997. I.R.C. § 121(d)(6).

50. It is the allowable gain that is prorated. If a taxpayer were single and could normally exclude $250,000 of gain, that allowable gain would be prorated. For example, if a single taxpayer owned and occupied a home for only one year and sold it due to a permanent change of station move, the taxpayer would be allowed to exclude up to $125,000 of gain. This would result in most service members being able to exclude all of the gain they might have on the sale of a home.

51. I.R.C. §121(d)(2)(B). As of the date of this note, there are no regulations describing what these unforeseen circumstances might be.

52. *Id.*

53. Pub. L. No. 105-34, §312(d)[(e)](3) (1997).

54. The taxpayer would have owned and occupied the home for one year, which is one-half of the two-year requirement. Thus, the taxpayer would be allowed to exclude up to one-half of the $250,000 allowable exclusion, which would be $125,000. (If the taxpayer meets the requirements to exclude $500,000 of gain, he could exclude up to $250,000 of gain. *See supra* note 45.)

55. In fact, the taxpayer must disregard some of the instructions on Form 2119 (the form used to exclude the gain). These instructions imply that a taxpayer can only prorate the gain when the sale is due to change of employment, health, or some future IRS provided unforeseen circumstances. While this is true for all sales after 4 August 1999, it is not true for sales from 5 August 1997 to 4 August 1999.

56. No. 97 C 5044, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. Mar. 23, 1998).

§ 526 of the Soldiers' and Sailors' Civil Relief Act[57] (SSCRA). Section 526 of the SSCRA states:

> No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a person in military service before that person's entry into military service shall, during any part of the period of military service, bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section, the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.[58]

This provision of the SSCRA is commonly known as the "six percent interest cap" provision.[59]

In July 1986, Gary Moll, an Air Force Reserve member, obtained a fifteen-year loan secured by a second mortgage on his home, with a variable annual interest rate of 10.25 percent. On 25 February 1991, Moll was ordered to active duty to serve in support of Operation Desert Storm. Once activated, Moll notified Ford, his lender, of his military status and requested reduction of his loan interest to six percent, pursuant to 50 U.S.C. App. § 526. He provided all of the documentation that the lender requested, which showed that his military service materially affected his ability to pay his loan. Despite the fact that Moll followed the SSCRA procedure for interest rate relief, Ford never adjusted his interest rate to six percent while he was on active duty.

On 16 July 1997, Moll filed a class action suit, in which he alleged that the lender failed to comply with § 526 of the SSCRA.[60] The lender moved to dismiss the action for failure to state a claim. The court denied the lender's motion as to the issue of whether a private cause of action exists under the SSCRA.[61]

The court recognized that § 526 provides a six percent loan interest rate cap for activated military members on preservice loans. The court further recognized a lender's right to petition the court for a determination that the military member's active duty did not materially affect his ability to pay the loan.[62] Moll claimed that, since he properly asserted his rights under the SSCRA, the lender should have reduced his loan interest to six percent and that Ford's failure to do so violated the SSCRA.[63]

Ford, for purposes of the motion to dismiss, did not dispute Moll's interpretation of the meaning of § 526, the protections it provides for activated reservists, or that Moll's military service materially affected his ability to pay the loan.[64] Instead, Ford claimed that the SSCRA does not provide service members with a private right to sue to enforce the SSCRA. Ford claimed that the SSCRA provides only "defensive relief," that is, that § 526 would only protect the service member if Ford attempted to enforce the loan upon default.

The court dismissed Ford's argument, observing:

> Such an interpretation of [the] SSCRA is not only illogical, but would severely limit the relief available under § 526, since it is quite unlikely that any mortgagor will default on his obligation for the sole purpose of taking advantage of a moderate interest rate reduction during his period of military service.[65]

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57. 50 U.S.C. App. §§ 501-593 (1994).

58. *Id.* § 526.

59. *See* Major James Pottorff, *Protection for Active and Reserve Component Soldiers*, ARMY LAW., Oct. 1990, at 48; Major James Pottorff, *A Look at the Credit Industry's Approach to the Six Percent Limitation on Interest Rates*, ARMY LAW., Nov. 1990, at 49; James Pottorff, *Soldiers' and Sailors' Civil Relief Act Protection for Reserve Component Servicemembers Called to Active Duty*, VA. L. REG., Dec. 1990, at 7; Larry Carpenter, *The Soldiers' and Sailors' Civil Relief Act: Legal Help for the Sudden Soldier*, 25 ARK. LAW. 42 (1991); Joseph Chappelle, *Legal Primer for Advising the Deployed Servicemember*, 34 RES GESTAE 494 (1994); Kathleen H. Switzer, *Benefits for Reserve and National Guard Members Under the Soldiers' and Sailors' Civil Relief Act of 1940*, 110 BANKING L.J. 517 (1993); Major Mary Hostetter, *Using the Soldiers' and Sailors' Civil Relief Act to Your Client's Advantage*, ARMY LAW., Dec. 1993, at 34, 36-37.

60. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *2-3. Moll also alleged a violation of the Illinois Interest Act, but that allegation will not be discussed in this article. *See* 815 ILL. COMP. STAT. 205/0.01 (West 1997).

61. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *1, *3.

62. *Id.* at *4.

63. *Id.*

64. *Id.* at *5-6. Ford stated that it did reduce Moll's interest rate, but Moll denied this. *Id.* at *7 n.2.

65. *Id.* at *7.

If the service member made timely payment on his mortgage loan, he would have no recourse under Ford's "defensive relief" theory. The court pointed out that mortgage holders generally foreclose only when a borrower fails to pay his loan in a timely manner.[66] In most cases, unless the service member was in serious monetary default, the lender would not want to raise the six percent interest cap issue by initiating foreclosure proceedings.

The court reviewed the case law that interprets the SSCRA[67] and emphasized that "Congress intended the SSCRA to be liberally construed in favor of the military person and administered to accomplish substantial justice."[68] Looking at the equities in six percent interest cap cases, the court dismissed Ford's "defensive relief" argument. The court reasoned that Congress could not have intended to encourage lenders to ignore six percent interest requests by providing no way for borrowers to enforce the six percent interest cap provision.[69]

The court then addressed Ford's argument that the SSCRA does not expressly provide for a private cause of action to enforce § 526 or any other section of the Act. Noting that no court has previously considered whether a military member may assert a claim against a lender who fails to comply with § 526,[70] the court applied the four-part test established by the United States Supreme Court in *Cort v. Ash*[71] to determine whether there is an implied right to sue under a federal statute.[72] Under *Cort*, the court must determine:

> (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted;
> (2) whether there is any implication that Congress intended to create or [to] deny such a remedy;
> (3) whether an implied remedy is consistent with the underlying purpose(s) of the statute; and
> (4) whether the cause of action is one traditionally relegated to state law.[73]

The court noted that the Supreme Court has chiefly concentrated on the second factor, Congress' intent to create a private right to sue.[74] The court then examined Congress' intent to allow military members to sue to enforce § 526.

The court examined the legislative history of § 526 and determined that Congress intended to give special relief to activated military members.[75] Relying on *McMurtry v. City of Largo*,[76] Ford argued that § 526 does not confer any special benefit to military members that is not available to civilians.[77]

In *McMurtry*, the City of Largo declared a building a public nuisance, condemned it, and destroyed it. The building was owned by a service member who was overseas on active duty. Upon his return from active duty, the service member sued the city to recover the costs of the building and condemnation.[78] Although the statute of limitations on appealing the condemnation decision was tolled by § 525 of the SSCRA[79] while Mr.

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66. *Id.* at *8 n.3.

67. *See* LeMaistre v. Leffers, 333 U.S. 1, 6 (1948); Hellberg v. Warner, 48 N.E.2d 972, 975 (Ill. App. 1943).

68. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *7.

69. *Id.*

70. *Id.* at *8.

71. 422 U.S. 66 (1975).

72. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *8.

73. *Id.* at *8-9. *See Cort*, 422 U.S. at 78, *as cited in* Long v. Trans World Airlines, Inc., 704 F. Supp. 847, 853 (N.D. Ill. 1989).

74. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *8 (citing Suter v. Artist M., 503 U.S. 347, 364 (1992); Thompson v. Thompson, 484 U.S. 174, 178, (1988)).

75. *Id*. at *10 n.4 (citing 88 CONG. REC. 5364 (1942) (comments of Representative Sparkman) ("[T]he primary purpose of this legislation is to give relief to the boy that is called into service."); Patrikes v. J.C.H. Serv. Stations, 41 N.Y.S.2d 158, 165 (N.Y. City Ct. 1943) ("The underlying purpose of the SSCRA is to provide the soldier with relief in meeting his financial obligations that he incurred prior to his military service.")).

76. 837 F. Supp. 1155 (M.D. Fla. 1993) (holding that the SSCRA does not provide for a private cause of action in federal court). *See* Tolmas v. Streiffer, 21 So. 2d 387 (La. Ct. App. 1945).

77. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *10.

78. *McMurtry*, 837 F. Supp. at 1156-57.

79. 50 U.S.C. App. § 525 (1994) (tolling the statute of limitations on actions or proceedings by courts, boards, and government agencies while a service member is on active duty status, if the action accrued prior to or during active military service).

McMurtry was overseas, he failed to appeal the decision in a timely manner upon his return. The court found that Mr. McMurtry had no federal cause of action under the SSCRA, since civilians in Mr. McMurtry's situation must exhaust state statutory remedies before seeking federal relief.[80] The court held that the SSCRA did not provide service members with a specific federal court remedy when they failed to file a lawsuit properly under state law.[81]

The court in *Moll* distinguished *McMurtry* on the grounds that Moll was seeking to enforce a specific right provided by § 526 of the SSCRA.[82] Unlike Mr. McMurtry, Gary Moll had no state remedy. Moll was relying solely on a federal statute to cap loan interest at six percent while on active military duty. The court further observed that § 526 provides military members "an undeniable benefit not enjoyed by other citizens."[83] The court pointed to the enactment of § 518(2)(B) of the SSCRA in 1991. Congress passed this section to amplify that "[r]eceipt by a person in military service of . . . [a] suspension pursuant to the provisions of this Act in the payment of any . . . civil obligation or liability of that person shall not itself . . . provide the basis for . . . a change by the creditor in the terms of an existing credit arrangement."[84]

The court recognized that § 518 specifically prohibits creditors from altering the terms of an obligation strictly because of the six percent interest cap.[85] Since the creditor cannot defer any interest above six percent without changing the terms of the obligation, the court reasoned that § 526 bestows a benefit on military members not available to civilians.[86] The court further reasoned that Congress must have intended a private cause of action to enforce the provisions of § 526, "because otherwise the relief would [be] of no value at all."[87]

Finally, the court looked at the three other factors in *Cort*[88] that, if satisfied, would allow an implied federal cause of action. First, the plaintiff, as an Air Force reservist, was a member of the class for whose benefit the SSCRA was enacted.[89] Second, the implied remedy of a federal lawsuit is consistent with the underlying purposes of the SSCRA—to provide military personnel with relief in meeting their preservice financial obligations.[90] Third, § 526 provides service members with relief that is not typically found in state law, and it is based on Congress' constitutional war powers.[91]

Moll opens up a new avenue for military legal counsel to assert the six percent interest cap with lenders who refuse to voluntarily comply with § 526. The potential threat of possible legal action short of foreclosure should increase creditor compliance with § 526. The court also warns creditors that they may not avoid the six percent interest cap by adding extra principal payments or balloon interest rates.[92] This case further

80. *McMurtry*, 837 F. Supp. at 1157-58.

81. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *11.

82. *Id.* at *12.

83. *Id.*

84. SSCRA Amendments of 1991, Pub. L. No. 102-12, § 7, 105 Stat. 38 (1991) (codified as amended at 50 U.S.C. App. § 518).

85. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *13-14.

86. *Id*. at *14 n.5. The court cited Senator Biden's comments regarding the passage of § 518, which indicated that it was a reaction to creditors who failed to grant the relief provided by § 526.

> Creditors [are] not granting the relief promised by the Act, especially with regard to interest rates. Section 526 of the Act clearly limits interest on debts incurred prior to being activated to 6 percent for the full period of active duty. Yet, qualifying applicants have been asked by creditors to make up payments or higher interest charges in the future. In my view, those practices are contrary to both the spirit and the letter of the law.

101 Cong. Rec. S 2142 (1991) (comments of Senator Biden).

87. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *14.

88. Cort v. Ash, 422 U.S. 66 (1975).

89. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *14. Air Force Reservists are covered by the SSCRA. *See* 50 U.S.C. App. § 511(1) (1994).

90. *Moll*, 1998 U.S. Dist. LEXIS 3638, at *14.

91. *Id.* at *15.

92. While not addressed by the court, creditor violations of § 526 may also subject them to violations of the Truth in Lending Act (TILA) disclosure provisions. *See* 15 U.S.C. §§ 1601-1667 (1994). Specific credit disclosure violations include: (1) failure to adjust the interest rate to six percent upon proper request by an activated Reservist, resulting in violation of the creditor's duty to disclose the proper interest rate [15 U.S.C. § 1637(b)(6)]; (2) failure to properly adjust any finance charge to reflect the six percent interest cap [15 U.S.C. § 1637(b)(4)]; and (3) failure to credit retroactively to the date of entry of active duty the reduced interest rate and resulting finance charges, resulting in erroneous disclosure of the balance due on the loan or credit transaction [15 U.S.C. § 1637(b)(2)].

allows Reserve Component service members, upon return from active duty, to go back to noncooperative lenders who failed to honor the six percent interest cap to seek reimbursement for interest wrongly paid. Lieutenant Colonel Conrad.

Contract and Fiscal Law Note

Allowable Cost: Contractor Can Claim Legal Costs Even Though It Lost Wrongful Discharge Case

Introduction

In *Northrop Worldwide Aircraft Services, Inc.*,[93] the Armed Services Board of Contract Appeals (ASBCA) decided that a contractor is entitled to charge the government for the legal costs incurred in defending itself against the wrongful termination actions of former employees, even though a jury verdict was rendered against the contractor. The ASBCA ruled that the jury verdict was not determinative of whether the costs are allowable.[94]

Northrop is the culmination of significant prior litigation between the two parties.[95] In its earlier summary judgment ruling, the ASBCA held that the reasonableness of Northrop's incurred legal costs must be determined by examining the following key issues:

> [W]hether the claimed costs were "necessary to the overall operation of the business" (i.e., were allocable under FAR 31.201-4) and whether they were the type of costs which "would be incurred by a prudent person in the conduct of competitive business" or which are "generally recognized as ordinary and necessary for the conduct of [the] contractor's business" (i.e., were reasonable under FAR 31.201-3(a) and 9(b)).[96]

Essentially, the ASBCA concluded that the "reasonableness of an incurred cost may depend, in large part, on the circumstances at the time the cost was incurred. Here, for example, it may be appropriate to examine the contractor's position in the state lawsuit, its proffered evidence, et cetera."[97]

Background

On 9 June 1987, the Army awarded a cost-reimbursement award fee contract to Northrop. The contract required Northrop to provide the maintenance, supply, and transportation functions of the Directorate of Logistics operations at Fort Sill, Oklahoma.[98] During contract performance, three Northrop employees, Charles Cook, Melvin Miller, and Charlie Lewis, were fired from their jobs as quality control inspectors.[99] Northrop terminated these three individuals due to their abusive and threatening behavior towards other Northrop employees as well as their poor duty performance.[100]

On 9 May 1990, Cook, Miller, and Lewis filed a civil wrongful termination lawsuit against Northrop.[101] The lawsuit alleged that "they had been wrongfully terminated for refusing to follow directions in inspecting vehicles that would have made them participants in acts of fraud against the government, which they maintained had an effect on public policy and the public interest."[102] Specifically, the plaintiffs made three allegations of wrongdoing and fraud against Northrop. First, all of the quality control inspectors were asked to sign inspection

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93. ASBCA Nos. 45216, 45877, 1998 ASBCA LEXIS 53 (Mar. 26, 1998).

94. *Id.*

95. *See* Northrop Worldwide Aircraft, ASBCA Nos. 45216, 45877, 95-1 BCA ¶ 27,503 (addressing cross summary judgment motions); Northrop Worldwide Aircraft Servs., Inc., ASBCA Nos. 45216, 45877, 96-2 BCA ¶ 28,574 (second motion for summary judgment); Northrop Worldwide Aircraft, ASBCA Nos. 45216, 45877, 97-1 BCA ¶ 28,885 (involving a similar wrongful termination case involving four different former government employees).

96. Earlier, the parties moved for summary judgment, which the ASBCA denied. *See Northrop Worldwide Aircraft*, 95-1 BCA ¶ 27,503 at 137,057.

97. *Id.* at 137,059.

98. *Northrop*, 1998 ASBCA LEXIS 53, at *1. The instant contract award was the result of OMB A-76 cost study. These services had been previously performed in-house by federal employees but were later contracted out to Northrop.

99. *Id.* at *4. Cook, Miller, and Lewis were three former government employees who worked as quality control inspectors for the Fort Sill Directorate of Logistics and were performing the same type of work as when they were employed by the government. The instant contract contained a "right of first refusal of employment" clause, which forced Northrop to hire these three former government employees.

100. *Id.* at *8-9. Mr. Lewis was cited for failing to stay at his duty station during normal working hours and other violations of company rules and regulations. Mr. Miller was terminated when he refused to perform his duties as an inspector. Northrop terminated Mr. Cook when he violated company rules against fighting, threatening, and harassing other employees. Collectively, these three individuals were known as the "Three Amigos."

101. *Id.* at *11. The lawsuit was filed in the District Court of Comanche County, Oklahoma.

102. *Id.*

forms without inspecting the vehicles. Second, Northrop hid the logbooks that contained the inspection forms. Further, Northrop asked the plaintiffs to hide these logbooks from government inspectors, and the plaintiffs actually witnessed other Northrop employees hiding the logbooks. Third, Northrop allowed a mechanic's helper to perform the duties of a mechanic, which resulted in either a violation of the contract or excessive billing.[103] Prior to their termination, however, the plaintiffs never alleged that Northrop committed or required them to participate in defrauding the government.[104]

> During their employment with [Northrop], neither Mr. Lewis, Mr. Cook, nor Mr. Miller raised any allegations of any improprieties on the part of [Northrop] when they received contact reports or discussed their personnel evaluations with Ms. Whitworth. On no occasion did they state to appellant that they were being fired for refusal to engage in illegal conduct or [to] commit fraud.[105]

When Northrop initially notified the government of its decision to defend the wrongful termination case, both parties concluded that the incurred legal fees would be reasonable.[106] In September 1990, when the contracting officer was formally notified of the impending lawsuit, she stated, "[w]e have a document that shows litigation exists, but it does not justify the cost. I don't know how I could determine if it was reasonable or not. Our attorney cannot either."[107] The parties eventually agreed to resolve the issue of the legal fees after the conclusion of the case.[108]

On 20 September 1991, the jury in the civil case found for the plaintiffs and awarded them $1.8 million in damages.[109] When the contracting officer learned of the jury verdict, she issued a final decision disallowing Northrop's legal fees. Northrop appealed the contracting officer's final decision to the ASBCA.

The ASBCA Decision

Northrop argued that its incurred legal costs in defense of the wrongful termination case were reasonable and that the government should reimburse the legal costs, notwithstanding the unfavorable jury verdict.[110] The government argued that, because the nature of the legal fees incurred is founded on illegal and fraudulent conduct, all costs that flow from such illegal or fraudulent activities are unreasonable, unallocable, and unallowable.[111] To support its claim of contractor fraud, the government submitted to the ASBCA the Oklahoma state court verdict and the underlying evidence in the wrongful termination action.[112]

Unfortunately for the government, neither the trial transcripts nor the jury verdict provided the ASBCA with conclusive evidence of contractor fraud or other improprieties. Administrative Law Judge Lisa Anderson Todd stated:

> The jury verdict does not determine our disposition of these appeals. The jury did not make findings that any [Northrop] activities were either illegal or intended to defraud the government. The jury was presented with government contracting issues but not a government contract and in that context arrived at a verdict. In this regard, we note that "the complexities of military contracts and regulations are beyond conventional experience.[113]

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103. *Id*. at *15-18. Since the contract was a cost plus award fee contract, Northrop was entitled to an award fee based on the quality of its performance. Part of the award fee was based on maintaining a daily non-tactical vehicle operational readiness rate above 90 percent.

104. *Id*. at *9.

105. *Id*. at *9. A contact report is a form used by Northrop to document an employee's misconduct or violation of company rules and regulations. Ms. Whitworth is the Superintendent of Human Resources.

106. *Id*. at *12

107. *Id*.

108. *Id*. at *13. Initially, the contracting officer did not know that the plaintiffs in the civil suit had alleged fraud. When she discovered the basis of the wrongful termination lawsuit, she notified Northrop that the allowability of the legal fees would be determined at a later date.

109. *Id*. at *21. The Oklahoma appellate court denied the subsequent appeal, and the Supreme Court of Oklahoma denied Northrop's petition for certiorari.

110. *Id*. at *32.

111. *Id*. This allegation was based primarily on the allegations of the plaintiffs.

112. Northrop disputed the underlying evidence presented by the plaintiffs. The jury made only general findings, not special findings of fraud or other illegal action. *Id*. at *21.

113. *Id*. at *37 (citing United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987).

The ASBCA concluded that the mere fact that the Army Criminal Investigation Division conducted an investigation and "titled"[114] the contractor for false statements and false claims did not amount to a finding of fraud.[115] Further, "no action was taken, and the reason for no action was the lack of evidence."[116]

The ASBCA concluded that there was "no substantial evidence that appellant was engaged in conduct to defraud the government or otherwise issued improper directives to the plaintiffs."[117] The ASBCA held that Northrop's actions in incurring costs to "defend the litigation were reasonable, and the costs that are reasonable in their nature and amount are held allowable."[118]

Conclusion

Does this case change how the government should review allowable costs? The answer is probably no. It will not change how the contracting officer would normally determine a contractor's incurred costs, but it forces the government to look beyond the verdict of any case when determining the allowability of incurred legal costs. Major Hong.

Criminal Law Note

The Supreme Court Upholds the Constitutionality of M.R.E. 707: Polygraph Evidence Still Banned

Introduction

In *United States v. Scheffer*,[119] the United States Supreme Court reversed the United States Court of Appeals for the Armed Forces (CAAF) by holding that Military Rule of Evidence (MRE) 707,[120] which excludes polygraph evidence from courts-martial, does not unconstitutionally abridge an accused's right to present a defense. As a result, defense counsel are now prohibited from introducing exculpatory polygraph evidence to bolster their clients' in-court testimony.

Despite this ruling, the Court left several questions unanswered. One remaining issue is the degree of scientific consensus required before a per se ban on polygraph evidence is no longer justified. The majority opinion also failed to address concerns that the promulgation of MRE 707 violates Article 36(a) of the Uniform Code of Military Justice (UCMJ).

