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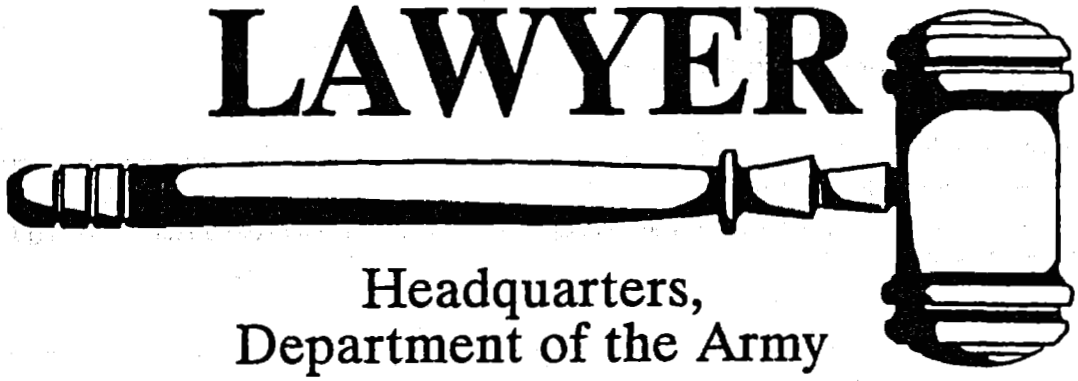

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Criminal Offenses by Juveniles on the Federal Installation: A Primer on 18 U.S.C. § 5032

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"Under our Constitution, the condition of being a boy does not justify a kangaroo court."[1]

"Few of us over the age of eighteen can recall gaining any significantly greater measure of wisdom, insight or skill on the day after our eighteenth birthday which we did not already possess in the very days before that birthday."[2]

Introduction

In August 1981, police found three murder victims at a Camp Lejeune, North Carolina, family quarters. Police suspected Carlton James Smith—the fifteen-year-old brother of one of the victims—of having committed the crimes. Neither the federal nor state prosecutors, however, have been able to prosecute Carlton Smith.[3] In addition to this example, reported cases show that juveniles are committing armed robberies of post exchanges and pizza delivery men. Civilian prosecutors in the juvenile court system will attest to the increase in juvenile crime. Furthermore, as the number of juvenile offenses has increased, so has the violence. Consequently, as installation crime increases, the possibility exists that juveniles will become involved.

Federal statutes allow juveniles to be prosecuted in United States district court. The procedures are complex and require agreement by the United States Attorney General to proceed. The statutes and legislative background prefer state prosecution. If a sixteen or seventeen-year-old commits offenses on an installation and the state is unwilling, or unable, to prosecute, what then? Sometimes, not only does the installation need to try a case because the state has no jurisdiction, but it also wants to seek adult level punishment.

This article provides some background to the juvenile court system. It looks at the statutes, legislative history, and federal case law dealing with offenses by juveniles. This article will not discuss exclusive federal jurisdiction or dual sovereignty. At times, the state authorities can, and should, handle the case. For those occasions when the installation needs to handle the case, however, an understanding of the history that goes with the rules is important.[4]

Philosophy and Historical Perspective

The juvenile justice system in the United States developed around a philosophy of rehabilitation. The emphasis was not on punishing the juvenile for the offense, but on turning him or her around and into a productive member of society.

The current juvenile court structure has its roots in Chicago in 1899.[5] The state juvenile court systems developed around a concept of *parens patriae*[6]—to provide guidance and structure for the juveniles before the court.[7] The new thinking brought with it a new vocabulary. A court held "adjudication hearings" rather than trials. It found juveniles "delinquent" rather than guilty of criminal offenses. The "disposition hearings" could result in orders for "detention" rather than a sentence to a prison term.[8]

During the mid-1960s, the United States Supreme Court became active in reviewing and setting guidelines in juvenile justice matters in *Kent v. United States*.[9] The petitioner, Morris A. Kent, Jr., was arrested at age sixteen for housebreaking,

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[1] Application of Gault, 387 U.S. 1, 28 (1967).

[2] United States v. E.K., 471 F. Supp. 924, 932 (D. Ore. 1979).

[3] These brief facts are drawn from the series of cases before the United States District Court for North Carolina, two opinions of the Fourth Circuit Court of Appeals, and the opinion of the North Carolina court. *See infra* notes 91-103 and accompanying text.

[4] This article is designed as an in-depth examination of prosecuting juveniles as adults in district court. For an overview of this area, however, see Criminal Law Div. Note, *Prosecuting Juveniles as Adults in United States District Court: Some Practical Guidance*, ARMY LAW., July 1991, at 21; CRIMINAL L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-338, UNITED STATES ATTORNEY PROSECUTIONS (Oct. 1993) [hereinafter JA-338].

[5] *Children's Court*, 5 ENCYCLOPEDIA BRITANNICA 514; Application of Gault, 387 U.S. 1, 14-19 (1967).

[6] "Parens patriae" refers traditionally to the role of state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

[7] 47 AM. JUR. 2D § 15 (1969).

[8] Many states also include matters of neglect, dependency, incorrigibility, truancy, guardianship, and adoptions within the juvenile court structure. Given the nature of the federal statutes to be discussed, this article focuses only on "criminal" behavior.

[9] 383 U.S. 541 (1966).

robbery, and rape. Kent later was convicted in district court as an adult for housebreaking and robbery, but found not guilty by reason of insanity on the rape charges.[10] The Court was concerned with how the government apprehended, questioned, detained, and eventually transferred Kent for adult prosecution.[11] The Court noted that the juvenile process is "theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct."[12] In assessing the due process protections for a juvenile in such situations, the Court acknowledged the traditionally "civil" nature of the hearings. The trial court failed to state findings, reasons for a finding of waiver, or rule on defense motions. Consequently, the transfer order did not comport with the district court's statutory requirements or case precedent. The Supreme Court stated "We do not mean . . . the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."[13]

The next major decision in the juvenile justice arena came in *Application of Gault*.[14] Gault was a fifteen-year-old already on probation when the police arrested him for making obscene telephone calls. The Supreme Court considered the sufficiency of the hearings and rights afforded to Gault before his eventual commitment to a juvenile institution. The Court quoted its language from *Kent* that fair treatment of juveniles was "a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution."[15] The Court held that the juvenile must receive notice of the charges, assistance of counsel, protection against self-incrimination, and confrontation of sworn witnesses.[16] No longer was juvenile justice to be a matter solely for the state courts. The Supreme Court recognized that parallels to the "civil" system of juvenile courts and the criminal justice system existed and consequently applied federal constitutional interests.

Federal Juvenile Statutes—History

The current juvenile delinquency statutes originated from 1938 enactments. Other than changes in arrangement and phraseology of the sections in 1948,[17] Congress kept out of the juvenile arena. Widespread amendments occurred, however, with the passage of the Juvenile Justice and Delinquency Prevention Act of 1974[18] (1974 Juvenile Justice Act). The process began in 1972 with a Senate bill designed to reform the federal juvenile justice system. After hearings in May and June 1972, its sponsor modified and reintroduced the bill in February 1973.[19] The Senate Report stated:

> [J]uvenile delinquency continues to present a most difficult challenge to the nation. Juveniles under 18 are responsible for 51 percent of the total arrests for property crimes, 23 percent for violent crimes, and 45 percent for all serious crime. From 1960 to the present, arrests of juveniles under 18 for violent crimes, such as murder, rape, and robbery, increased 216 percent. During the same period, arrests of juveniles for property crimes, such as burglary and auto theft, increased 91 percent . . . . Recidivism rates for juvenile offenders are estimated to range from 60 to 75 percent and higher.[20]

Overall, the bill created a national emphasis on federal leadership in juvenile justice. It authorized new policy agencies and made available grant monies for programs. The bill also amended the delinquency statutes "to guarantee [that] certain basic procedural and constitutional protections to juveniles under Federal jurisdiction . . . reflect [the *Gault*-recognized] due process rights . . . [and] incorporate the rehabilitative concept of a juvenile proceeding."[21] The amendment was to

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[10] *Id.* at 550.

[11] "Transfer" is another term of art for the process of the juvenile court considering the charges and a juvenile's history in making the decision on the proper forum—juvenile or adult court.

[12] *Kent*, 383 U.S. at 554.

[13] *Id.* at 562.

[14] 387 U.S. 1 (1967).

[15] *Id.* at 30-31 (citation omitted).

[16] *Id.* at 59.

[17] *See* 18 U.S.C. §§ 5031-42, Historical and Revision Notes (1988).

[18] Pub. L. No. 93-415, 88 Stat. 1109 (1974), *reprinted in* 1974 U.S.C.C.A.N. 1267.

[19] S. REP. No. 93-1011, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284.

[20] *Id.* at 5285.

[21] *Id.* at 5312.

"provide for the desperately needed Federal leadership and coordination of the resources necessary to develop and implement at the state and local community level effective programs for the prevention and treatment of juvenile delinquency."[22] The 1974 Juvenile Justice Act demonstrated Congress's intent to provide "resources, leadership, and coordination . . . [and] to increase the capacity of State and local governments and public and private agencies to conduct effective juvenile justice and delinquency prevention and rehabilitation programs."[23] Thus, Congress began facing the growing problem of juvenile crime. This approach broke with the history of reserving the matter for the individual states. The 1974 Juvenile Justice Act did not take away any state jurisdiction. It did, however, add to the resources available for the states, and brought the federal statutes up to the standard set by the Supreme Court.

The other significant amendments to the juvenile delinquency statutes occurred in 1984.[24] The House Report on the Crime Control Act stated:

> The essential concepts of the 1974 Act are that juvenile delinquency matters should generally be handled by the States and that criminal prosecution of juvenile offenders should be reserved for only those cases involving particularly serious conduct by older juveniles. The Committee continues to endorse these concepts . . . .
>
> . . . .
>
> . . . The Committee believes that additional, mandatory provisions for treating juveniles as adults are needed.[25]

These amendments made it easier to handle petty offenses. They also added a third category for serious offenses with a substantial federal interest.[26]

The changes worked to enlarge the jurisdiction over juveniles. They decreased the age limit to fifteen (for trial as adults), deleted the felony offense limitation based on a potential ten years imprisonment, and added a mandatory transfer for repeat violent offenders.[27] Additionally, the amendments take a stronger position regarding confidentiality rules. Police now can fingerprint and photograph a juvenile arrested for felony crimes of violence and serious drug offenses.[28]

Current Federal Statutes

Overview

The federal juvenile delinquency statutes are located at Title 18, United States Code, §§ 5031 to 5042. The statutes apply to anyone under the age of eighteen and to acts that would be considered criminal if committed by an adult. A second definitional category allows proceeding against anyone between the ages of eighteen and twenty-one for an act committed before he or she turned eighteen.[29] The essence of these proceedings and the cognizable offenses are found at § 5032.[30] The due process concerns voiced in *Gault* and echoed in the 1974 Juvenile Justice Act are located in the subsequent sections. Police must advise the juvenile of his or her rights and notify the parents of the arrest. Furthermore, a juvenile must receive an initial appearance before the magistrate within a reasonable time.[31] Likewise, the magistrate must appoint counsel and a guardian ad litem (if necessary), and make release determinations.[32]

The statutory conditions for "pretrial" detention are located in § 5035 and speedy trial rules are found in § 5036. Specific

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[22] *Id.* at 5329 (comments from the bill's sponsor, Senator Birch Bayh).

[23] Pub. L. No. 93-415, tit. I, § 102(b), 88 Stat. 1109, 1110, *reprinted in* 1974 U.S.C.C.A.N. 1268 (codified at 42 U.S.C. § 5602 (1988)).

[24] Pub. L. No. 98-473, tit. XII, pt. A, § 1201, 98 Stat. 1837, 2149 (1984), *reprinted in* 1984 U.S.C.C.A.N. vol. 2. This amendment created the problem in the *Smith* case noted in the introduction and discussed *infra* notes 91-103 and accompanying text.

[25] H.R. REP. No. 98-1030, 93d Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3526.

[26] Pub. L. No. 98-473, tit. XII, pt. A, § 1201(a), 98 Stat. 1837, 2149 (1984) (codified as amended at 18 U.S.C. § 5032 (Supp. II 1990)); legislative history *reprinted in* 1984 U.S.C.C.A.N. 3182, 3529.

[27] Pub. L. No. 98-473, tit. XII, pt. A, § 1201(a), 98 Stat. at 2150, *reprinted in* 1984 U.S.C.C.A.N. 3530-31.

[28] Pub. L. No. 98-473, tit. XII, pt. A, § 1201(a), 98 Stat. at 2150, *reprinted in* 1984 U.S.C.C.A.N. 3522.

[29] 18 U.S.C. § 5031 (1988).

[30] *Id.* § 5032 (Supp. II 1990).

[31] *Id.* § 5033 (1988).

[32] *Id.* § 5034 (1988).

time limits for holding the disposition hearing and "official detention" (confinement) guidelines have been created.[33] The statutes also cover the use of juvenile delinquency records,[34] rules on placement of delinquents,[35] and revocation of probation procedures.[36]

Adjudication and Transfer Hearings

Section 5032 contains a number of potential pitfalls for the practicing attorney. This section describes the steps necessary to initiate the charges in district court and to seek transfer for adult prosecution and includes due process and other constitutional protections.

The first paragraph of § 5032 specifies those offenses that the prosecutor may bring in the federal courts against juveniles. For a felony level offense, the Attorney General must certify that one of three categories exists. The first category is that the state juvenile court does not have, or refuses to exercise, jurisdiction over the juvenile and the offense. This most likely would occur either in an exclusive federal jurisdiction or a concurrent jurisdiction installation with unresponsive civilian authorities.[37] Second, the state's programs must be inadequate for the juvenile's needs. This concern with the individual's needs demonstrates the continued adherence to a rehabilitative framework. The final category involves serious cases—such as violence or enumerated drug offenses—where there is a "substantial Federal interest."

Congress returns to its stated philosophy in § 5032's second paragraph. If the Attorney General does not certify, the "juvenile shall be surrendered to the appropriate legal authorities of such State."[38]

The third and fourth paragraphs of § 5032 address the steps necessary to handle a juvenile case. Venue is in the appropriate district court, with the hearing held anywhere within the district. The court may hold this hearing in chambers. The charging document is an information filed by the United States Attorney (typically as the Attorney General's designee). Further, "no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided [by § 5032]."[39] In this regard, "criminal prosecution" refers to proceeding as an adult case. It is not a shorthand or generic statement on prosecuting the case. If the juvenile is under the age of fifteen, no authority exists in the federal scheme to transfer the case. A motion requesting transfer for adult prosecution triggers the court's inquiry into statutorily listed factors. A recidivist provision also is included in § 5032. Transfer is mandatory under the following conditions: the juvenile is at least sixteen; faces a felony level offense involving the actual or potential use of physical force or an enumerated drug offense; and has a "prior" from the same list of offenses.

In ruling on the motion to transfer, the court's standard is the "interest of justice." The fifth paragraph of § 5032 lists the factors that the court shall consider: the juvenile's age and social background, the nature of the alleged offense, the extent and nature of the prior delinquencies, the juvenile's present intellectual and psychological development, the past treatment efforts and responses, and whether suitable programs "to treat the juvenile's behavioral problems" are available.[40]

The sixth paragraph requires reasonable notice to the juvenile, parents, and counsel before any transfer hearing. This paragraph specifically requires assistance by counsel during the transfer hearing. The ninth paragraph provides further protection for the juvenile, essentially for findings of guilt on lesser offenses than that on which a court grants the transfer. If that finding does not warrant a transfer, then the disposition (sentencing) must be under the juvenile provisions.

One of two troubling elements—from a strict reading of the statute—is contained in the seventh paragraph where Congress placed a double jeopardy provision. This provision bars other proceedings on the same act after a plea of guilty or presentation of evidence on the merits. From a practitioner's standpoint, the attorney must be sure of the course of action to follow. A motion for transfer cannot be submitted after a delinquency hearing begins. This prohibition is consistent with the certification language where the United States Attorney has a duty to investigate before filing with the court.

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[33] *Id.* § 5037 (1988).

[34] *Id.* § 5038 (1988).

[35] *Id.* § 5039 (1988).

[36] *Id.* § 5042 (1988).

[37] This will be a matter of local law at each installation, with due consideration of when the land was obtained, how it was obtained, and any reservations in the ceding of jurisdiction. *See* Richard T. Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 35 (1976); *see also* DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, sects. 2-8 to 2-13 (15 Mar. 1992).

[38] 18 U.S.C. § 5032 (Supp. II 1990).

[39] *Id.*

[40] *Id.*

The other concern is found in the eighth paragraph of § 5032: "Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions."[41] This paragraph did not exist before the 1974 amendments. The Senate Report does not explain its inclusion or intended scope.[42] Minimal but clear case law, however, solves this problem.[43]

The final two paragraphs, ten and eleven, were part of the 1984 amendment. These additions "get tough" on serious offenders, yet also reinforce the rehabilitative side of the system. The tenth paragraph added the requirement that the court must review prior juvenile court records before any proceedings commence under the chapter. The House Report on the 1984 amendments explains that complete information is necessary to make an informed decision. Although the language of the provision—and some case law—indicates this filing is jurisdictional, the legislative history states otherwise. The Report observes that "The Committee intends, however, that this new provision's requirements are to be understood in the context of a standard of reasonableness."[44] The reasonableness standard suggests that while transfer and disposition hearings would require the information, delinquency hearings without information on prior history would be appropriate. Finally, from an investigative standpoint, the eleventh paragraph provides that adjudications of delinquency shall become part of the juvenile's official record.

Case Law Interpretations

Dual Sovereigns

Much of the federal case law deals with incidents occurring on Indian reservations. Because reservations are distinct sovereigns, a clear parallel to dealing with state authorities exists. Accordingly, *United States v. Juvenile Female*[45] is instructive. The juvenile had admitted to driving under the influence and reckless endangerment in tribal court[46] and in a later delinquency proceeding in district court, she argued that double jeopardy protections prohibited federal charges for involuntary manslaughter. The court cited *United States v. Wheeler*[47] in discussing the separate sovereignty of the tribal and federal governments as well as the discussion of the double jeopardy language from the seventh paragraph of § 5032. "Read in context, [this paragraph] protect[s] a juvenile from federal prosecution as an adult after juvenile proceedings have begun in district court and vice versa."[48] The Ninth Circuit observed further:

> there is no suggestion in either the statutory language or the legislative history that it was meant to apply where a state or tribe had already proceeded against a juvenile. . . . [I]t is unlikely that Congress would have undertaken such a radical change in state-federal relations in the juvenile context without some more explicit indication of its intent.[49]

Thus, under *Juvenile Female*, the Ninth Circuit would allow a federal delinquency proceeding even when state authorities already had acted. This result, however, would undercut the basis for certifying that no state court will assume jurisdiction.

Certification Requirements

Many of the cases deal with the sufficiency of the various certifications filed in a case. Section 5032 requires that the Attorney General provide the initial certification. In *United States v. Dennison*,[50] the trial judge faced a motion to dismiss due to a faulty certification. The defense alleged errors in the criteria listed in § 5032 and the lack of the Attorney General's signature.[51] The court held that the alleged error of failing to assert a "substantial federal interest" was a technicality that would not defeat jurisdiction over the murder charge. Although some case law reads an "and"[52] into the certification

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[41] *Id.*

[42] S. REP. No. 93-1011, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5320.

[43] *See infra* notes 84-90 and accompanying text.

[44] H.R. 98-1030, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3531.

[45] 869 F.2d 458 (9th Cir. 1989).

[46] *Id.* at 459.

[47] 435 U.S. 313 (1978).

[48] *Juvenile Female*, 869 F.2d at 461.

[49] *Id.*

[50] 652 F. Supp. 211 (D.N.M. 1986).

[51] *Id.* at 213.

[52] *See* United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988); United States v. Doe, 710 F. Supp. 958, 960 n.2 (S.D.N.Y. 1989).

criteria outlined in the first paragraph of § 5032, such a reading ignores the disjunctive "or" separating the three criteria. The legislative history also shows an intention to add the third category (with two clauses).[53] The court swiftly dealt with the signature issue argument. The Attorney General, by regulation, has delegated the authority to institute juvenile proceedings to the Deputy Assistant Attorney General and to the Assistant Attorney General (Criminal Division). Further delegation is permissible.[54] The court noted, as an additional issue, the lack of similar delegation on the signing of the motion for transfer. Because the proper officials ratified and a lack of prejudice existed, the court denied the motion to dismiss.