Facts

Airman Edward Scheffer was stationed at March Air Force Base, California. In March 1992, he volunteered to assist the Air Force Office of Special investigations (OSI) with several ongoing drug investigations. Scheffer agreed to undergo periodic drug testing and polygraph examinations as a member of the investigating team. On 7 April 1992, one of the supervising OSI agents asked Scheffer to provide a urine sample. Scheffer agreed, but stated that he could not immediately provide a specimen because he urinated only once a day. He submitted a sample the next day. On 10 April, Scheffer took a polygraph examination. According to the examiner, Scheffer's polygraph charts indicated "no deception" when he denied using drugs since joining the Air Force.[121]

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114. *Id.* at *20. The ASBCA concluded that "[t]o 'title' someone means to place one's name in the subject block of a criminal investigation report." *Id. See* U.S. Dep't of Defense, Instr. 5505.7, Titling and Indexing of Subjects of Criminal Investigations in the Department of Defense (14 May 1992).

115. *Northrop*, 1998 ASBCA LEXIS 53, at *34-35.

116. *Id.* at *20. The U.S. Attorney declined to prosecute Northrop, and no other investigation was conducted.

117. *Id.* at *20-21.

118. *Id.* at *39.

119. 118 S. Ct. 1261 (1998). *See* United States v. Scheffer, 41 M.J. 683 (A.F. Ct. Crim. App. 1995), *overruled by*, 44 M.J. 442 (1996), *cert. granted*, 117 S. Ct. 1817 (1997), *rev'd*, 118 S. Ct. 1261 (1998).

120. Manual for Courts-Martial, United States, Mil. R. Evid. 707 (1995) [hereinafter MCM]. Military Rule of Evidence 707 states:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Id. The President promulgated MRE 707 pursuant to Article 36(a) of the Uniform Code of Military Justice (UCMJ). The stated reasons for the ban were: (1) the lack of scientific consensus on the reliability of polygraph evidence; (2) the belief that panel members will rely on the results of polygraph evidence rather than fulfill their responsibility to evaluate witness credibility and make an independent determination of guilt or innocence; and (3) the concern that polygraph evidence will divert the focus of the members away from the guilt or innocence of the accused. *Id.* analysis, app. 22, at A22-49.

121. *Scheffer*, 41 M.J. at 685-86.

On 14 May, the OSI agents learned that Scheffer's urine specimen had tested positive for methamphetamine. Scheffer was subsequently charged with wrongful use of methamphetamine, among other offenses. At trial, Scheffer informed the court that he intended to testify and to offer an innocent ingestion defense. Scheffer moved to introduce the results of the polygraph test to corroborate his in-court testimony. Citing MRE 707, the military judge refused to allow Scheffer to introduce, or even to attempt to lay a foundation for the introduction of, the polygraph examination results to corroborate his innocent ingestion defense.[122] Scheffer was subsequently convicted of wrongful use of methamphetamine.

On appeal, the Air Force Court of Criminal Appeals rejected Scheffer's claim that MRE 707 is unconstitutional.[123] The court said that the President had legitimate reasons for banning polygraph evidence. Further, the ban was not unconstitutional because it applies equally to the prosecution and the defense and because it does not limit an accused's ability to testify in his own behalf.[124]

In a three-two decision, the CAAF reversed the Air Force court's decision, holding that MRE 707 violated Scheffer's Sixth Amendment[125] right to present a defense.[126] The CAAF adopted the Supreme Court's rationale in *Rock v. Arkansas*,[127] in which the Court stated that a legitimate interest in barring unreliable evidence does not extend to a per se exclusion that may be reliable in an individual case.[128] The CAAF concluded that the trial court should rule on the admissibility of polygraph evidence on a case-by-case basis and remanded the case to the trial court for an evidentiary hearing on the admissibility of Scheffer's polygraph results.[129] The government appealed, and the Supreme Court granted certiorari.[130]

Supreme Court Analysis

On 31 March 1998, the Supreme Court reversed the CAAF, holding that MRE 707's exclusion of polygraph evidence does not unconstitutionally abridge the right of accused members of the military to present a defense.[131] Justice Thomas wrote for the eight-person majority, which held that rules that prohibit the accused from presenting relevant evidence do not violate the Sixth Amendment, so long as the rules are not arbitrary or disproportionate to the purposes they are designed to serve.[132]

The Court examined the reliability of polygraph evidence and found that there was no scientific consensus on the reliability of polygraph evidence. The Court noted that most state courts and some federal courts still have a per se ban on polygraph evidence. Additionally, even in jurisdictions without a per se ban, courts continue to express doubts concerning the reliability of polygraph evidence.[133] Given the widespread uncertainty concerning the reliability of polygraph evidence, the Court held that the President did not act arbitrarily or disproportionately in promulgating MRE 707.[134]

The Court distinguished the per se ban on polygraph evidence from other situations where it has held per se bans on evidence unconstitutional.[135] Unlike a ban on impeaching a party's own witnesses[136] or a ban on post-hypnosis testimony,[137] MRE

122. *Id.* at 686.

123. *Id.* at 683.

124. *Id*. at 691.

125. U.S. CONST. amend. VI.

126. United States v. Scheffer, 44 M.J. 442, 445 (1996). The court assumed that the President acted in accordance with UCMJ Article 36(a) when he promulgated MRE 707, but it did not address the issue.

127. 483 U.S. 44 (1987). In *Rock*, the Court struck down Arkansas' per se ban on post-hypnotic testimony.

128. *Id*. at 61.

129. *Scheffer*, 44 M.J. at 449.

130. United States v. Scheffer, 117 S. Ct. 1817 (1997).

131. United States v. Scheffer, 118 S. Ct. 1261, 1263 (1998).

132. *Id*. at 1264.

133. *Id.* at 1266.

134. *Id*.

135. *See* Rock v. Arkansas, 483 U.S. 44 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967).

136. *Washington*, 388 U.S. at 14.

707 does not prevent the accused from testifying or from introducing factual evidence on his own behalf. Military Rule of Evidence 707 prevents the accused from introducing only a specific type of expert testimony to bolster his credibility.[138] The Court held that the President's interest in excluding unreliable evidence from courts-martial outweighs the accused's interest in bolstering his own credibility. Seven justices joined Justice Thomas in this portion of the opinion.[139]

Justice Thomas, joined by three other justices, also said that the President's interests in avoiding collateral litigation and in preserving the panel's function of determining witness credibility were sufficient to justify MRE 707.[140] In a concurring opinion, Justice Kennedy, joined by three other justices, submitted that MRE 707 serves only to prevent unreliable evidence from being introduced at trial. Because of the ongoing debate about the reliability of polygraph evidence, he was unwilling to require all state, federal, and military courts to consider this evidence.[141]

Justice Kennedy also wrote that, while MRE 707 was not unconstitutional, he doubted that a rule of per se exclusion was wise and that some later case may present a more compelling case for the introduction of polygraph evidence.[142] However, he did not provide any indication or example of a more compelling case. Justice Kennedy also noted, but did not discuss, the tension between a per se ban on scientific evidence and the Court's holding in *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[143] which provides the trial judge with wide discretion to admit scientific evidence that the court deems both relevant and reliable.[144]

Justice Kennedy did not find the other interests served by MRE 707 persuasive. He dismissed any concern about polygraph evidence diminishing the role of the jury, particularly since MRE 704[145] abolished all ultimate issue restrictions on expert testimony.[146]

In a stinging dissent, Justice Stevens wrote that the President's promulgation of MRE 707 violates UCMJ Article 36(a)[147] because there is no identifiable military concern that justifies a special evidentiary rule for courts-martial.[148] Justice Stevens also asserted that polygraph evidence is as reliable as other scientific and non-scientific evidence that is regularly admitted at trial.[149] Given this degree of reliability and the sophisticated Department of Defense polygraph program, Justice Stevens stated that it was unconstitutional to deny an accused the use of exculpatory polygraph evidence.[150] Justice Stevens also rejected the assertions that MRE 707 prevents jury confusion and avoids collateral litigation.[151]

Analysis

Scheffer guarantees that military judges can continue to exclude polygraph evidence from the trial phase of courts-martial. Despite this ruling, the Supreme Court failed to resolve a number of issues. Eight justices held that the President's per se ban is constitutional because there is no scientific consensus about the reliability of polygraph evidence. However, the majority opinion did not provide any guidance concerning the amount of scientific consensus required before the MRE 707 ban would no longer be justified. Furthermore, neither Justice Thomas' majority opinion nor Justice Kennedy's concurrence

137. *Rock*, 483 U.S. at 44.

138. *Scheffer*, 118 S. Ct. at 1269.

139. *Id*. at 1263.

140. *Id.* at 1267.

141. *Id.* at 1269 (Kennedy, J., concurring).

142. *Id.*

143. 509 U.S. 579 (1993).

144. *Scheffer*, 118 S. Ct. at 1269 (Kennedy, J., concurring).

145. MCM, *supra* note 120, MIL. R. EVID. 704.

146. *Scheffer*, 118 S. Ct. at 1270 (Kennedy, J., concurring).

147. *See* UCMJ art. 36(a) (1994).

148. *Scheffer*, 118 S. Ct. at 1272 (Stevens, J., dissenting).

149. *Id.* at 1276.

150. *Id.* at 1270.

151. *Id*. at 1278.

discusses how a per se ban on polygraph evidence squares with *Daubert*, which gives wide discretion to the trial judge to admit or to exclude scientific evidence. Finally, the majority opinion did not address the issue raised by Justice Stevens that the President's promulgation of MRE 707 violates Article 36(a) of the UCMJ. The majority opinion did not discuss or note any unique military concerns that justify a special evidentiary rule for courts-martial.

In spite of the eight-one decision upholding the constitutionality of MRE 707, the Court's support of this "unwise" ban appears lukewarm. Given a more compelling case, four justices may join Justice Stevens and require trial courts to consider the introduction of polygraph evidence.

Advice to Practitioners

For the foreseeable future, MRE 707 binds counsel and military judges. When the government attacks the credibility of a testifying accused, the trial counsel should successfully prevent the accused from attempting to lay the foundation for the admissibility of exculpatory polygraph evidence, even where a government polygrapher administered the test. Practitioners should note, however, that polygraph results, both inculpatory and exculpatory, can still be used pretrial and post-trial to assist the convening authority in determining the appropriate disposition of a particular case. In addition, because the MREs do not control the military judge when ruling on preliminary questions regarding the admissibility of evidence,[152] counsel can still offer polygraph testimony during Article 39(a)[153] sessions in support of motions to admit or to exclude evidence.

In the future, the constitutionality of MRE 707 is less clear. Given the Court's holding, the apparent weak support for MRE 707, and Justice Stevens' dissent, trial defense counsel and appellate defense counsel may be successful in overturning MRE 707 on one of three bases. First, as state and federal courts use polygraph evidence more frequently, it is likely to gain a higher degree of scientific as well as legal acceptability. Widespread acceptability of polygraph evidence will undermine the Court's rationale for the MRE 707 ban on polygraph evidence. Greater acceptance of polygraph evidence may eventually cause the President to eliminate MRE 707.

Second, the CAAF and the Supreme Court may allow the introduction of exculpatory polygraph evidence in spite of MRE 707 if defense counsel make a more compelling argument for the constitutional necessity of polygraph evidence as part of their defense. Unfortunately, Justice Kennedy's concurrence was silent about what qualifies as a "more compelling case."

Finally, defense counsel may argue that the President's promulgation of MRE 707 violates UCMJ Article 36(a). In his dissent, Justice Stevens noted that the rationale for MRE 707 is not based on issues unique to the military. Under Article 36(a), the President is charged with promulgating evidentiary rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[154] Because there is no MRE 707 counterpart in the Federal Rules of Evidence, and because MRE 707 was not promulgated to address issues unique to the military, Justice Stevens opined that the President exceeded his statutory authority in promulgating this rule. The parties in *Scheffer* did not brief this issue. Neither the majority opinion nor the lower court decisions addressed this issue. In light of the majority opinion upholding MRE 707 on constitutional grounds, this statutory argument may be the best argument available to defense counsel who seek to admit exculpatory polygraph evidence.