Similarly, *United States v. Doe*[55] involved the propriety of the Assistant United States Attorney signing the motion for transfer. At that time, the regulation had been clarified to allow delegation to the section chief of the criminal division for all motions under § 5032. The court looked to who decided to seek transfer and concluded that "[t]he Assistant United States Attorney merely performed a ministerial act of signing and filing [the transfer]."[56] Accordingly, no procedural defect was found to exist.

In dicta, another court expressed concern about the allegations in the transfer motion. In *United States v. Doe*,[57] the government sought transfer for a drug sale near a school and restated the third criterion from § 5032—that is, "When the nature of the offense gives rise to the motion itself, . . . [transfer is warranted] only when some feature of the alleged crime makes treating the defendant as an adult more appropriate than as a juvenile."[58] Although the court denied the transfer on the facts, the decision suggests that it would be wise for the government to allege more than the mere nature of the offense to show that a substantial federal interest is involved.

Procedures

Litigation on the procedural steps required for delinquency proceedings has generated the majority of recent precedents. There is, however, a split of authority in this area. The First and Tenth Circuits strictly interpret the statutory requirements. The Sixth and Eighth Circuits, however, are more in line with the "reasonable" approach noted in the House Report for the 1984 amendments. Several cases demonstrate this variation.

In *United States v. Brian N.*,[59] the government did not follow § 5032's requirement of filing the juvenile's prior records or a certificate of unavailability (in accordance with paragraph ten). Although both the government and the defense knew—and had uncertified copies—of tribal court records for the juvenile, the government failed to file certified copies with the court. The district court dismissed the case (on which transfer was sought) due to government error that the district court labeled as jurisdictional. The circuit court declined to analyze the legislative history—labeling it scant and vague—because it viewed the statute as clear.[60] The circuit court stated that proceedings begin with the filing of the information. If the government fails to file the necessary documents or certificates with the information, then no jurisdiction exists.[61]

In *United States v. M.I.M.*,[62] a different circuit court reached the same result. Again, the juvenile had a prior record. The court did not receive this information, however, until a suppression hearing had begun. Because the government failed to properly invoke the jurisdiction of the court, the circuit court vacated the adjudication. It likewise declined to look to the legislative history, reading the statute as unambiguous. The opinion closes by citing *Brian N.* and a 1991 Eighth Circuit opinion, *United States v. Juvenile Male*, as reaching the same conclusion.

United States v. Juvenile Male,[63] while not reversed, is softened by subsequent proceedings under the title *United States v. Parker*.[64] Initially, the government did not certify a substantial federal interest. Nor did it file the prior records or a certificate of unavailability. These omissions defeated jurisdiction at the trial level. In the second proceeding, the issue

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[53] *Dennison*, 652 F. Supp. at 213; H.R. 98-1030, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3529; *see also* United States v. Juvenile Male, 864 F.2d 641, 646 (9th Cir. 1988) ("The certification list in section 5032 is disjunctive. Certification under any one of the provisions of section 5032 is sufficient.").

[54] *Dennison*, 652 F. Supp. at 213; 28 C.F.R. § 0.57 (1992).

[55] 871 F.2d 1248 (5th Cir. 1989).

[56] *Id.* at 1257.

[57] 710 F. Supp. 958 (S.D.N.Y. 1989).

[58] *Id.* at 962.

[59] 900 F.2d 218 (10th Cir. 1990).

[60] *Id.* at 221.

[61] *Id.* at 223.

[62] 932 F.2d 1016 (1st Cir. 1991).

[63] 923 F.2d 614 (8th Cir. 1991).

[64] 956 F.2d 169 (8th Cir. 1992).

was whether letters from a judge and assistant district attorneys in neighboring counties met the requirements on lack of available records. Although not certified by appropriate court clerks the court held that it would not "stand on technicalities . . . [and] hold that the government adequately complied with the statutory requirements."[65] *Juvenile Male* and *Parker* indicate a need for the government to make a good faith effort to meet the statute's requirements.

In *United States v. Chambers*,[66] the Sixth Circuit vacated the adult convictions and remanded to consider the certification. The defendants were adults at the time of the trial and the filing of the charges although the acts occurred while they were under the age of eighteen. Under § 5031 they were eligible for treatment as juveniles. Because the government did not file a certification, the defense moved for acquittal for lack of jurisdiction under § 5032. At trial, the government tendered the certification and the defense motion was denied. In remanding the case, the district court was directed to determine whether the "interest of justice" was served through adult prosecution. Under these facts—where the defense did not object until the close of the government's case—the circuit court concluded that the certificate was timely.[67] The circuit court determined that the certificate is a prerequisite to subject matter jurisdiction under the juvenile statutes. On remand, the district court noted that the original trial judge already had balanced the factors. The district court ruled that this prior balancing was the law of the case, that adult prosecution was appropriate, and reinstated the convictions.[68]

The Factual Inquiry

A significant portion of litigation involves assessing the factors listed in the fifth paragraph of § 5032—that is, whether a transfer would be in the interest of justice. In these cases, the reviewing court considers whether the trial judge abused his or her discretion in ordering a transfer. Because a strict formula does not apply, a judge must balance the factors based on their relative strength.

The Ninth Circuit's opinion in *United States v. Alexander*,[69] is consistently cited as precedent for the level of inquiry. The case dealt with adult convictions for first degree murder after the district judge granted the transfer motion. At the district court level, "the grievous nature of the crime was such that the judge wanted more than a glimmer of hope of rehabilitation."[70] The decision on granting transfer was within the judge's "sound discretion." Similarly, the Fifth Circuit stated that "[a] court is certainly not required to weigh all statutory factors equally."[71] This flexible approach applied unless the court failed to consider and make findings on the six listed factors. Eighth[72] and Ninth[73] Circuit opinions make similar statements. The Eleventh Circuit vacated a transfer order and remanded a case when the trial court did not make adequate findings.[74]

District court opinions demonstrate the thought process involved in weighing the statutory factors. In *United States v. E.K.*,[75] the court discussed the legislative philosophy towards rehabilitation. In denying a motion to transfer, the court's concern was with the juvenile's social background and potential for success.

> It is incumbent upon the court to deny a motion to transfer where, all things considered, the juvenile has a realistic chance of rehabilitative potential in available treatment facilities during the period of his minority. . . . However, where no realistic chance for rehabilitation exists, we have the clearest case where the balance does indeed tip in favor of bringing the philosophy of the criminal justice system into play.[76]

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[65] *Id.* at 170.

[66] 944 F.2d 1253 (6th Cir. 1991).

[67] *Id.* at 1260.

[68] United States v. Chambers, 796 F. Supp. 1036 (E.D. Mich. 1992).

[69] 695 F.2d 398 (9th Cir. 1982).

[70] *Id.* at 401.

[71] United States v. Doe, 871 F.2d 1248, 1254-55 (5th Cir. 1989).

[72] United States v. A.W.J., 804 F.2d 493 (8th Cir. 1986).

[73] United States v. Gerald N., 900 F.2d 189 (9th Cir. 1990).

[74] United States v. C.G., 736 F.2d 1474 (11th Cir. 1984).

[75] 471 F. Supp. 924 (D. Ore. 1979).

[76] *Id.* at 932.

Relying on this concern for rehabilitation potential, in *In re J. Anthony G.*[77] the court granted transfer in a case involving an attempted armed robbery that occurred when the juvenile was seventeen years and nine months old. Initially, the court took the matter under advisement and gave the juvenile specific release conditions. The juvenile had a stable home life, no prior record, and was of average maturity. Although no prior treatment efforts were present, the court analogized poor school performance and failure to abide by release conditions as indicative of poor potential. The court compared juvenile and adult programs based on testimony of a chief probation officer. In ordering transfer, the court stated:

> While all of the factors weigh very heavily, I feel that the seriousness of this offense is perhaps the most critical factor in this case. . . .
>
> . . . .
>
> Perhaps second most important in my determination was Anthony's inability to comply with the conditions of his release. While this is technically not one of the factors as such, I do think it reflects whether or not rehabilitation of a juvenile type will work with Anthony. He shows a dangerous interest in illegal drugs . . . .[78]

In *United States v. M.L.*,[79] a California district court also adopted this balancing and concern for rehabilitation. In balancing the factors, the court held the government to a standard of "clear and convincing" evidence, and cited *United States v. E.K.* as authority. It saw a presumption in the statutes that a juvenile should remain within the protection of the juvenile court.[80]

Presenting evidence on each factor is critical. In *United States v. A.J.M.*,[81] the district court denied a transfer motion after receiving no evidence on the availability of rehabilitative programs. The court held, "To do otherwise would be to ignore the rehabilitative focus of the Federal Juvenile Justice Act."[82] Undue emphasis on a single factor, at the expense of a balanced presentation, also can be fatal. In *In re Sealed Case (Juvenile Transfer)*,[83] the appellate court reversed the transfer order. The trial court had considered uncharged misconduct under the factor of the "nature of the offense."

Prior Statements of the Juvenile

Three courts of appeal have dealt with the meaning of the eighth paragraph of § 5032—that is, the inadmissibility at subsequent criminal proceedings of statements made by juveniles prior to or during transfer hearings—since Congress added it in 1974. In *United States v. Spruille*,[84] a murder case, the state appealed the suppression of the defendant's statements to investigators. This case did not involve voluntariness or *Miranda*[85] issues. The trial court suppressed the statements on the basis of § 5032. However, the circuit court distinguished confessions from statements made during the course of the hearing—that is, to court personnel—where cooperation was necessary. Citing legislative history, the circuit court stated "we doubt that Congress, since the legislative history reveals no consideration of the necessity for such a significant change, would have intended to so drastically curtail the usefulness of a customary police investigatory process ordinarily of value during trial."[86]

In *United States v. Cheyenne*,[87] the trial court refused to suppress statements made under similar circumstances. The circuit court held, "A blanket prohibition against the admission of all statements made prior to the transfer hearing would

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[77] 690 F. Supp. 760 (S.D. Ind. 1988).

[78] *Id.* at 766.

[79] 811 F. Supp. 491 (C.D.Cal. 1992).

[80] *Id.* at 493-94. In discussing the standard of "interest of justice," the court in *United States v. E.K.* provided examples of futile gestures at juvenile rehabilitation:

> Empty exercises do not serve the interest of justice. Nor should society risk danger to itself where a continued, escalating pattern of violence shows that the risk is too great to be borne. However, since the presumption is that an offender of a certain age is a juvenile, the facts ought to clearly convince one on the side of these conclusions in order to warrant transfer.