Conclusion

By an eight-one decision, the Supreme Court upheld the constitutionality of MRE 707. For the foreseeable future, polygraph evidence is inadmissible in the trial phase of courts-martial. However, the Court's ruling has not eliminated all of the issues that accompany polygraph evidence. The Court's affirmation of MRE 707 is not as strong as the vote indicates. If polygraph evidence gains a higher degree of scientific acceptability, if an accused is able to present a more compelling need for this evidence, or if defense counsel can successfully argue that the President exceeded his statutory authority in the promulgation of MRE 707, *Scheffer* may be overturned, and military courts could admit exculpatory polygraph evidence. Major Hansen.

International & Operational Law Note

Introduction

152. Military Rule of Evidence 104(a) states:

> Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance or the availability of a witness shall be determined by the military judge. In making these determinations, the military judge is not bound by the rules of evidence except those with respect to privileges.

MCM, *supra* note 120, Mil. R. Evid. 104(a).

153. UCMJ art. 39(a) (1994).

154. *Id.* art. 36(a).

This note is the second in a series of practice notes[155] that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense Law of War Program.[156]

Principle 1: Military Necessity

"My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far as it is absolutely necessary; everything beyond that is criminal."[157] With this statement, Napoleon captured the essence of one of the most fundamental principles of the law of war, military necessity. In *Field Manual 27-10*, the United States Army addresses military necessity as follows:

> The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.
>
> The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.[158]

Military necessity is the international legal link between a lawful military objective and the actions taken to achieve that objective. This legal link is intended to limit the destructive actions of combatants to only those actions that contribute to achieving the objective, which in conflict is to force the enemy to submit.

The concept of imposing such limitations on combatants is arguably as ancient as organized warfare itself.[159] However, this principle did not take the form of an order for combatants in the field until 1863.[160] Not until 1868 was this principle codified in a multilateral treaty related to regulating conflict—the St. Petersburg Declaration of 1868.[161] Although this declaration does not refer to military necessity explicitly, it embraces the concept that inflicting harm is permissible only when linked to a legitimate military objective. It states that "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."[162] In 1907, the drafters of the Hague Convention Respecting the Laws and Customs of War on Land[163] made this principle a cornerstone of this still binding treaty when they established the rule that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[164]

The essence of the concept of military necessity is that the only legitimate focus of a combatant's destructive power is the enemy war-making capability, or, in the negative, that war does not justify the intentional infliction of destruction on any person or object within the range of a combatant's weapon systems. The law of war "goes much farther than this. It rejects the claim that whatever helps to bring about victory is permissible . . . . It forbids some things absolutely. They are criminal even if without them the war will be lost."[165]

The test of this "caveat" to the concept of military necessity occurred following World War II during the Nuremberg Tribunals. Several German defendants asserted military necessity as a defense to various charges involving the murder of civilians and the destruction of civilian property in occupied areas.[166]

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155. *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., JUNE 1998, at 17.

156. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). *See also* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 AUG. 1996).

157. GEOFFREY FRANCIS ANDREW BEST, WAR AND LAW SINCE 1945, at 242 (1994) (citing 7 MAX HUBER, ZEITSCHRIFT FUR VOLKERRECHT 353 (1913)).

158. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3-4 (July 1956).

159. *See* BEST, *supra* note 157, at 14-15.

160. *See* Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (Apr. 1998).

161. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 1 A.J.I.L. 95-96 (Supp. 1907) (*reprinted in* THE LAWS OF ARMED CONFLICT 101-03 (Dietrich Shindler & Jiri Toman eds., 3d ed. 1988).

162. *Id.*

163. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, 36 Stat. 2277, *reprinted in* U.S. DEP'T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE 5-17 (Dec. 1956).

164. *Id.*

165. SHELDON M. COHEN, ARMS AND JUDGMENT 35 (1989).

The essence of the German defense rested on an assertion of the concept of *Kriegsraison,* which represents an *unlimited* application of military necessity. According to a former President of the American Society of International Law:

> The doctrine practically is that if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is to be the sole judge of the necessity, the doctrine really is that a belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage.[167]

When the Nuremberg Tribunal convicted the defendants who asserted military necessity as a defense to their conduct, the concept of *kriegsraison* was explicitly rejected. In short, the Tribunal confirmed the notion that, while military necessity serves as a pre-condition to validate destructive conduct during conflict, it does not justify violating or ignoring the law of war. According to the Tribunal:

> It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification for their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of the positive rules. International law is prohibitive law.[168]

When translating this principle to the context of military operations other than war (MOOTW), one must bear in mind that this principle relates to legally justifying the use of force during military operations. As a result, it is most logically related to the justifying measures necessary to protect friendly forces. While the term "military necessity" is not often used in relation to force protection issues, it lies at the foundation of any set of rules of engagement intended for that purpose.

Inherent in the analysis of whether the use of destructive force is justified for force protection is the concept that protecting the force is a necessary component of the military mission. However, as with the wartime caveat that military necessity justifies only those measures not otherwise prohibited by the law, military necessity does not justify all actions that arguably enhance force protection. The customary international law prohibitions against state practiced murder; torture; cruel, inhumane, or degrading treatment; and prolonged arbitrary detention[169] serve as limitations to what military necessity may justify during the conduct of MOOTW. To illustrate, the need to extract information from a local civilian for the military necessity of protecting the force does not justify subjecting that individual to torture as a means of obtaining the information. Thus, even without an "enemy" in the classic sense, the principle of military necessity remains relevant in the decision making process for the use of force.

When analyzing the meaning of this principle, it is often easy to overlook the key factor of how to apply it—how to determine what is "necessary." Ultimately, this remains a key function of command, in both the wartime and MOOTW environments. However, as with virtually all decision-making related principles of the law of war, the law presumes that the commander makes the "necessity" determination in good faith, based on an analysis of all of the information available at the time of the decision.[170] In this regard, therefore, the standard is subject to an "objective" quality control element. In short, the commander who makes arbitrary and ill-informed determinations of military necessity risks condemnation of those decisions when they become subject to subsequent scrutiny. The judge advocate who understands both the meaning of military necessity and the imperatives of the mission is best able to ensure that determinations of what is "necessary" for the mission are made in good faith. Major Corn.

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166. *See* William Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251, 253 (1953) (discussing the Nuremburg War Crimes Tribunal decisions).

167. *Id.* (*quoting* Elihu Root, Address Before the American Society of International Law, April 27, 1921).

168. *Id.*

169. *See* 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §701 (1986) (discussing customary international law based human rights).

170. *See* Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 126 (1982) (discussing the need for "good faith" application of the law of war).

Note from the Field

The Military Occupational Specialty/Medical Retention Board: An Introduction and Practical Guide

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Introduction

A military occupational specialty/medical retention board (MMRB) is a type of physical evaluation board that is convened by a soldier's local command to determine whether the soldier can perform in his primary military occupational specialty (PMOS) or specialty code in a worldwide field environment.[1] The MMRB is not technically part of the Army's physical disability evaluation system (APDES). Rather, an MMRB is a part of the Army's physical performance evaluation system (PPES) within the personnel system, not the medical system. The MMRB is an administrative screening procedure to determine whether a soldier can perform worldwide in his PMOS. This note acquaints practitioners with the reasons for, and the procedures involved in, the conduct of a command MMRB and provides a brief synopsis of the processing of a typical MMRB. Finally, it provides the administrative law attorney with an MMRB checklist for conducting a proper legal review of an MMRB.

Isn't This Just Another Medical Board?

Perhaps the term "MMRB" causes people to associate it automatically with a physical evaluation board (PEB) or a medical evaluation board (MEB).[2] However, the MMRB operates as a function of the personnel system. While the results of an MMRB may eventually place a soldier within the disability system, the MMRB should be viewed entirely separate from the other "medical" boards.[3]

Currently, Army policy requires soldiers to perform duties commensurate with their office, grade, rank, or rating under worldwide field conditions.[4] A soldier's ability to operate in a worldwide theater is determined by his ability to perform basic soldier physical tasks as well as the physical tasks associated with and required of his PMOS.[5] While these standards are viewed only as guidelines, "[t]he overriding consideration by the MMRB is whether the soldier possesses the physical ability to perform PMOS or specialty code assignments worldwide under field conditions."[6]

Referral to an MMRB

The majority of soldiers who are referred to an MMRB are those who have a permanent physical profile with a numerical factor of three in one or more of the physical profile serial (PULHES) factors.[7] In addition to these mandatory referrals, a company commander has discretion to refer soldiers whom the PPES[8] has previously evaluated if the commander determines that the soldier is incapable of performing in his PMOS or if the

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1. U.S. Dep't of Army, Reg. 600-60, Physical Performance Evaluation System (31 Oct. 1985) [hereinafter AR 600-60]. *Army Regulation 600-60* is the current regulation concerning the conduct of an MMRB. The Office of the Judge Advocate General point of contact for MMRB's is Major Anthony Jones at (703) 588-6791.

2. *See* Captain James R. Julian, *What You Absolutely, Positively Need to Know About the Physical Evaluation Board*, Army Law., May 1996, at 31. A soldier who has been injured or who becomes ill while on active duty is referred by his treating physician to an MEB. The MEB will determine whether the soldier's injury or illness prevents him from meeting medical retention standards, as defined by *Army Regulation 40-501*. *Id.* *See* U.S. Dep't of Army, Reg. 40-501, Standards of Medical Fitness (30 Aug. 1995) [hereinafter AR 40-501]. If the soldier does not meet these retention standards, he is referred to a PEB. The PEB is generally located at a major Army medical center. The PEB makes the determination of whether the soldier is fit for continued service and, if not, the extent of disability payments, if any, he is to receive. Julian, *supra.*

3. *See* Julian, *supra* note 2, at 31.

4. AR 600-60, *supra* note 1, para. 2-1b.

5. *See id.*

6. *Id.* The regulation cautions commanders not to refer soldiers to an MMRB automatically if they have medical conditions that restrict or limit full participation in the Army physical fitness test (APFT). For example, a soldier who has been diagnosed with knee problems may have a permanent profile that restricts him to walk rather than run the APFT. "[R]eferring a soldier for further evaluation in the disability system based only on these factors is inappropriate." *Id.* However, a soldier's restrictive PT profile may be considered along with other evidence of inability to perform. *Id.*

7. Referral in this situation is mandatory. Mandatory referral is also required for soldiers who have a condition listed in *AR 40-501, Standards of Medical Fitness*. *See* AR 40-501, *supra* note 2, ch. 3. In addition, soldiers who are wounded in combat will be referred to an MMRB under certain circumstances. *See* AR 600-60, *supra* note 1, para. 2-1g.

soldier's medical condition deteriorates.[9] The commander also has discretion to refer a soldier whose permanent physical profile provides overly restrictive limitations for his grade and MOS.[10] Soldiers who possess a temporary profile are not referred to an MMRB.