United States v E.K., 471 F. Supp. at 932.

[81] 685 F. Supp. 1192 (D.N.M. 1988).

[82] *Id.* at 1193.

[83] 893 F.2d 363 (D.C. Cir. 1990) *rev'g* United States v. H.S., 717 F. Supp. 911 (D.D.C. 1989).

[84] 544 F.2d 303 (7th Cir. 1976).

[85] Miranda v. Arizona, 384 U.S. 436 (1966).

[86] *Spruille*, 544 F.2d at 306.

[87] 558 F.2d 902 (8th Cir. 1977).

seriously impede the investigation of juvenile crime and the successful prosecution of dangerous offenders tried as adults."[88]

Finally, the court in *United States v. Smith*[89] cited *Spruille* and *Cheyenne* in holding the pretransfer confession admissible. The court noted the distinction between the investigative and social background inquiries, "revelation of this material in aid of the court determination which will be crucial to his welfare should not be used against him. However, his prior confession of crime at the time of his arrest or interrogation stands on a different footing."[90]

The Case of Carlton James Smith

In August 1981, the bodies of the defendant's aunt, sister, and cousin were found in a home on Camp Lejeune, North Carolina (an area of exclusive federal jurisdiction). At the time, the defendant was fifteen years old. Throughout the investigation he was a suspect although the investigators did not have enough evidence to charge him and he eventually moved from the area. Five years later, in 1986, during an attempt to enlist in the National Guard, investigators again questioned him about the murders. After he made incriminating statements, the government filed a juvenile information and a motion for transfer.

The Fourth Circuit dismissed the initial attempt to charge Smith because the government violated the provisions of the ex post facto prohibition.[91] At the time of the offense, a juvenile had to be at least sixteen years of age in order to transfer.[92] Given the significant increase in the consequences that Smith faced as an adult, the court saw the 1984 amendment as more than a mere procedural change.[93]

On remand, the government dismissed the juvenile information and filed an indictment. Smith was now four months past his twenty-first birthday and no longer amenable to jurisdiction under the juvenile statutes.[94] The district court rejected the defense arguments of vindictive prosecution and prosecutorial misconduct, before reaching the jurisdictional challenge.[95] In discussing the jurisdictional requirements, the district court found that because the defendant was over twenty-one when indicted, the protections no longer applied.[96]

The Fourth Circuit reversed in a two-to-one decision in *United States v. Smith*.[97] *Smith* focused on the choice of forum language found in the third paragraph of § 5032. The court emphasized that the government could not initiate prosecution—in the sense of an adult proceeding—except as provided in the rest of the statute.[98] Thus, although jeopardy had not attached, the jurisdictional language required that once the government filed the juvenile information, it had to continue under the juvenile statutes. The Fourth Circuit ordered dismissal of the indictment. As consolation to the prosecutor, the dissent indicated that the majority misapplied the definition of "juvenile." Because Smith was twenty-one when indicted, the dissent read the protections as inapplicable.[99]

Subsequently, the State of North Carolina indicted Smith for the murders.[100] The North Carolina State Supreme Court reviewed the denial of a defense motion to dismiss. At issue was the lack of jurisdiction because the case arose in an area of exclusive federal jurisdiction. The state argued that the intention behind § 5032 was that the local governments would handle matters of juvenile delinquency; because the basis of juvenile proceedings is civil rather than criminal law, the "offense" was a matter of concurrent state and federal jurisdiction. The problem with this argument was that the federal government certified during their juvenile proceedings that no

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[88] *Id.* at 906-07.

[89] 574 F.2d 707 (2d Cir. 1978).

[90] *Id.* at 712.

[91] United States v. Juvenile Male, 819 F.2d 468 (4th Cir. 1987).

[92] *Id.* at 469; 18 U.S.C. § 5032 (1982).

[93] *Juvenile Male*, 819 F.2d at 470.

[94] *See* 18 U.S.C. § 5031 (1988) (definition of "juvenile").

[95] United States v. Smith, 675 F. Supp. 307 (D.N.C. 1987).

[96] *Id.* at 313.

[97] 851 F.2d 706 (6th Cir. 1988).

[98] *Id.* at 709.

[99] *Id.* at 711.

[100] State v. Smith, 400 S.E.2d 405 (N.C. 1991).

juvenile court with jurisdiction over the defendant existed. Although *Kent* characterized juvenile proceedings as historically civil, North Carolina did not have any such precedent.[101] Additionally, certain constitutional rights apply only in criminal trials. Thus, the court felt bound by the federal determination that jurisdiction lay with the federal courts and dismissed the indictment.[102] The United States Supreme Court denied certiorari in November 1991.[103]

Conclusion

The provisions of 18 U.S.C. § 5032 can be confusing at first. The statute is the product of several piecemeal legislative fixes made in response to growing violence by juveniles. The terminology is different, but not entirely foreign. Congressional hearings in 1974 noted the increase in juvenile crime. It is now twenty years later.

The underlying rationale is that the system can rehabilitate juveniles. This justification results in a statutory premise that the juvenile should remain within the juvenile court system which the courts keep alive by requiring strict adherence to procedural and jurisdictional rules. Accordingly, the prosecuting attorney needs to present information to overcome that premise. By following the required steps, a prosecutor can surmount the hurdles. This means presenting the full information to the district judge (in the capacity as a juvenile court).

The first, and most important, step is to investigate the case completely, not just from the perspective of trial presentation, but also to justify the course of action in seeking juvenile jurisdiction. The installation initially will have to convince the Attorney General's office why state action is insufficient to handle the case. Next, formulate the argument for, or against, transfer to adult prosecution. The information and motion to transfer are two separate filings. File both in a close case. Tactically one can dismiss the motion later if the juvenile deserves leniency. Rather than adopting a standard policy of always filing both, the prosecutor must consider local rules of practice. The adage of "knowing your judge" is probably wise to consider. A motion for transfer, filed as a matter of routine, may be answered with a defense motion to dismiss—alleging prosecutorial overreaching or vindictiveness. More critical than the justification to the Attorney General, will be the explanation to the court why transfer is in the interest of justice.

Certification requirements are set forth in two separate areas of the statute. First, the Attorney General must assert federal interest. Issues on delegation of authority, and who has to sign, should not be a problem. This certification vests the court with jurisdiction, so there is no room for government error.

The other area concerns the juvenile's prior record where support exists for taking a reasonable approach. This is not, however, a license to procrastinate or withhold information. If you must file charges immediately, request additional time to file any prior records. If problems occur in getting state court records, notify the federal court. In short, make a record of your efforts to comply with § 5032. Good faith will go a long way in overcoming technical shortfalls.

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[101] The Supreme Court in *Kent* indicated that juvenile court proceedings were typically civil in nature rather than criminal. Accordingly, the argument was that because civil statutes were not overridden by the concept of exclusive federal jurisdiction, the state was not divested of jurisdiction over the juvenile.

[102] The concurring opinion in *North Carolina v. Smith* felt that the Assimilative Crimes Act (ACA) would have provided a remedy. The rationale was that while federal law prohibited transfer, state law did not. The opinion quoted language from the North Carolina statute and the 1948 enactment of 18 U.S.C. § 13. The North Carolina statute is procedural in nature, just like § 5032. The opinion does not reflect the correct status of § 13 which was amended in 1988 to add an unreferenced subparagraph (b). The ACA is a "gap filler" when no federal statute speaks in an area. Section 5032 is a congressional statement on the procedures and types of offenses on which to seek transfer; *see* United States v. Juvenile Male, 939 F.2d 321 (6th Cir. 1991) (delinquency hearing for assaultive and sexual conduct with a juvenile female on an exclusive federal area of Fort Knox, Kentucky). In that case the court found that "[T]he ACA is by its terms only a gap filler, and therefore not applicable to a state statute 'when the precise conduct it prohibits is made penal by federal law.'" *Id.* at 325. The ACA works to import crimes and punishments—not procedures and jurisdictional requirements.

[103] North Carolina v. Smith, 112 S. Ct. 414 (1991).

Appendices

1. Letter requesting Attorney General certification.[104]

Date

Mr. Larry Lippe, Esq.
Chief, General Litigation
P.O. Box 887
Ben Franklin Station
Washington, D.C. 2004

RE: (Juvenile's Name)

Dear Mr. Lippe:

The _____ District of _____, requests permission to move for the treatment of one (juvenile's name) as an adult.

"Juvenile's" date of birth is _____. On (date) he was apprehended/charged/found in possession/etc. for the offenses of _____. This occurred on an area of Fort Swampy in an area of exclusive federal legislative jurisdiction. [Other information as appropriate—recent release from juvenile facility, known to area law enforcement].

The circumstances of the offense and arrest are as follows: [give sufficient details to justify treatment as an adult criminal offender, efforts to escape on apprehension, use of force against police, possession of deadly weapons].

(Juvenile's name) has previously been arrested by the local State authorities. His delinquent history is as follows: [list arrests, adjudications, treatment alternatives tried by the State authorities, prior custody/commitment/probation efforts, school successes/failures, psychological evaluations/efforts].

The State juvenile court does/does not have jurisdiction to adjudicate this case. Consistent with a Memorandum of Understanding/State procedural rules/federal-state jurisdictional requirements, the State does not have adequate treatment facilities or programs to serve "Juvenile's" needs. [Or, since the offense is listed and there is a substantial federal interest, give appropriate details].

The U.S. Attorney has been personally briefed on this matter. He/she joins in this request to seek transfer of "Juvenile" for criminal prosecution.

Sincerely,

XXXXXXXXX

2. Motion Requesting Transfer.[105]

UNITED STATES DISTRICT COURT
FOR THE ____ DISTRICT OF _____
_____ DIVISION

NO. _____

UNITED STATES OF AMERICA	:	
	:	MOTION REQUESTING
V.	:	DEFENDANT BE TRANSFERRED
	:	TO ADULT JURISDICTION
"JUVENILE'S NAME"	:	

[104] *See* JA 338, *supra* note 4, Tab C.

[105] *Id.*

The United States of America, by and through the United States Attorney for the _____ District of _____, moves the Court to transfer the juvenile, (name), to adult jurisdiction on the bases contained herein. This motion is made pursuant to the provisions of Title 18, United States Code, Section 5032.

1. The Defendant's date of birth is _____, making him eighteen in _____.

2. The Defendant, on (date of offense) attempted to commit the murder of (victim). At the time of the offense, the Defendant was ___ years and ___ months old.