General officers with a physical profile of three or four in one or more of the PULHES factors will not be *mandatorily* referred to an MMRB. A general officer may be referred to an MMRB at the discretion of the MOS/Medical Review Board Convening Authority (MMRBCA), commonly the general court-martial convening authority.[11]

Conducting an MMRB

The MMRBCA is responsible for convening an MMRB.[12] The MMRB is composed of five voting members and at least two non-voting members. The president of the board must be a colonel (O-6). Typically, the president will be the commander of the boarded soldier's brigade. A medical officer, either a colonel or a lieutenant colonel, must be present at all times during the MMRB.[13] Regardless of date of rank, the medical officer will not serve as president. Two additional voting members in the rank of lieutenant colonel (O-5) may be from the combat arms, combat support, or combat service support branches. Judge advocates, chaplains, and medical corps officers will not be appointed as voting members.[14] The fifth voting member will be a command sergeant major (CSM); however, if the MMRB is being conducted for a commissioned officer, the CSM will be replaced with another lieutenant colonel of the same branch as the boarded officer (if reasonably available).[15] All voting board members must be senior to the soldier being boarded.[16]

At least two nonvoting members are required for an MMRB. A personnel officer, generally a warrant or commissioned officer, advises the board regarding personnel policy and procedures.[17] An enlisted member serves as a recorder. The recorder in an MMRB assists the president in assembling records that the board considers and also prepares a record of the proceedings.[18]

The Hearing[19]

The hearing itself is non-adversarial.[20] After the president convenes the board, the personnel officer provides the board with a verbal summary of the pertinent facts relating to each soldier who is to appear before the board.[21] The medical officer appointed to the board briefs the other members on the import and characteristics of the soldier's profile.[22] The president

8. U.S. Dep't of Army Reg. 635-40, Physical Evaluation for Retention, Retirement, Separation (1 Sept. 1990).

9. *Id.*

10. *Id.*

11. AR 600-60, *supra* note 1, para. 2-1f.

12. The MMRBCA may delegate convening authority to another general officer on his staff or to the first general officer in the soldier's chain of command. AR 600-60, *supra* note 1, para. 3-1d. Any delegation must be in writing. *Id.* Administrative authority over the remainder of the MMRB may be delegated to a commissioned or warrant officer on the MMRBCA's staff. *Id.* This authority includes the appointment of board members by the MMRBCA, referring individuals to the MMRB, administratively processing the board recommendations, and taking action on approved or disapproved board recommendations. *Id.* Typically, the MMRBCA will delegate administrative authority to the division or corps personnel section.

13. *Id.* para. 3-2b(1)(b). A civilian physician may be appointed to serve in lieu of a medical officer if the medical center commander or the medical activity commander determines that a medical officer is not reasonably available. *See id.* para. 3-2b(1)(b).

14. An officer from one of these branches may be appointed as the fifth voting member if the MMRB involves a member of that branch. *Id.* para. 3-2b(1)(e).

15. *See id.* para. 3-2b(1)(e). If the board concerns a warrant officer, a warrant officer three or four will replace the CSM. If the MMRB is being conducted for a chaplain or a judge advocate, the CSM will be replaced by a lieutenant colonel in the Judge Advocate General's Corps or the Chaplain's Corps.

16. *See id.*

17. *See id*. para. 3-2b(2)(a).

18. *See id*. para. 3-2b(2)(b).

19. *See generally* Major Curtis A. Parker, *The Army Physical Disability Evaluation Deskbook*, at B-1 through B-10 (3 May 1996) (available on the Legal Automated Army Wide System bulletin board service in the legal assistance files).

20. *Id.* at B-6.

21. *Id.*

22. *Id.* at B-7.

advises the soldier regarding the purpose of the board and explains how the board will conduct the proceedings.[23]

A soldier who appears before an MMRB is not entitled to counsel representation.[24] He may, however, be represented or accompanied by a commissioned, warrant, or noncommissioned officer of his own choosing. The soldier may call witnesses and testify before the board.

Following the presentation of all relevant evidence, the board will conduct its evaluation of the capabilities (or lack thereof) of the soldier. The board must consider the soldier's physical abilities and limitations, the unit commander's evaluation, the soldier's personal statement, and other evidence presented.[25] The board must conduct a comparison of the physical tasks required of the soldier's PMOS and those tasks that the soldier cannot perform.[26]

In addition to evaluating the tasks required of the PMOS, the board must determine whether the soldier can perform basic soldier skills with the limitations contained in the soldier's profile. For example, a soldier might have a permanent profile that precludes the wearing of a kevlar helmet. The soldier would probably be able to perform in the PMOS. However, performance in the PMOS necessarily includes basic soldier skills. The wearing of a kevlar helmet is essential in weapons qualification, often flag detail, and generally any deployed situation. Accordingly, the soldier cannot perform in a worldwide field environment.

Following this comparison, the board will close and deliberate on its recommendations. The board makes its recommendations by majority vote. Each board member uses an MMRB worksheet to reduce to writing the factors he considered in arriving at his respective vote. The recorder collects the work sheets and prepares a summary that provides an explanation of the board's rationale.[27]

The board has four possible recommendations. First, the board can retain the soldier in his current MOS.[28] The board makes this recommendation when the soldier's profiled condition does not preclude satisfactory performance of the physical requirements of the PMOS in a worldwide field environment. The soldier is fully deployable.

Second, the board can place the soldier in a probationary status.[29] The board makes this recommendation when the soldier's profiled condition has caused an impairment which precludes performing the physical requirements of the PMOS in a worldwide field environment. However, a program of rehabilitation may improve the soldier's condition to the point where he could be worldwide deployable. The probationary period cannot exceed six months.

Third, the board can recommend reclassification or change in specialty of PMOS.[30] This will only be recommended when the soldier can perform capably in another shortage or balanced MOS. The soldier must meet all of the qualifications of the new MOS.

Fourth, the board can recommend referral to the Army's physical disability system.[31] The board makes this recommendation when the limitations of the soldier's profile preclude satisfactory performance in any MOS in a worldwide field environment.

The soldier will be informed of the board's findings and recommendations following the hearing. The soldier may submit a written rebuttal to the board's recommendations, but the rebuttal must be submitted to the board within two working days after the board adjourns. Following the expiration of the opportunity for rebuttal, the action is forwarded to the personnel division for actions commensurate with the findings.[32]

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23. *Id.*

24. The regulation covering legal assistance operations does not address MMRBs as a type of legal assistance service provided. It does, however, indicate that a legal assistance attorney may provide PEB counseling as an optional service, if time and the number of attorneys permits. *See* U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program, para. 3-6g(4)(q) (10 Sept. 1995).

25. Parker, *supra* note 19, at B-7.

26. This is a critical stage in an MMRB. Each PMOS has required physical tasks that soldier's must perform. If a soldier cannot perform one of the tasks of his PMOS, the board must determine whether the skill is critical to the PMOS. If the skill is not critical, the board may recommend that the soldier be monitored but returned to his PMOS.

27. In addition, if the board recommends reclassification or referral to an MEB or PEB, the summary will provide the circumstances which preclude the soldier from performing in his PMOS. The summary will also provide a concurrence or non-concurrence with the commander's recommendation regarding the soldier. *See* AR 600-60, *supra* note 1, para. 3-4a(3).

28. Parker, *supra* note 19, at B-8.

29. *Id.*

30. *Id.* at B-9.

31. *Id.*

The Legal Review

A review of the board proceedings is required. A member of the MMRBCA's staff in the rank of major or higher must conduct the review.[33] The regulation does not require that a judge advocate conduct the review. In practice, however, MMRBs are not staffed to the MMRBCA without judge advocate legal concurrence.

A legal review of an MMRB can be tedious. Each brigade that initiates an MMRB uses a different format, which often sidesteps certain provisions of the regulation. While the regulation itself is generally clear, commands have a tendency to overlook basic regulatory provisions. As a result, the MMRB recommendations cannot be approved; sometimes, an MMRB must be returned for initiation of a new board. While the command can easily fix these mistakes, the delay in processing the action might produce tremendous inconvenience for the soldier. Once an MMRB is reviewed and found to be legally sufficient, it should become the command's prototype for future boards.

The appendix to this note contains an MMRB checklist that provides practitioners with the basic standards for legal review. If each MMRB reviewed complies with the checklist, the review required by regulation will be accomplished.

Conclusion

An MMRB is but a small part of the overall physical disability system in the Army. The goals of the MMRB system are to achieve retention of a quality force and to ensure effective transition of members who cannot satisfactorily perform in a worldwide environment. The legal review of an MMRB is only one of many actions that an administrative law attorney will conduct. If effectively conducted, however, the legal review of an MMRB can be accomplished in a timely fashion with very few problems. A timely and properly conducted legal review can ultimately assist in the overall goal of retaining only the best of the force.

32. *See generally* AR 600-60, *supra* note 1, paras. 3-6 through 3-7.

33. *See id.* para. 3-5a.

MMRB CHECKLIST

1. The regulation governing an MMRB is *AR 600-60, Physical Performance Evaluation System*. This checklist is not a substitute for the regulation.

2. In accordance with *AR 600-60*, para. 3-5b, review of these board proceedings must ensure that:

a. The soldier received a full and fair hearing;

b. Proceedings of the MMRB were conducted IAW *AR 600-60*; and

c. Records of the case are accurate and complete.

3. The cases must be reviewed by a major or above.

4. MMRB review checklist:

a. Was the convening authority authorized to convene the board?

(1) In accordance with *AR 600-60*, para. 3-1, the convening authority must be a general court-martial convening authority.

(2) If the convening authority is not a GCMCA, check to see if a proper delegation has been done IAW para. 3-1.

b. Was the board properly appointed?

(1) In accordance with *AR 600-60*, para. 3-2b, the following members must be on the board:

(a) president (0-6), voting;

(b) medical officer (0-5 or above), voting;

(c) 2 board officers (combat arms, combat support, or combat service support officers, 0-5), voting; and

(d) noncommissioned officer (command sergeant major), voting (an additional 0-5 replaces the CSM if an officer is appearing before the board).

(2) Are voting members senior to the soldier?

(3) Voting members are not judge advocates, chaplains, or medical corps officers.

(4) Is there a personnel officer (commissioned, warrant, or DA civilian) serving as an adjutant (nonvoting)?

(5) Is there an enlisted member serving as a recorder (nonvoting)?

c. Did the soldier receive written notification of the board, IAW *AR 600-60*, para. 3-3a(5)(a)? Is a copy of the notice included in the file? A sample notification is found at Figure 3-3, *AR 600-60*.

d. Did the soldier acknowledge notification of the board, in writing, IAW AR 600-60, paragraph 3-3a(5)(d)? Is a copy included in the file? Sample acknowledgment is found at Figure 3-4, *AR 600-60.*

e. Did the soldier's unit commander write an evaluation of the soldier's physical capabilities and the impact of the profile on the full range of PMOS duties, as required by *AR 600-60*, para. 3-3c?

f. In accordance with *AR 600-60*, para. 3-4a, does the summary of board proceedings contain, at a minimum:

(1) A detailed explanation of the board's rationale for its recommendation;

(2) Circumstances or evidence that documents how the soldier's condition prevented performance in his PMOS (if reclassi-

fication or referral to an MEB or PEB is recommended); and

(3) Concurrence or nonconcurrence with the commander's evaluation of the soldier's ability to perform and why?

g. Does the file reflect that the board compared the physical tasks that the soldier is incapable of performing with the physical requirements of the soldier's PMOS, IAW *AR 600-60*, para. 3-3d(8)?

h. Did the MMRB recommend one of the following, IAW *AR 600-60*, para. 3-4b:

(1) Retain the soldier in his current MOS;

(2) Place the soldier in a probationary status to monitor the impairment, for a period not to exceed 6 months;

(3) Reclassify; or

(4) Refer to an MEB/PEB?

i. In accordance with *AR 600-60*, para. 3-4c, was the soldier informed that he may submit a written rebuttal to any of the findings and recommendations within two working days after the board adjourns?

An Approach to Cross-Examination[1]
"It's a Commando Raid, not the Invasion of Europe."[2]

After a lengthy, relatively uneventful direct-examination, the military judge turns to you and dryly asks, "Counsel, do you care to cross-examine this witness?" All eyes in the members' box quickly focus on you. Without hesitation, you jump to your feet and firmly state, "Yes, your honor!" As an advocate, you know that your role is to attack the opponent's case zealously, which means that you must cross-examine this witness, but deep inside, you feel somewhat uncertain, apprehensive, and even a little scared. Of all phases of trial, cross-examination is your weakest advocacy skill. These feelings, however, are suppressed by the overwhelming desire to hear yourself talk. After all, you are a lawyer; lawyers must advocate; and you cannot advocate unless you talk. With feigned confidence, you gather your papers, stride to the podium, and begin, uncertain of what is about to come.