3. These facts would support a prosecution of the Defendant for a violation of _____. The maximum sentence possible on conviction for these offenses is _____.

4. [Separate paragraphs for each major element of proof to be offered].

. . . .

9. The State juvenile court authorities do/do not have jurisdiction to adjudicate this case. [Explain jurisdictional aspects of the case].

10. The State juvenile court authorities report the following record of previous adjudications. [Summarize the record].

11. The U.S. Probation Department reports the following circumstances concerning the Defendant's family background. [Explain].

12. The U.S. Attorney for the _____ District of _____ has reviewed the circumstances of this matter and supports the request to transfer the Defendant to adult jurisdiction.

13. Pursuant to Department of Justice Policy, permission for the initiation of this motion has been sought and granted by supervisory officials therein.

Respectfully submitted, this ___ day of _____, 199X

XXXXXXXXX

UNITED STATES ATTORNEY

BY: XXXXXXXXX

SPECIAL ASSISTANT UNITED STATES ATTORNEY

3. Juvenile Information.[106]

UNITED STATES DISTRICT COURT
FOR THE ____ DISTRICT OF _____
_____ DIVISION

NO. _____

UNITED STATES OF AMERICA	:	
	:	
V.	:	JUVENILE DELINQUENCY
	:	INFORMATION
A JUVENILE, MALE	:	(18 U.S.C. § 5032)
Defendant	:	

[106] *Id.* Tab Q.

The United States Attorney charges that:

COUNT I

On or about January X, 199X, at Fort Swampy, within the special maritime and territorial jurisdiction of the United States and in the _____ District of _____, A JUVENILE, MALE with the intent to steal and purloin, did take and carry away U.S. currency, the property of the Military Communications Center, Incorporated, of a value in excess of $100.00, in violation of Title 18, United States Code, Sections 661 and 662.

COUNT II

. . . .

This _____ day of _____, 199X.

Respectfully submitted,

XXXXXXXXXXXX
United States Attorney

By: _____
XXXXXXXXXXXXXX
Special Assistant United
States Attorney
Criminal Division

4. Certification.[107]

CERTIFICATION

TO: THE HONORABLE CHIEF JUDGE _____, UNITED STATES DISTRICT

COURT FOR THE _____ DISTRICT OF _____

This is to certify that in the case of UNITED STATES OF AMERICA vs. A JUVENILE, MALE, no juvenile court or other appropriate court of any state, including the (state court of general jurisdiction), has jurisdiction over said juvenile with respect to the acts having occurred on Fort Swampy, a military reservation acquired for the United States and under the exclusive legislative jurisdiction thereof.

This certificate is made pursuant to the requirements of Title 18, United States Code, Section 5032, and is made by the United States Attorney for the _____ District of _____ on the basis of authority delegated to him by the Attorney General of the United States. (Attorney General Order No. 579-74, 28 C.F.R. 0.57.).

This the ___ day of _____, 199X.

XXXXXXXXXXX
United States Attorney

By: _____
XXXXXXXXXXXX
Special Assistant U.S. Attorney
Criminal Division

[107] *Id.*

5. Juvenile Record Certification.[108]

IN THE GENERAL COURT OF JUSTICE
JUVENILE COURT

IN THE MATTER OF:

_____
JUVENILE MALE/FEMALE

[OR APPROPRIATE LOCAL CAPTION]

JUVENILE RECORD CERTIFICATION

In accordance with the provisions of Title 18, United States Code, Section 5032, it is hereby certified that the juvenile male/female in the above-captioned case has no prior delinquency record on file in this office/has a prior juvenile record, copies of which are attached/has a prior juvenile delinquency record which is unavailable because_____.

CLERK OF THE JUVENILE COURT

DATE: _____ BY: _____
Deputy Clerk

[108] *Id.*

United States v. Teters:[1] More Than Meets the Eye?

Lieutenant Colonel Gary J. Holland
Circuit Judge, Second Judicial Circuit
United States Army Trial Judiciary
Fort Stewart, Georgia

Major Willis C. Hunter
Instructor, Criminal Law Division
The Judge Advocate General's School, U.S. Army

Introduction

Multiplicity[2] has long been a thorn in the side of the military criminal practitioner. Since *United States v. Baker*,[3] trial and defense counsel, military judges, appellate counsel, and appellate judges all have been involved in a continuous descent "into that inner circle of the Inferno where the damned endlessly debate multiplicity."[4] With the recent decision by the United States Court of Military Appeals (COMA) in *United States v. Teters,* that descent finally may have been halted.

[1] 37 M.J. 370 (C.M.A. 1993).

[2] The term multiplicity generally refers to the practice of charging an accused with multiple offenses, all of which arise from a single criminal transaction. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 307(c)(4), discussion (1984) [hereinafter MCM]. However, consider the following:

> Multiplicity is a term which is barren of substantive meaning unless it is considered within a particular procedural context. For example, a multiplication of charges as a matter of pleading may infringe on the defendant's right to a fair trial or his right to prepare a defense . . . . Multiple convictions may raise questions concerning Double Jeopardy under the Fifth Amendment and Article 44, UCMJ . . . . Multiple punishments not only raise Double Jeopardy questions . . . but also due process questions in the military justice system.

United States v. Baker, 14 M.J. 361, 364 n.1 (C.M.A. 1983).

[3] *Baker,* 14 M.J. at 364 n.1.

[4] United States v. Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990).

In *Teters,* the COMA purports to establish a new, bright-line test for deciding multiplicity issues. Still, while "burying *United States v. Baker* . . . and its progeny,"[5] many multiplicity questions, as well as questions about lesser-included offenses, remain unresolved. This article will review *Teters* and discuss some of these unanswered questions.

United States v. Teters: The Facts

The Government successfully prosecuted Airman First Class Barbara Teters for forgery and larceny. The charges and specifications, along with the proof (introduced by way of her guilty plea inquiry), reflected that the forgery of two checks was the means by which she stole $500 from a federal credit union.[6] At trial, Airman Teters' defense counsel argued that the larceny and forgery offenses were multiplicious for both findings and sentencing.[7] The military judge disagreed, finding them to be multiplicious for sentencing, but not for findings.[8] Most importantly, the military judge ruled that larceny and forgery have separate elements and neither is a lesser-included offense of the other.[9] On appeal, the COMA held that the Air Force Court of Military Review and the trial judge were correct in holding the offenses to be separate for findings purposes.[10]

United States v. Teters: The Holding

In *United States v. Baker,* the COMA held that when offenses arise out of the same criminal transaction, they are multiplicious for findings when (1) "one offense contains only elements of, but not all the elements of the other offense;" or (2) "one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by the evidence introduced at trial."[11] In *Teters,* the COMA reconsidered *Baker* and concluded that the time had come to adopt a more definitive test for multiplicity.[12] The COMA now holds that the test for multiplicity is limited solely to consideration of the statutory elements of the charged offenses.[13] This holding, in effect, does away with the second prong ("fairly embraced") of the *Baker* test.

United States v. Teters: An Analysis of the Holding

In arriving at this new test for multiplicity, the COMA adopted the multiplicity rules established by the Supreme Court of the United States.[14] In so doing, the COMA expressly recognized the similarity of language between Article 79, Uniform Code of Military Justice (UCMJ),[15] upon which the

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[5] *Teters,* 37 M.J. at 378 (Cox, J., concurring). The opinion does not expressly state that *Baker* is overruled or distinguished, but merely states that the court "has reconsidered" the *Baker* decision. What ever happened to clear legal writing? One wonders how *Shepard's Military Justice Citations* will treat the effect of *Teters* on *Baker.*

[6] *Id.* at 371-72.

[7] *Id.* at 372.

[8] *Id.*

[9] *Id.* As the COMA noted in *Teters,* the primary difference between the offenses is that an element of larceny is the wrongful taking, obtaining, or withholding of property, whereas forgery does not contain a taking element. *Id.* at 377.

[10] *Id.* at 371. This holding is significant in that the COMA on several occasions has held otherwise. *See, e.g.,* United States v. Allen, 16 M.J. 395 (C.M.A. 1983) (where making of worthless checks was the means to obtain airline tickets, the bad check offenses were multiplicious for findings with the resulting larceny offenses); United States v. Mullins, 20 M.J. 307 (C.M.A. 1985) (summary disposition) (forgery of withdrawal slips and resulting larceny by use of the slips to withdraw money from credit union were multiplicious for findings); United States v. Gracia, 21 M.J. 162 (C.M.A. 1985) (summary disposition) (forgery and attempted larceny were multiplicious for findings).

[11] United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983).

[12] *Teters,* 37 M.J. at 376. *Baker's* demise was essentially forecast by the COMA in several recent multiplicity cases. In United States v. Traeder, 32 M.J. 455 (C.M.A. 1991), the COMA rejected the so-called "single impulse" theory of sentencing. In United States v. Wilson, 35 M.J. 473, 475 n.3 (C.M.A. 1992), Judge Cox, joined by Judge Crawford, wrote that the "test of statutory construction stated in *Blockburger v. United States*" should be the controlling test for deciding multiplicity. And finally, Judge Crawford, concurring in United States v. Boyle, 36 M.J. 326, 328 (C.M.A. 1993), wrote "[i]t is apparent that judges and counsel are confused by the multiplicity rules . . . . While it was admirable for Judge Fletcher in *United States v. Baker* to attempt to clarify multiplicity rules, in effect that decision created more confusion" (citations omitted). Only time will tell whether *Teters* will clarify, or merely add to the confusion.

[13] *Teters,* 37 M.J. at 376.

[14] *See* Blockburger v. United States, 284 U.S. 299 (1932); Schmuck v. United States, 489 U.S. 705 (1989).

[15] UCMJ art. 79 (1988). Article 79 states: "An accused may be found guilty of an offense necessarily included in an offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

military multiplicity rules of *Baker* were based, and Federal Rule of Criminal Procedure 31(c),[16] which is the basis of the Supreme Court multiplicity rules. The significance is in connection with lesser-included offenses.

In previous decisions, the COMA consistently interpreted Article 79 to include an offense as a lesser-included offense if the *pleading and proof* of the greater offense "fairly embraced" the lesser offense.[17] In 1989, the Supreme Court reviewed this approach of looking not only at the offenses—but also at the pleadings and proof—to determine whether one offense is a lesser-included offense of another. In *Schmuck v. United States,*[18] the Supreme Court, interpreting Federal Rule of Criminal Procedure 31(c), held that the statutory elements of the offenses is the sole factor to consider in determining when one offense is a lesser-included offense of another offense.