The decision to cross-examine the witness in the above hypothetical may be correct, but the thought process is not correct. Undoubtedly, cross-examination is one of the most difficult trial advocacy skills to master. Few attorneys have the raw talent to conduct an effective, impromptu cross-examination; most struggle. There are numerous factors that impact counsel's conduct of cross-examination, including talent, experience, preparation, organization, and form.[3] Some of these factors are especially conducive to learning and development through planning and practice; some are not. This note addresses one aspect of cross-examination that can be comfortably learned—organization. Regardless of talent and experience, organized trial practitioners can confidently approach cross-examination.

There are three phases to organizing a cross-examination. First, conceptualize the entire case. Ask yourself: "What argument am I going to make about this witness during my summation?" Second, determine what specific factors (attack points) support the argument. Finally, draft particular questions that develop each attack point. Appendix A depicts this three-step approach to cross-examination in a simple, one-page format.

Preparation complements this organized approach to cross-examination. Ideally, you will have a list of the opponent's witnesses well in advance of trial. After interviewing the witnesses and reviewing their statements, you can deliberately prepare and rehearse your cross-examination. Preparation, however, should not stifle flexibility. Unexpected situations often arise in the courtroom. You must be able to react and to adapt to the unforeseen. The three-step approach to cross-examination not only serves as a vehicle for the well-prepared cross, but also can aid in responding to the unexpected.

Argument

The first step is to decide what argument you are going to make about the witness. This requires you to think about the "big picture." Consider how this witness supports your theory and theme of the case. Determine what you are going to tell the fact finder about this witness during the argument. You may decide that you are not going to make any argument about this witness. If so, consider not cross-examining the witness. If, however, you are going to make reference to this witness during the argument, draft one or two sentences that define the argument about the witness. This method is similar to your thought process for deciding the theory and theme of the case, only instead of considering the entire case, you are focusing on one witness. If possible, limit the number of arguments to one or two per witness.[4]

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1. In the acknowledgment section of his book, *McElhaney's Litigation*, Professor James McElhaney discusses an inescapable aspect of writing about trial advocacy. "Everything in [this book] came from someone else. That kind of massive appropriation of other people's material is called scholarship." James W. McElhaney, McElhaney's Litigation ix (1995). This note requires a similar disclaimer. I have tried to acknowledge various sources. Beyond these direct citations, I also acknowledge lessons repeated herein that were learned from previous supervisors, colleagues, and opponents in the courtroom.

2. Videotape: Irving Younger: The Art of Cross-Examination (Cornell University, 1975) (on file with the Audiovisual Department, The Judge Advocate General's School, U.S. Army).

3. *See id. See generally* The Advocacy Trainer: A Manual for Supervisors, tab B, module 2 (1997); Steven Lubet, Modern Trial Advocacy (2d ed. 1997); Thomas A. Mauet, Trial Techniques (4th ed. 1996); James W. McElhaney, McElhaney's Trial Notebook (3d ed. 1994).

4. This is a fluid concept. Limiting the number of arguments to one or two per witness keeps the cross-examination focused and manageable for both the listener and the practitioner. Some witnesses, however, may lend themselves to several arguments. For example, when cross-examining the accused, trial counsel may have four or five arguments. It may not be too confusing or tenuous to develop all four or five arguments. Remember, though, the touchstone for crafting arguments about witnesses is your theme and theory. Any argument you decide upon should tie into your theme and theory of the case in some way.

Attack Points

The second step is to identify one or more factors that support your argument. These factors are called attack points. Attack points are concise statements that characterize a significant element of the argument you will make about the witness. If possible, limit the number of attack points for each witness to no more than three per argument. Once determined, arrange the attack points in the order in which you expect to address them in your cross-examination. Place the attack points with the greatest impact and import at the beginning and end of your questioning. This accommodates the concepts of primacy and recency.[5]

Specific Questions

The final step is to draft specific questions that develop each attack point. Pay attention to the form of the question. Each question should be a short, single-fact, leading question.[6] This permits you to control the witness. Remember, you do not want to rehash the direct examination. Rather, you want to extract testimony that supports your case, which can only be done if you are in control.

Vary the form of the question. Alter the use of tags.[7] Using one style of questioning is distracting and boring. Use inflection and modulation to strengthen the questioning; these are effective means of highlighting key points and keeping the listener interested.[8]

Ask enough questions to develop each attack point fully, but avoid asking the ultimate question. For example, when attacking a witness' perception due to inadequate lighting, you would not ask the witness: "You couldn't see because the lighting was bad, could you?" This is your attack point—the ultimate point you want to argue to the fact-finder about this witness. Instead, ask questions that solicit the ammunition you need to argue the attack point: "You were outside"; "It was midnight"; "It was rainy"; "You were in the woods"; "There were no streetlights." Based on these questions, you can persuasively argue your attack point: the witness could not clearly see what happened.

Finally, avoid asking questions to which you do not know the answer. If you follow this rule, you enhance your ability to control the cross-examination and, more importantly, to limit exposure to the unexpected.

To illustrate this cross-examination methodology, consider the following hypothetical. You are the defense counsel. Mrs. Smith, a key government witness, will testify that she saw your client stab the victim. Your theory of the case is mistaken identity. During the summation, you will argue that Mrs. Smith's ability to perceive the crime was poor and that, therefore, her eyewitness identification of your client is unreliable. As you reflect on this argument, you identify several attack points: (1) the lighting was bad; (2) she was too far away; and (3) the event happened too fast. After arranging these attack points in the order that you intend to present them (remembering primacy and recency), you begin drafting specific questions that develop each attack point. Appendix B portrays the above hypothetical using the suggested one-page format.

Conclusion

The three-step approach does not provide the end-all for effective cross-examination. It does, however, provide an orderly approach to cross-examination—an approach that permits an advocate to decide with confidence whether to conduct cross-examination and, if so, how best to conduct it. Further, this approach furnishes a framework for cross-examining any type of witness, from an expert witness to a simple character witness. When this approach is employed, the feelings of uncertainty, apprehension, and fear will subside, and counsel can unleash a planned, triumphant "commando raid." Major Sitler, USMC.

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5. An audience best remembers those points presented first (primacy) and last (recency) in a lecture. It makes sense, therefore, to present your strongest points at the beginning and end of cross-examination. These will be the points that the fact-finder recalls most vividly during deliberation.

6. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(c) (1995).

7. In cross-examination, an advocate uses leading questions with or without "tags." A "tag" either begins or ends the question and takes on many forms, for example, didn't you?, isn't it true?, isn't that correct? An example of a leading question using a tag is: "You own a car, don't you?" The tag is "don't you?" An example of a leading question without a tag is: "You own a car." To be leading, however, the inflection must fall. If the inflection does not fall in a "no tag" question, the questioner seems uncertain of the answer, which invites an explanation from the witness. *See* THE ADVOCACY TRAINER, *supra* note 3, tab B, module 2.

8. Inflection is a change in pitch or loudness of the voice. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 620 (1990). Modulation is the use of inflection to communicate meaning. *Id.* at 762. Using inflection and modulation will not only make your questioning more interesting, but also will allow you to emphasize key points. Consider the impact of inflection on the following statement. "***I*** never said I would give you money." "I never said I would give you ***money***." The first version acknowledges that someone said that money would be given, but it was not the person making the statement. The second version indicates that the person making the statement said that he was going to give the witness something, but it was not money. As illustrated, inflection and modulation can give new meaning to an otherwise dull cross-examination question. *See* THE ADVOCACY TRAINER, *supra* note 3, tab B, module 2.

Appendix A

WITNESS: ____

ARGUMENT:

ATTACK POINTS:

1.

2.

3.

Appendix B

WITNESS: Mrs. Smith

ARGUMENT: Her eyewitness identification is unreliable.

ATTACK POINTS:

1. The lighting was bad:

- You were outside
- Standing in a field
- It was midnight
- It was rainy
- You didn’t have a flashlight
- There were not streetlights
- There was no moonlight
- It was too dark

2. She was too far way:

- The field was a football field
- It’s big (100 yds x 50 yds)
- You were standing in the middle of the field
- The attack took place at the edge of the field
- You were about 50 yds away.

3. The attack happend too fast:

- You lost your glasses
- In the filed looking for your glasses
- heard yelling
- Looked up
- saw a scuffle (2 people)
- One person fell
- The other an away
- From the time you looked up until person was out of site less than 5 sec.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in environmental law. The latest issue of the *Bulletin*, volume 5, number 6, is reproduced in part below.

Changes in Utility Infrastructure Raise NEPA Consideration

The Army continues its efforts to change how it operates its utility infrastructure. Many installations are trying to get out of the business of providing installation utility services, either by contracting out those services or by transferring those operations to other entities, either private or governmental. Several issues have arisen concerning the appropriate environmental documentation under the National Environmental Policy Act[1] for these transfer actions.

Army Regulation (*AR*) *200-2*[2] provides two potential categorical exclusions (CXs) that installations may use. While each situation must be evaluated on its individual facts, CX A-15[3] may be appropriate when the utility is being contracted out under the provisions of *Department of Defense Directive 4100.15*.[4] For situations in which the Army has not done a complete divestiture of the property, environmental law specialists should consider the use of CX A-20[5] and ensure completion of a record of environmental consideration for such actions. The list of categorical exclusions in the pending revision of *AR 200-2* is expected to address situations in which there is a total divestiture of the utility. Installation environmental law specialists should consult their major command environmental law specialist or the Environmental Law Division concerning individual situations, as appropriate. Colonel Rouse.

Use of Multidisciplinary Army Teams on Environmental Issues

The Environmental Protection Agency (EPA) recently commended a multidisciplinary Army team that focused on ozone protection. The EPA awarded United States Army Pacific (USARPAC) the "1997 Stratospheric Ozone Protection Award" in the corporate category. This Army team provides an example of the success of the multidisciplinary approach to environmental issues.

The team consisted of four individuals who represented the acquisition, logistics, engineering, and legal communities. Their cross-functional, integrated approach conveyed the message to subordinate commands within the USARPAC and to the EPA that ozone depleting compounds are a legitimate concern to the Army.

The team prepared the approach, methodology, training plan, assessment plan, and compliance plan. The team traveled to all major subordinate commands in Hawaii, Japan, and Alaska. At each installation, the team briefed the commanding general and provided him with instruction and training on his roles and responsibilities as a senior approving official. The team also performed other tasks on the site visits, including training, evaluation, town hall meetings, roundtable discussions, reviewing contracts, and assisting in drafting elimination plans.

The Pacific Command's Environmental Compliance Action Team will follow up the team's efforts. The Environmental Compliance Action Team is also interdisciplinary and operates under the auspices of the USARPAC Inspector General. Mr. Nixon.

EPA's Monitored Natural Attenuation Policy

On 18 November 1997, the Environmental Protection Agency (EPA) issued a draft interim final policy, *Office of Solid Waste and Emergency Response (OSWER) Directive 9200.4-17*, entitled Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites.[6] The stated purpose of the directive is to clarify the EPA's policy concerning the use of monitored natural attenua-

1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

2. U.S. Dep't of Army, Reg. 200-2, Environmental Effects of Army Actions (23 Dec. 1988) [hereinafter AR 200-2].

3. *Id*. app. A. The A-15 categorical exclusion covers "[c]onversion of commercial activities (CA) to contract performance of services from in-house performance under the provisions of *DOD Directive 4100.15*." *Id.*

4. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).

5. AR 200-2, *supra* note 2, app. A. Categorical exclusion A-20 refers to granting of easements for various utility infrastructure.

6. Office of Solid Waste, Emergency Response Dir. 9200.4-17, Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites (Dec. 1, 1997) [hereinafter Emergency Response Dir. 9200.4-17].

tion for the remediation of contaminated soil and groundwater at sites regulated by the OSWER. This includes programs managed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);[7] the Resource Conservation and Recovery Act (RCRA);[8] corrective action; and the RCRA underground storage tank provisions. The effective date of the directive was 1 December 1997.

The *OSWER Directive 9200.4-17* is a policy document that provides guidance to the EPA staff, the public, and regulated entities on how the EPA plans to implement national policy on the use of natural attenuation.[9] As guidance, the directive does not carry the force of statute or regulation and does not impose legally binding requirements on the regulated community. The EPA intends for the directive to encourage consistency in the proposal, evaluation, and approval of monitored natural attenuation remedies.[10] The document does not, however, provide technical guidance on how to evaluate the remedies. In the directive, the EPA admits that there is a "relative lack" of EPA guidance concerning implementation of monitored natural attenuation remedies.[11] The EPA has not yet published specific technical guidance to support the evaluation of monitored natural attenuation for the OSWER sites.

The EPA is careful to say that monitored natural attenuation should be used "very cautiously" as the exclusive remedy at contaminated sites.[12] The EPA views natural attenuation as suitable more often for use in conjunction with active remediation or as a follow-on to other remedial measures.[13] The EPA supports the evaluation and comparison of all viable remediation methods with the consideration of natural attenuation as one alternative for achieving site-specific remediation objectives. The EPA emphasizes that the use of the natural attenuation remedy does not signal a change in the OSWER's remediation objectives of controlling source materials and restoring contaminated groundwater.[14]

Natural attenuation is defined in the directive to "include a variety of physical, chemical, or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, volume, or concentration of contaminants in soil or groundwater."[15] The policy lists three ways through which natural attenuation may reduce the risk posed by site contamination: biodegradation may convert contaminants to less toxic forms, dilution or dispersion may lower concentration levels, and sorption to soil or rock may reduce contaminant mobility or bioavailability.[16] The EPA states their preference for natural attenuation processes that degrade contaminants. For this reason, the EPA expects that sites that have a low potential for plume generation and migration are the best candidates for monitored natural attenuation.[17]

The directive addresses three categories of pollutants that are receptive to natural attenuation: petroleum-related contaminants, chlorinated solvents, and inorganics.[18] Although biological degradation is well documented at petroleum fuel spills, the policy notes that natural attenuation alone is usually not adequate to remediate a petroleum release site. This is true because residual contamination will typically remain following degradation of a plume, and it may pose a threat to human health or the environment. The EPA recommends that source removal and institutional controls may be necessary, in addition to natural attenuation, at petroleum sites.[19]

Due to the nature and distribution of chlorinated solvents, natural attenuation may not be an effective remedial option. These contaminants are capable of biodegradation; however, the conditions that favor degradation of chlorinated solvents may not readily occur. In addition, a solvent spill often consists

7. 42 U.S.C.A. §§ 9601-9675 (West 1997).

8. *Id.* §§ 6901-6992k.

9. Emergency Response Dir. 9200.4-17, *supra* note 6, at 1.

10. *Id.*

11. *Id.* at 3.

12. *Id.* at 1.

13. *Id.*

14. *Id.* at 2.

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 4.

18. *Id.* at 4-6.

19. *Id.*

of a number of contaminants, including some that are not degradable.[20]

The toxic form or concentration of inorganic contaminants in both groundwater and soil may be reduced by natural attenuation. Sorption and oxidation–reduction are the two methods that the EPA details as the most effective in reducing the mobility, toxicity, or bioavailability of inorganic contaminants.[21]

The EPA recognizes that natural attenuation is not a new remedy; it has been an element in Superfund groundwater cleanup since 1985.[22] The policy cites the new scientific understanding of the mechanisms that contribute to natural attenuation for the heightened interest in this as a cleanup approach.[23] The EPA clarifies its position that natural attenuation is not to be considered a presumptive remedy at any site, but that it is appropriate as a remediation method only where its use is protective of human health and the environment.[24] In addition, the policy stresses that natural attenuation must be capable of achieving site-specific objectives within a reasonable timeframe, as compared to other methods.[25]

The policy goes into great detail concerning the requirement for a demonstration of the efficacy of natural attenuation.[26] The decision to employ natural attenuation must be thoroughly supported with site-specific characterization data and analysis. The EPA stresses that the degree of site characterization required to support the evaluation of natural attenuation is actually more detailed than necessary to support active remediation.[27] Throughout the directive, the EPA dispels the notion that natural attenuation is a "no action" remedy.

The complete directive may be accessed at http://www.epa.gov/OUST/directive/d9200417.htm. Major Anderson-Lloyd.

Horsehead Resources Development Co. v. EPA

The United States Court of Appeals for the District of Columbia Circuit recently enunciated important precedent that should lay to rest any confusion over the window of opportunity to file a suit that challenges any rulemaking promulgated pursuant to the Resource Conservation and Recovery Act (RCRA).[28] In *Horsehead Resources Development Co. v. Environmental Protection Agency*,[29] the court ruled that an Environmental Protection Agency (EPA) hazardous waste regulation did not become final and, therefore, could not be challenged until it was published in the *Federal Register*.

In *Horsehead Resources Development Co.*, an electric arc furnace dust recycler challenged an EPA rule that excludes electric arc dust from the RCRA's hazardous waste list when treated by a newer, cheaper alternative to recycling.[30] The instant petition was filed after the EPA administrator signed the rule, but twelve days before it was printed in the *Federal Register*.[31]

Under the RCRA, petitions for review of an EPA regulation may be filed with an appeals court "within ninety days from the date of promulgation."[32] The statute does not further explain the exact meaning of promulgation. Horsehead argued that the statute establishes only a filing deadline and that, thus, a petition for review may be filed at any time after the EPA takes final action, such as signing the rule. Horsehead argued in the alternative that, if the statute established a window rather than a deadline, the window opened when the rule was signed.[33]

The court disagreed with this expansive definition, citing precedent set in 1988 in *National Grain & Feed Association,*

20. *Id.* at 5.

21. *Id.* at 6.

22. *Id.* at 8.

23. *Id.*

24. *Id.*

25. *Id.* at 10.

26. *Id.* at 10-13.

27. *Id.* at 11.

28. 42 U.S.C.A. §§ 6901-6992k (West 1997).

29. 130 F.3d 1090 (D.C. Cir. 1997).

30. *Id.* at 1091.

31. *Id.*

32. 42 U.S.C.A. § 6976(a)(1).

Inc. v. OSHA.[34] The court held that *National Grain* established a default rule that if an agency does not define "promulgation" through a rule, the term "is accorded its ordinary meaning," which the court determined was publication in the *Federal Register*.[35]

Based on this decision, environmental law specialists can advise with greater certainty concerning the potential timing of challenges of this nature. Absent any unlikely attempts by the EPA to attach a special meaning to the term "promulgation" through future rulemaking, an area that had been substantially muddied is now significantly clearer. Major Egan.

Fines and Penalties Update

At the close of the second quarter of fiscal year (FY) 1998, four new fines had been assessed against Army installations. Of the 168 fines assessed against Army installations since FY 1993, Resource Conservation and Recovery Act[36] (RCRA) fines (94) continue to predominate, followed by the Clean Air Act[37] (CAA) (43), the Clean Water Act[38] (22), the Safe Drinking Water Act[39] (6), and, finally, the Comprehensive Environmental Response, Compensation, and Liability Act[40] (3).

Of particular note in the latest reporting quarter, the fines assessed under the CAA have continued to be assessed almost as frequently as those assessed under the RCRA. Because these two statutes have differing waivers of sovereign immunity, the scope of federal liability also differs. An installation will pay punitive fines and penalties assessed under the RCRA but not under the CAA, which can create some confusion for state regulators. Installation environmental law specialists should take the opportunity to advise state agencies early on that payment of fines and penalties by Army installations is governed by the Supreme Court decision in *Department of Energy v. Ohio*. [41]

During the second quarter of FY 1998, there were several unreported fines from various installations. One installation attempted to justify the failure to report on the grounds that no notice of violation had been issued. By regulation, "any actual *or likely* [enforcement action] . . . that involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact *will* be reported through technical legal channels" to major command environmental law specialists and to the Environmental Law Division "*within 48 hours, followed by written notification within 7 days, and report of significant development thereafter.*"[42] Major DeRoma.

33. *Horsehead Resource Dev. Co.*, 130 F.3d at 1092.

34. 845 F.2d 345 (D.C. Cir 1997).

35. *Horsehead Resource Dev. Co.*, 130 F.3d at 1093.

36. 42 U.S.C.A. §§ 6901-6992k (West 1997).

37. *Id.* §§ 7401-7671q.

38. 33 U.S.C.A. §§ 1251-1387 (West 1997).

39. 42 U.S.C.A. §§ 300f through 300j-26 (West 1997).

40. *Id.* §§ 9601-9675.

41. 503 U.S. 607 (1992).

42. U.S. Dep't of Army, Reg. 200-1, Environmental Protection and Enhancement, para. 15-7c (21 Feb. 1997) (emphasis added).

Claims Report

United States Army Claims Service

Personnel Claims Notes

1997 Table of Adjusted Dollar Value

The table below updates the 1996 Table of Adjusted Dollar Value (ADV) printed in the May 1997 edition of *The Army Lawyer*.[1] In accordance with *Army Regulation 27-20*, paragraph 11-14c, and *Department of Army Pamphlet 27-162*, paragraph 2-39e, claims personnel should use this table only when no better means of valuing property exists.

Year Purchased	Multiplier for 1997 Losses	Multiplier for 1996 Losses	Multiplier for 1995 Losses	Multiplier for 1994 Losses	Multiplier for 1993 Losses
1996	1.02				
1995	1.05	1.03			
1994	1.08	1.06	1.03		
1993	1.11	1.09	1.05	1.03	
1992	1.14	1.12	1.09	1.06	1.03
1991	1.18	1.15	1.12	1.09	1.06
1990	1.23	1.20	1.17	1.13	1.11
1989	1.29	1.26	1.23	1.20	1.17
1988	1.36	1.33	1.29	1.25	1.22
1987	1.41	1.38	1.34	1.30	1.27
1986	1.46	1.43	1.39	1.35	1.32
1985	1.49	1.46	1.42	1.38	1.34
1984	1.55	1.51	1.47	1.43	1.39
1983	1.61	1.57	1.53	1.49	1.45
1982	1.66	1.63	1.58	1.54	1.50
1981	1.77	1.73	1.68	1.63	1.59
1980	1.95	1.90	1.85	1.80	1.75
1979	2.21	2.16	2.10	2.04	1.99
1978	2.46	2.41	2.34	2.27	2.22
1977	2.65	2.59	2.51	2.45	2.38
1976	2.82	2.76	2.68	2.60	2.54
1975	2.93	2.92	2.83	2.75	2.69
1974	2.26	3.18	3.09	3.01	2.93
1973	3.61	3.53	3.43	3.34	3.26
1972	3.84	3.75	3.65	3.55	3.46
1971	3.96	3.87	3.76	3.66	3.57

1. *See* Personnel Claims Note, *1996 Table of Adjusted Dollar Value*, ARMY LAW., May 1997, at 80.

Do not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

To determine an item's value using the ADV table, find the column for the calendar year in which the loss occurred. Multiply the purchase price of the item by the "multiplier" in that column for the year in which the item was purchased. Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide[2] (ALDG). For example, the adjudicated value is $219 for a comforter purchased in 1990 for $250 and destroyed in 1995. To determine this figure, multiply $250 times the 1990 "year purchased" multiplier of 1.17 in the "1995 losses" column for an "adjusted cost" of $292.50. Next, depreciate the comforter as expensive linen (item number 88, ALDG) for five years at a five-percent yearly rate to arrive at the item's value of $219.