In view of the virtually identical language in Federal Rule of Criminal Procedure 31(c) and Article 79, UCMJ, the COMA in *Teters* made a potentially far-reaching statement: "[W]e will apply the Supreme Court's more recent holding and abandon the 'fairly embraced' test for determining lesser-included offenses as a matter of military law."[19] The COMA then used this statement to change the multiplicity rules in the military. However, issues now revolve around the statement as it concerns the law of lesser-included offenses in the military.

Multiplicity

In its most limited reading, *Teters* stands for the following proposition: Congress intended that an accused may be found guilty of both larceny and forgery at a single court-martial when the pleadings and proof at trial establish that the forgery was the means of committing the larceny.[20] The decision seemingly buries *Baker.* Its apparent intent is to give a single test for multiplicity: If two offenses do not stand in the relation of greater-lesser offenses to each other, then—absent congressional intent that prevents conviction for both offenses—the offenses are not multiplicious for findings. The COMA made clear that the only means to determine if the offenses stand in relation of greater-lesser offenses is to compare the elements of the offenses. If the purported lesser offense contains an element not in the greater offense, then no multiplicity problem exists with respect to findings.

Teters may have even broader implications. The trial judge held the forgery and larceny offenses to be multiplicious for sentencing and the COMA limited its grant of review to the issue of multiplicity for findings.[21] Are the offenses really multiplicious for sentencing or did the military judge grant Airman Teters an unnecessary windfall? Can the military criminal justice community rely on the COMA's language in *Teters* when it said "the *Blockburger* Rule [offenses are separate if each offense requires proof of a separate fact which the other does not] is clearly satisfied in this case and separate offenses *warranting separate convictions and punishment* can be presumed to be Congress' intent?"[22] Would the COMA have permitted the offenses to be separate for punishment purposes?

Did the COMA bury *Baker* in the area of multiplicity for sentencing? In *Baker*, the COMA held that an aggravated assault and a communication of a threat were multiplicious for sentencing because the offenses were committed as the result of a single impulse or intent and the offenses violated the same societal standard.[23] The COMA also has held previously that a unity of time and the existence of a connected chain of events may require that otherwise separate charges be multiplicious for sentencing.[24] Criminal law practitioners should continue to be mindful of the *Manual for Courts-Martial (Manual)* and its discussion of Rule for Courts-Martial (R.C.M.) 1003(c), which sets forth these various tests for determining multiplicity for sentencing.[25] However, R.C.M.

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[16] "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." FED. R. CRIM. P. 31(c).

[17] *See* United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983).

[18] 489 U.S. 705 (1989).

[19] United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993).

[20] *Id.* at 378.

[21] *Id.* at 371.

[22] *Id.* at 377-78 (emphasis added).

[23] United States v. Baker, 14 M.J. 361, 370 (C.M.A. 1983). In United States v. Beene, 15 C.M.R. 177 (C.M.A. 1954), the COMA earlier used the "separate societal norms" test to hold that drunk driving and involuntary manslaughter were not multiplicious for sentencing even through the homicide resulted from the drunk driving. Note, however, that in United States v. Traeder, 32 M.J. 455 (C.M.A. 1991), the COMA discarded the "single impulse" theory.

[24] United States v. Irving, 3 M.J. 6 (C.M.A. 1977).

[25] The discussion in the *Manual* "does not have the force of law, even though it may describe legal requirements derived from other sources of binding law." *See* MCM, *supra* note 2, Analysis, app. 21, at A21-3.

1003(c)(1)(C) seemingly adopts the "elements" approach to determine multiplicity by stating that "the maximum authorized punishment may be imposed for each separate offense. . . . [O]ffenses are not separate if each does not require proof of an element not required to prove the other."[26]

Should military judges treat offenses separate for sentencing if they are separate for findings? Judge Cox—in his concurring opinion in *Teters*—indicated that something needs to be done in the area of "the sentencing of servicemembers convicted of multiple offenses."[27] He advocated that the President or Congress do something about the issue. Even former Chief Judge Everett, in his concurring opinion in *Baker,* was concerned about returning to the simplicity of the *Blockburger* Rule. He reasoned that the removal of the military's multiplicity rules "might lead to sentences that were inappropriately severe and to overreaching by prosecutors in an effort to induce plea bargains."[28] Until something is done in this area, the responsibility will continue to rest with the military judge to ensure that by applying fundamental notions of military due process, fairness, equity, and public policy considerations, just results are obtained.

One final point on multiplicity must be made. *Teters* does not address all aspects of multiplicity. Not only must practitioners concern themselves with multiplicity for findings and sentencing, they also must take care not to violate multiplicity rules for charging. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[29] The COMA applied this test in *United States v. Taylor*[30] to seventeen specifications charging the accused with failing to go to his appointed place of duty and fifteen specifications charging the accused with being derelict in his duties by not going to his duties. The COMA held that these pleadings constituted an unreasonable multiplication of charges.

Lesser-included Offenses

Although *Teters* involved a multiplicity issue, because the holding was based on the Supreme Court's concept of lesser-included offenses, the law of lesser-included offenses in the military also may be affected. These are clearly different issues. Multiplicity concerns whether the same offense is being charged, found, or punished twice. Lesser-included offenses, on the other hand, concerns whether a single specification fairly includes lesser offenses which may, as an alternative to that charged, result in a finding of guilty.

Consequently, counsel need to examine *Teters* concerning its impact on how counsel and military judges are to treat offenses as being included within a greater offense.[31] Recall that the COMA has now indicated that it will apply the "elements approach" of *Schmuck* for determining lesser-included offenses.[32] One must take care, however, to note that *Teters* may be limited to its factual setting—that is, multiplicity issues and not issues of lesser-included offenses. If taken at face value, the *Teters* decision would be a drastic departure from current military practice.

Current military practice determines lesser-included offenses from examination of the charges and the evidence. The COMA has consistently interpreted Article 79, UCMJ, to mean that it

> must look to the allegations of the specification, and proof in support thereof, in each case to determine whether a lesser offense is placed in issue. . . . [I]n an unbroken line of decisions we have made the test turn on both the charge and the evidence. When both offenses are substantially the same kind so that [the] accused is fairly apprised of the charges he must meet and the specification alleges fairly, and the proof raises reasonably, all elements of both crimes, we have held that they stand in the relationship of greater and lesser offenses.[33]

Despite what the COMA has repeatedly held, in 1992, two military courts of review applied the *Schmuck* "elements" test for determining lesser-included offenses.[34] Has *Teters*

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[26] *Id.* R.C.M. 1003(c)(1)(C).

[27] United States v. Teters, 37 M.J. 370, 379 (C.M.A. 1993) (Cox, J., concurring).

[28] United States v. Baker, 14 M.J. 361, 371 (C.M.A. 1983) (Everett, C.J., concurring).

[29] MCM, *supra* note 2, R.C.M. 307(c)(4), discussion.

[30] 26 M.J. 7 (C.M.A. 1988).

[31] For an excellent discussion of the treatment of lesser-included offenses in the military and the potential impact of adopting the "elements approach" of *Schmuck, see* Herbert Green, *Annual Review of Developments in Instructions,* ARMY LAW., Mar. 1993, at 3, 5-8.

[32] *See supra* note 14. The COMA further noted in *Teters* that "our 'fairly embraced' approach to Article 79 does not survive the 1989 decision of the Supreme Court . . . ." United States v. Teters, 37 M.J. 370, 378 (C.M.A. 1993).

[33] United States v. Duggan, 15 C.M.R. 396, 399 (C.M.A. 1954).

[34] United States v. Foster, 34 M.J. 1264 (A.F.C.M.R. 1992) (the court used both the "elements" and "fairly embraced" tests in holding that indecent assault was not a lesser-included offense of forcible sodomy); United States v. Littles, 35 M.J. 644 (N.M.C.M.R. 1992) (the court held that only the "elements" test is applicable in determining lesser-included offenses and, because the element of "military property" was lacking from the charged violation of a federal statute, the wrongful selling of military property was not a lesser-included offense of the statute).

changed the COMA's thinking in this regard, or is the case strictly limited to multiplicity issues?

If the *Teters* court intended to adopt the "elements" test for determining lesser-included offenses on which an accused can be convicted, counsel and military judges should recognize the ramifications of such a holding. First, one could argue attempts would no longer be lesser-included offenses to general intent crimes because the attempt requires an element not required by the greater offense—that is, a specific intent. This issue, however, is resolved by Article 79, UCMJ. The statute expressly states that an accused may be convicted of a lesser-included offense or an attempt to commit the charged offense.[35]

The more troublesome question is whether an Article 134, UCMJ, offense would ever be a lesser-included offense of a substantive offense under another article of the UCMJ. For example, because indecent acts and indecent assault under Article 134 contain—as do all Article 134(1) and (2) offenses—the conduct prejudicial to good order and discipline or service-discrediting conduct element, can these offenses be lesser-included offenses of rape under Article 120a, UCMJ, which does not contain this element? Depending on the facts of a given case, the total and complete adoption of the "elements" approach could hamper both the prosecution and defense. If this is the intended result of *Teters,* and the government fails to charge all potential offenses, then, regardless of the evidence, the judge can give lesser-included offense instructions on only those offenses with fewer elements than those contained in the charged offense. This approach raises not only issues of multiplicity for charging and sentencing purposes, but unfair prejudice to the accused, who conceivably could be convicted of some offense based solely on the number of charges preferred against him or her. Has *Teters* opened the proverbial can of worms? If so, the military judge will be the one who must ensure that both the government and defense receive a just result. Counsel, have an important role, however, in seeing that judges ensure a just result, and this often should occur before the charges are preferred or referred to trial.

If the *Teters* decision is meant to apply to lesser-included offenses outside of the multiplicity arena, how are courts to apply the decision? Does it have a retroactive effect and, if so, how retroactive is it to be? Does the decision apply to cases on appeal prior to the date of the decision? Does it apply where charges have been preferred, referred, or where arraignment has occurred prior to August 12, 1993? The consequences of how the courts apply the case are tremendous. The government may be precluded from obtaining a conviction on a "traditional" lesser-included offense because it did not know to charge the offense as a separate offense under the "elements" approach. What happens to an accused who was convicted of a "traditional" lesser-included offense prior to the *Teters* decision when the lesser offense would not now satisfy the "elements" approach? What happens to the case when the military judge does not believe the decision applies outside of the multiplicity area and the judge continues to use the "fairly embraced" test in instructing on lesser-included offenses? Uncertainty abounds in the law.

If we look to federal law for guidance in applying the "elements test" in the area of lesser-included offenses, the answer would suggest that Article 134, UCMJ, offenses should be charged separately. In *United States v. Flores,* the First Circuit Court of Appeals, in discussing possible lesser-included offenses to assault on a flight attendant, stated "To pass the test, all the elements of the lesser-included offense must be elements of the charged offense—but the charged offense must include at least one additional element."[36]

One final comment about lesser-included offenses. The President has provided guidance interpreting Article 79 in the *Manual.*[37] The President derives his authority from Article 36, UCMJ, which gives the President the ability to prescribe procedural rules for courts-martial, which should be consistent with the evidentiary rules and principles of law used in criminal trials in the federal district courts.[38] The *Manual* currently contains language that goes beyond the "elements" test for lesser-included offenses. If *Teters* truly has adopted the "elements" approach, the President apparently has no authority under Article 36, UCMJ, to change substantive law and the current language is of little value to practitioners. Again, this reflects the potentially far-reaching effects of the COMA's decision in *Teters.*

Conclusion

How should military counsel and judges apply *Teters* in the field? Until additional cases involving *Teters* are decided, no definitive answer can be given. A strong argument can be made, however, that *Teters* is limited solely to establishing a single test for multiplicity and is intended to have no effect on the law of lesser-included offenses. This is especially true when one considers the court's treatment of multiplicity in

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[35] *See supra* note 15.

[36] 968 F.2d 1366, 1369 (1st Cir. 1992).

[37] MCM, *supra* note 2, pt. IV, para. 2b.

[38] UCMJ art. 36 (1984).

Traeder, Wilson, and *Boyle,*[39] as well as Judge Cox's concurrence describing *Teters* as "burying *United States v. Baker* . . . and its progeny."[40]

Assuming this is *Teters'* intended result, then counsel and judges should simply follow the *Blockburger* Rule in analyzing all multiplicity issues. If one charged offense requires proof of a separate element which another offense does not, the offenses should be treated separately for all purposes. In other words, the accused may be separately charged, convicted, and punished for each offense.

If, on the other hand, one takes the position that *Teters* also intended to change the law of lesser-included offenses, then trial counsel will need to adjust their charging practices. By this we mean that trial counsel will want to charge all possible lesser-included offenses which would not qualify as lesser-included offenses when the *Blockburger* "elements test" is applied. Most likely this will require the charging of Article 134 offenses as separate offenses where they are currently listed as lesser-included offenses in the *Manual.* At the trial stage, the military judge then could instruct the court members that they may find the accused guilty of only one of the alternative charges.

Counsel practicing in courts-martial and military judges should read *Teters* very closely and fully understand its ramifications. The case is an eye opener—not entirely for what it says, but for what law and procedures it leaves to military criminal law practitioners to implement in their exercise of discretion. The case could become a watershed in military justice. Whether it does, or not, depends on how counsel, judges, and appellate courts treat, implement, and interpret its language.

The COMA apparently has given us a clean slate in the area of multiplicity. We must ensure their trust in this regard is not abused. This will require the exercise of wise discretion during the trial process, not only by trial counsel, but by staff judge advocates and judges as well.

[39] *See supra* note 12.

[40] United States v. Teters, 37 M.J. 370, 378 (C.M.A. 1993).

USALSA Report

United States Army Legal Services Agency

United States Army Judiciary

Military Contempt Procedures: An Overdue Proposed Change

Introduction

Military bureaucracy lives on. On September 30, 1988, the United States Court of Military Appeals (COMA) in *United States v. Burnett*[1] stated that the military's contempt procedures were outdated and urged the President and the Executive Branch to reexamine those procedures.[2] Nothing, however, has happened to the military's contempt procedures in the intervening five years.

This note will remind military criminal law practitioners of the *Burnett* decision. The author also will propose simple changes to Rule for Court-Martial (R.C.M.) 809[3] to bring its provisions in line with *Burnett.* With any luck, another five years will not pass before something is done to keep the *Manual for Courts-Martial* current with existing case law.

R.C.M. 809—The Contempt Procedure

While actual military contempt cases have been rare, the current statutory language of Article 48, Uniform Code of Military Justice[4] (UCMJ), has existed from the outset of the

[1] 27 M.J. 99 (C.M.A. 1988).

[2] *Id.* at 107 n.10.

[3] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 809 (1984) [hereinafter MCM].

[4] UCMJ art. 48 (1988).

Code and originates from the Articles of War.[5] By its wording, Article 48 is extremely limited: "A court-martial . . . may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100.00 or both." Rule for Court-Martial 809 is the procedural implementation of Article 48.

If the contempt is directly witnessed by the court-martial, R.C.M. 809(b) contemplates that the judge will suspend the regular proceedings of the court-martial pending disposition of the contempt. If the contempt is witnessed by the judge at a judge alone trial or outside the presence of the members, R.C.M. 809(c) indicates that the judge determines whether the offender should be punished and, if so, the appropriate punishment. When the contemptuous conduct occurs in the members' presence, the judge or any member on motion may initiate contempt proceedings, unless the judge rules as a matter of law that contempt does not exist.[6] After appropriate instructions by the military judge, the court members retire to vote on the issue of whether the offender should be held in contempt, and if they find contempt, they then determine the punishment.[7] If the judge or court members find the offender in contempt, a separate record of the contempt proceedings will be forwarded to the convening authority for his approval or disapproval.[8] These procedures were the subject of the court's decision in *Burnett*.

United States v. Burnett—the Facts

A general court-martial composed of officer members had to determine an appropriate sentence for Private First Class (PFC) Scott Burnett after the military judge had accepted his guilty pleas to conspiracy, robbery, and kidnapping. Throughout the trial—to include during the providence inquiry—the court indicated that "the relations between the military judge and the civilian defense counsel had been less that harmonious."[9] At one point on cross-examination of a defense witness, the trial counsel interrupted the witness before he fully responded to the trial counsel's question. The defense counsel objected and requested that the witness be allowed to respond to questions without interruption. The judge stated that he would allow the trial counsel to rephrase the question. During redirect examination, the defense counsel prefaced a question to the witness by referring to the question that the trial counsel and military judge earlier would not allow him to finish answering.[10] This episode eventually led to the military judge calling for a session outside the presence of the court members, citing the defense counsel for contempt, suspending the trial, and allowing the court members to decide whether the conduct of counsel amounted to contempt in accordance with the R.C.M. 809 procedures.

While the court members were deliberating on the contempt, the defense counsel requested permission to withdraw from the case. He contended that he no longer could be effective in representing PFC Burnett and that the members could not render credence to any argument that he would make on behalf of his client. The military judge denied the request. The court members found the defense counsel to be in contempt and adjudged a punishment of a reprimand and a $100 fine. The judge then instructed the members that the contempt proceedings could not affect their decision as to what would be an appropriate sentence for the accused.[11]

United States v. Burnett—the Holding

The COMA began its analysis of the case by reviewing the history of the military's contempt statute and procedures. The COMA further noted that it had no direct review under Article 69, UCMJ, of the specific contempt involved in the case, but that it could consider whether the procedures had "impinged on Burnett's right to receive a fair trial and to have the effective assistance of his counsel."[12] The COMA indicated that the current R.C.M. 809 procedures involving the court members in the contempt procedures were a carryover from the procedures contained in the 1969 *Manual for Courts-Martial.* The 1969 *Manual* based its contempt procedures on the provisions in the 1951 *Manual for Courts-Martial,* where the position of military judge did not exist and no sessions outside the presence of the court members could occur. The court categorically stated that in its view, the changes occurring to military justice resulting from the position of the military judge "have turned the *Manual's* contempt procedure—as now prescribed in R.C.M. 809(c)—into an anachronism."[13] The COMA, moreover, stated that under the current procedure—when the trial is suspended pending completion of the contempt proceedings and "when the alleged contempt is by a defense counsel—a danger of prejudice to the accused is great."[14]

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[5] *See* McHardy, *Military Contempt Law And Procedure,* 55 MIL. L. REV. 131 (1972) (comprehensive review of the origins and developments of military contempt); Hennessey, *Courts-Martial Contempt—An Overview,* ARMY LAW., June 1988 at 38 (review of the current procedures for adjudging contempt in a court-martial).

[6] MCM, *supra* note 3, R.C.M. 809(c)(2). *See* DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, app. E (1 May 1982), for a suggested guide in handling contempt procedures.

[7] *Id.*

[8] MCM, *supra* note 3, R.C.M. 809(d).

[9] United States v. Burnett, 27 M.J. 99, 100 (C.M.A 1988).

[10] *Id.* at 101.

[11] *Id.* at 103.

[12] *Id.* at 105.

[13] *Id.* at 107.

[14] *Id.* at 106.

The COMA based its decision, in part, on language by the Supreme Court in *Sacher v. United States*,[15] where the Court implicitly indicated a preference for a judge to delay punishment of a contemptuous defense attorney until the end of the trial. The Supreme Court recognized that holding a defense attorney in contempt during trial would likely prejudice the client, and if the court had to adjudge a sentence for the contempt before the trial ended, "it would add to the prejudice."[16] Drawing on the *Sacher* decision, the COMA made a statement that is unmistakably clear in its message:

> If, as the Supreme Court has suggested, a substantial risk of prejudice to the defendant is created when jurors are even aware that a defense attorney has been cited by the judge for contempt, the danger of prejudice would seem to be enhanced when the "jurors" themselves must determine during the trial whether a contempt has been committed by the attorney and what his punishment should be. Moreover, a defense counsel may have difficulty in zealously advocating his client's cause before the same persons who have just found the lawyer guilty of contempt and imposed a punishment therefor.[17]

The COMA remanded the case for a determination by the Army Court of Military Review (ACMR) as to whether the accused suffered prejudice by the contempt procedures employed in the case. Based on the military judge's instructions to the court members and the members' assurances that the contempt proceedings would have no influence on their determination of an appropriate sentence, the ACMR subsequently found no prejudice and affirmed the sentence.[18]

Conclusion

The meaning and significance of the *Burnett* decision is apparent: the current contempt procedures contained in R.C.M. 809 must be changed to bring them in line with not only military case law, but with Supreme Court precedents. A cursory reading of *Burnett* leads to the inescapable conclusion that two conditions need to occur regarding military contempt procedures: (1) contempt proceedings ordinarily should be delayed until the court-martial has been completed; and (2) the military should remove the court members from the contempt process and vest all contempt powers in the military judge.[19] These proposed amendments to the military's contempt procedures only should be the minimum changes considered. Other contempt issues that the Joint Service Committee on Military Justice should address are: whether the President should remove the convening authority from having any role in reviewing contempt procedures; whether Congress should adopt the contempt statute used in federal district courts for the military; or whether the President should increase the maximum punishment for contempt at courts-martial.