The U.S. Department of Labor calculates the cost of living at the end of each year, and the ADV table is derived from those figures. For losses occurring in 1998, use the "1997 losses" column.

This year's ADV table only covers the past twenty-five years. To determine the ADV for items purchased prior to 1971 or for any other questions concerning this table, contact Mr. Lickliter at the U.S. Army Claims Service, telephone number: (301) 677-7009, extension 313. Mr. Lickliter.

Claims Office Inspections

Inspections are often critical to adjudicate claims properly and to pursue recovery against carriers. Claims office personnel should conduct inspections when the inventory contains an indication that the carrier exaggerated or overstated the preexisting damage on the service member's property. One such indicator is a "ditto mark" inventory, in which the carrier lists the same type of preexisting damage (for example, "scratched") for every piece of furniture.

The United States Army Claims Service (USARCS) recently received a claim file that provides a good example of the importance of an inspection by the claims office. The claim file contained a six-page inventory, which the carrier prepared on 29 June 1995. The service member believed that the inventory descriptions of the condition of his property were grossly misstated. The service member indicated in the remarks section on most pages of the inventory that damage notes were erroneous. On one page of the inventory, he noted, "Damage & exceptions have been grossly misstated on this form, an inspector from U.S. Army Trans. is requested for confirmation." Unfortunately, a transportation inspector did not arrive.

Early the next morning, the service member called the transportation office and spoke with a quality control inspector. After hearing the service member's explanation of what had occurred, the quality control inspector provided the service member with a statement that noted, "[The service member] made his comments in the remarks section disagreeing with the exceptions. This office will . . . insure payment is adjusted for damaged goods that are apparent when delivery is made."

The service member appeared at the destination claims office and presented the statement from quality control, and claims office personnel acknowledged receipt of the statement on the chronology sheet. Unfortunately, the claims office personnel failed to perform an inspection; trouble ensued.

The claims office paid the service member's claim. The Army subsequently submitted a demand for $2350 against the carrier. The carrier contended that most of the damage was preexisting. The claim was ultimately offset for $1962, and the carrier appealed the offset.

An attorney at the USARCS asked an Air Force inspector at the service member's current duty station, Moody Air Force Base, Georgia, to conduct an inspection. The USARCS requested an inspection of the items that the service member had not claimed, as well as items that the service member had claimed.

The Air Force inspector inspected five chairs that the service member had not claimed. The inspector indicated that the carrier's description of the damage for all of the chairs were practically identical. The carrier's annotations on the inventory noted that all of the chairs were rusted, stained, and soiled. However, the Air Force inspector found no rust on any of the chairs. The inspector also indicated that the scratches listed for each chair were inaccurate, and though the chairs reflected some normal wear and tear, it was not consistent with the carrier's inventory descriptions.

The Air Force inspector also inspected a triple dresser that the service member had not claimed. The carrier's annotations on the inventory reflected that the dresser was scratched, chipped, gouged, and dented on the top. When the Air Force inspector looked on top of the dresser for the gouge, he could not find even a scratch; the top of the dresser was immaculate. The last unclaimed item the inspector looked at was a chest, which the inventory described as scratched, chipped, loose, cracked, rubbed, and stained. The Air Force inspector concluded that the crack did not exist and that there was no sign of staining.

For the items that the service member had claimed, the carrier contended that most of the damage was preexisting. The Air Force inspector concluded that most of the damage was new and that many of the carrier's inventory descriptions were exag-

2. *See* U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS PROCEDURES, tbl. 11-1 (1 Apr. 1998) [hereinafter DA PAM 27-162].

gerated and incorrect. The Air Force inspector concluded that the carrier was "over zealous" when describing the service member's property on the inventory.

Claims office inspections are vital, especially when a service member alleges that the carrier incorrectly described preexisting damage. In this case, many problems could have been avoided if the claims office had inspected the property when the service member initially filed his claim. Ms. Schultz.

New Rules on Denial of Claims for Fraud

The new claims regulation and pamphlet expand a staff judge advocate's authority to deny claims based on fraud. Under the old claims regulation and pamphlet, a staff judge advocate could deny a specific line item based on fraud.[3] However, a staff judge advocate could not deny a claim in its entirety because of fraud unless he determined that the entire claim was "substantially tainted by fraud."[4] Under the new regulation and pamphlet, a staff judge advocate can deny an entire claim based on fraud, whether or not the fraud "substantially" taints the rest of the claim.[5]

The new regulation and pamphlet require staff judge advocates to weigh the extent of the fraud carefully before denying a claim in its entirety. Staff judge advocates are still given the option of denying only the line item affected by the fraud if the deception is relatively insignificant.[6] The purpose of removing the "substantially tainted by fraud" language from the regulation was to give staff judge advocates more discretion when deciding whether it is appropriate to deny a claim in its entirety.[7]

The new regulation and pamphlet still require clear proof of fraud before a claim may be denied. Claimants should be presumed honest; absent clear evidence to the contrary, it should be assumed that a claimant was mistaken rather than dishonest.[8] Replacement costs that appear to be inflated and purchase dates that appear to be too close to the date of pickup usually will not constitute clear evidence of fraud. Altered estimates, on the other hand, may provide sufficient evidence of fraud to justify denial of a claim. Lieutenant Colonel Masterton.

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3. U.S. Dep't of Army, Pam. 27-162, Legal Services, Claims, para. 2-46c (15 Dec. 1989).

4. U.S. Dep't of Army, Reg. 27-20, Legal Services, Claims, para. 11-6k (15 Dec. 1989).

5. The new version of the regulation states that "[t]he head of an area claims office may completely deny a claim that he or she determines to be tainted by fraud." U.S. Dep't of Army, Reg. 27-20, Legal Services, Claims, para. 11-6f (31 Dec. 1997).

6. The new version of the Army pamphlet states that "when fraud is detected before payment, the entire claim, or only the line items tainted by fraud, may be denied." DA Pam 27-162, *supra* note 2, para. 11-6f (3).

7. The new version of the Army pamphlet states:

> In deciding whether to deny an entire claim when a claimant has engaged in fraud, the head of an area claims office should consider the nature and extent of the fraud. The decision to deny an entire claim when a claimant has engaged in fraud, however, is within the discretion of the head of an area claims office.

Id. para. 11-6f(3)(b).

8. *See id.* para. 11-6f(1).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1998

July 1998

13-17 July	69th Law of War Workshop (5F-F42).
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
22-24 July	Career Services Directors Conference.

August 1998

3-14 August	141st Contract Attorneys Course (5F-F10).

Note: The 10th Criminal Law Advocacy Course (5F-F34) has been rescheduled to 14-25 September 1998.

~~3-14 August~~	~~10th Criminal Law Advocacy Course (5F-F34).~~
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
14-25 September	10th Criminal Law Advocacy Course (5F-F34).
14-18 September	USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1998

17-18 July ICLE	Environmental Law Summer Seminar Amelia Island Plantation Amelia Island, Florida

1 August ICLE — Nuts and bolts of Family Law
Savannah Marriott
Riverfront Hotel
Savannah, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually

New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December **(Note: this is a recent change)**
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 — Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A301095 — Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 — Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A341841 — Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98 (224 pgs).

AD A333321 — Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).

AD A326002 — Wills Guide, JA-262-97 (150 pgs).

AD A308640 — Family Law Guide, JA 263-96 (544 pgs).

AD A283734 — Consumer Law Guide, JA 265-94 (613 pgs).

AD A323770 — Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (60 pgs).

*AD A332897 — Tax Information Series, JA 269-97 (116 pgs).

AD A329216 — Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).

AD A276984 — Deployment Guide, JA-272-94 (452 pgs).

AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A326316	Model Income Tax Assistance Guide, JA 275-97 (106 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

AD A328397	Defensive Federal Litigation, JA-200-97 (658 pgs).
AD A327379	Military Personnel Law, JA 215-97 (174 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A338817	Government Information Practices, JA-235-98 (326 pgs).
*AD A344123	Federal Tort Claims Act, JA 241-98 (150 pgs).
AD A332865	AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692	The Law of Federal Employment, JA-210-97 (290 pgs).
AD A336235	The Law of Federal Labor-Management Relations, JA-211-98 (320 pgs).

Developments, Doctrine, and Literature

AD A332958	Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A302312	Senior Officer Legal Orientation, JA-320-95 (297 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967	Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

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

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

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

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any

part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for Worl d Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software

may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
3MJM.EXE	January 1998	3d Criminal Law Military Justice Managers Deskbook.
4ETHICS.EXE	January 1998	4th Ethics Counselors Workshop, October 1997.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
21IND.EXE	January 1998	21st Criminal Law New Developments Deskbook.
22ALMI.EXE	March 1998	22d Administrative Law for Military Installations, March 1998.
46GC.EXE	January 1998	46th Graduate Course Criminal Law Deskbook.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide

97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
98JAOACA.EXE	March 1998	1998 JA Officer Advanced Course, Contract Law, January 1998.
98JAOACB.EXE	March 1998	1998 JA Officer Advanced Course, International and Operational Law, January 1998.
98JAOACC.EXE	March 1998	1998 JA Officer Advanced Course, Criminal Law, January 1998.
98JAOACD.EXE	March 1998	1998 JA Officer Advanced Course, Administrative and Civil Law, January, 1998.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
145BC.EXE	January 1998	145th Basic Course Criminal Law Deskbook.
ADCNSCS.EXE	March 1997	Criminal law, National Security Crimes, February 1997.
ALAW.ZIP	June 1990	*The Army Lawyer/ Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.

JA210.EXE	January 1998	Law of Federal Employment, May 1997.
JA211.EXE	January 1998	Law of Federal Labor-Management Relations, January 1998.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	March 1998	Government Information Practices, March 1998.
JA241.EXE	May 1998	Federal Tort Claims Act, April 1998.
JA250.EXE	January 1998	Readings in Hospital Law, January 1997.
JA260.EXE	April 1998	Soldiers' and Sailors' Civil Relief Act Guide, April 1998.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.EXE	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.DOC	March 1998	1997 Tax Information Series (Word 97).
JA269(1).DOC	March 1998	1997 Tax Information Series (Word 6).
JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	January 1998	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280P1.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, LOMI, March 1998.
JA280P2.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Claims, March 1998.
JA280P3.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Personnel Law, March 1998.

JA280P4.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Legal Assistance, March 1998.
JA280P5.EXE	March 1998	Administrative & Civil Law Basic Course Handbook, Reference, March 1998.
JA285V1.EXE	March 1998	Senior Officers Legal Orientation Deskbook (Core Subjects), March 1998.
JA285V2.EXE	March 1998	Senior Officers Legal Orientation Deskbook (Elective Subjects), March 1998.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
RCGOLO.EXE	January 1998	Reserve Component General Officer Legal Orientation Course, January 1998.
TAXBOOK1.EXE	March 1998	1997 Tax CLE, Part 1.
TAXBOOK2.EXE	January 1998	1997 Tax CLE, Part 2.
TAXBOOK3.EXE	January 1998	1997 Tax CLE, Part 3.
TAXBOOK4.EXE	January 1998	1997 Tax CLE, Part 4.
TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

5. ***The Army Lawyer* on the LAAWS BBS**

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK"_files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP JULY.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail stroncj@hqda.army.mil.

6. Articles

The following information may be useful to judge advocates:

Kenneth Williams, *Do We Really Need the Federal Rules of Evidence?*, 74 N.D. L. REV. 1 (1998).

Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindess on Terry "Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997).

7. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now

preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

8. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.