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[15] 343 U.S. 1 (1952).

[16] *Id.* at 10.

[17] *Burnett*, 27 M.J. at 107.

[18] United States v. Burnett, 27 M.J. 99 (C.M.A. 1988), *aff'd on remand*, CM 444568 (A.C.M.R., 13 Apr. 1989). The COMA later affirmed this decision. *See* United States v. Burnett, 29 M.J. 446 (C.M.A. 1989) (summary disposition).

[19] These changes can be accomplished by amending R.C.M. 809 to read as follows:

(a) *In general.* [no change]

(b) *Method of Disposition.*

(1) *Summary Disposition.* When conduct constituting contempt is directly witnessed by the court-martial, the conduct may be punished summarily.

(2) [no change]

(c) *Procedure; who may punish for contempt.*

(1) *Presiding official.* The military judge shall in all cases determine whether to punish for contempt, and, if so, what the punishment shall be. If the court-martial is with court members, the military judge shall conduct contempt proceedings outside the presence of the court members. 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.

(2) *Timing of contempt proceedings.* Ordinarily, the contempt proceeding should occur before adjournment of the court-martial, but not before the regular proceedings have concluded through findings and imposition of sentence, as applicable.

DISCUSSION

If the contempt is by one of the parties to the trial, ordinarily, to preclude the appearance of prejudice to either side, the contempt proceedings should be delayed until the completion of the court-martial proceeding. If with court members, the contempt proceedings ordinarily should occur after they have been excused from further participation in the case, but before adjournment of the court-martial. While desirable to postpone the contempt proceeding to the end of the trial, some situations may require immediate action to remedy the situation or to prevent the contempt from recurring. The decision when to hold the contempt proceeding in such cases is left to the discretion of the military judge.

(d) *Record; review.* [no change]

(e) *Sentence.* [no change]

(f) *Informing person held in contempt.* [no change]

In *Burnett*, the COMA also urged Congress to examine Article 48 to determine if the definition of contempt should be expanded to bring it more in line with the federal contempt statute (18 U.S.C. § 401 (1988)). While this author believes this may be appropriate, the proposed amendments to R.C.M. 809 can be accomplished regardless of the wording of Article 48.

The COMA recently has stated that "a military judge does the type of things that civilian judges do."[20] Military judges are lacking, however, compared to their civilian counterparts in not only their contempt powers, but in the procedural aspects of adjudging contempt. To preclude prejudice to an accused, to enhance the position of the military judge, and to bring the military contempt procedures in line with case law, R.C.M. 809 should be amended without further delay. After all, what value exists in having a rule when the rule has been superseded by the law? Lieutenant Colonel Holland, Circuit Judge, 2d Judicial Circuit.

Clerk of Court Notes

Court-Martial Processing Times

The following tables show the Army-wide average processing times for general courts-martial and bad-conduct discharge (BCD) special courts-martial for fiscal years (FY) 1991 to 1993.

General Courts-Martial

	FY 1991	FY 1992	FY 1993
Records received by Clerk of Court	1114	1156	1035
Days from charges or restraint to sentence	46	53	54
Days from sentence to action	62	72	66
Days from action to dispatch	7	9	7
Days enroute to Clerk of Court	10	11	8

BCD Special Courts-Martial

Records received by Clerk of Court	350	316	174
Days from charges or restraint to sentence	33	42	38
Days from sentence to action	53	61	59
Days from action to dispatch	6	6	7
Days enroute to Clerk of Court	9	8	7

[20] United States v. Graf, 35 M.J. 450, 457 (C.M.A. 1992).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

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

Legal Assistance

The Chief, Legal Assistance Division, Office of The Judge Advocate General, recently issued a message reminding Staff Judge Advocates about the deadlines for the Report on Legal Assistance Services for Calendar Year 1993 and the Chief of Staff Award for Excellence in Legal Assistance.[1]

The annual report on legal assistance services, *DA Form 4944-R*, is due not later than 1 February 1994. Legal offices providing legal assistance services on a routine basis should submit the report in hard copy and on disk.

The Chief of Staff Award application form is due not later than 1 March 1994. Applications received between 2 and 7 March will be considered in the evaluation process, but will have a penalty applied. Applications received after 7 March 1994 will not be considered.

Tax Notes

1994 Tax Assistance After-Action Report[2]

Offices providing tax assistance are required to submit after-action reports on tax assistance services covering the tax season (1 January through 15 April for legal offices in the United States; 1 January through 15 June for offices outside the United States).

[1] Message, Headquarters, Dep't of Army, DAJA-LA, subject: Due Dates for Legal Assistance Reports and Chief of Staff Awards and LAAWS-LA Update (291430Z Oct 93). Send the reports to The Legal Assistance Division, Office of The Judge Advocate General, 2200 Army Pentagon, Washington, D.C. 20310-2200.

[2] Message, Headquarters, Dep't of Army, DAJA-LA, subject: 1994 After-Action Report on Tax Assistance (281600Z Oct. 93).

An interim tax assistance report is due not later than 26 April 1994. The final after-action report is due not later than 1 June 1994 for offices located in the United States and not later than 1 July 1994 for offices located outside the United States.

The reports are used to provide the Internal Revenue Service (IRS) data to justify funding for next year's training at military installations.

The report, in memorandum form, should provide the following information:

A. Number of attorneys providing tax assistance on a full or part-time basis.

B. Number of Unit Tax Advisors (UTA).

C. Number of volunteers providing tax assistance.

D. Number of support personnel (such as, secretaries, legal clerks, and paralegals) in the legal office providing tax assistance on a full or part-time basis.

E. Tax assistance provided:

(1) Number of tax returns completed with primary assistance provided by:

(a) UTAs: _____ Federal: _____ State: _____
(b) Volunteers: ____ Federal: _____ State: _____
(c) Attorneys and Support:
Personnel: ____ Federal: _____ State: _____

(2) Number of inquiries on income tax matters answered by:

(a) UTAs: _____ Federal: _____ State: _____
(b) Volunteers: ____ Federal: _____ State: _____
(c) Attorneys and Support:
Personnel: ____ Federal: _____ State: _____

F. Number of federal income tax returns, if any, filed electronically by your legal office.

G. Number of the following federal income tax returns prepared:

(1) *1040:* _____ Joint: _____ Individual: _____
(2) *1040A:* _____ Joint: _____ Individual: _____
(3) *1040EZ:* _____ Joint: _____ Individual: _____

H. If the IRS provided volunteer income tax assistance (VITA) instruction to your tax preparers, provide the following:

(1) The number of VITA classes taught.

(2) Comments on the content and quality of instruction provided by VITA instructors to your tax preparers, and the restrictions, if any, placed on attendance.

I. What, if any, tax-related training—other than IRS VITA instruction—did your legal assistance attorney receive? If training occurred, describe the course, sponsor, and any comments on the content and availability of such instruction. If specialized tax-related training had been available through judge advocate channels, would you have attended (budget constraints permitting)?

J. Did a commercial tax preparer not previously authorized to operate on your installation receive authorization for the 1994 tax season? If so, provide the result of that request and the coordination, if any, that occurred.[3]

K. If a commercial tax preparer was operating on your installation during the 1994 tax season, provide the following:

(1) The identity of the tax preparer (such as, H&R Block, Federal Credit Union, Bank).

(2) The number of consecutive years (such as, first, second year of operation) that a commercial tax preparer has operated on the installation.

(3) Your comments, if any, on the positive or negative effect that the services of the commercial tax preparer had on Army tax assistance service or clients.

(4) Your comments on the failure, if any, of the commercial tax preparer to abide by the terms of the agreement authorizing its operation on the installation (such as, display of signs advertising free army tax services, providing monthly reports about its services to SJAs, providing written notice to each customer disclosing certain taxpayer information) and the effect this had, if any, on Army tax assistance services or clients.

L. Your comments on any successes, problems, or concerns about Army tax services and the 1994 tax season not already addressed.

The interim report—due not later than 26 April—should cover the period 1 January through 15 April and provide information as to subparagraphs B, C, E(1)(a),(b), E(2)(a),(b), G (as it pertains to the numbers reported in E(1)(a),(b), and H(1),(2)). Major Webster.

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[3] *See* DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, paras. 1-4f(2), 1-4g(7), 3-6i, 3-7e, 3-7f(1), 5-4 (30 Sept. 1992).

Tax Update for 1993 Federal Income Tax Returns

Legal assistance officers preparing for the 1993 income tax filing season may find this update useful in highlighting information of most concern to military taxpayers.[4] Lieutenant Colonel Hancock.

What Form Must be Used?

The tax form you should use depends on your filing status and income level and on the type of deductions and credits you claim. The IRS has established the following guidelines for choosing tax forms:

- You may use *Form 1040EZ*[5] if the following circumstances exist: (1) you are single or married filing jointly, are less than sixty-five years old (both you and your spouse if filing jointly), and have no dependents; (2) your taxable income is less than $50,000; and (3) your interest income does not exceed $400. If you use this form, you may *not* itemize deductions, claim credits, or take adjustments.

- You may use *Form 1040A*[6] if your taxable income from wages, salaries, tips, interest, and dividends is less than $50,000. If you use this form, you may not claim any itemized deductions; however, you may claim an IRA adjustment and credits for child and dependent care and earned income.

- If you intend to itemize deductions, or have taxable income over $50,000, you must file *Form 1040* ("the long form").[7]

When to File?

Tax returns for most military taxpayers are due on 15 April 1994. Nevertheless, you may request additional time to file a *Form 1040* or *Form 1040A*. The length of the delay available to you will depend on whether you live in the United States or overseas.[8]

If you live in the United States or Puerto Rico, you may receive an automatic four-month extension to file *Form 1040* or *Form 1040A*. This extension does not allow you, however, to defer paying any federal income tax you may owe. If you ask for this extension, you must estimate your tax liability and pay any expected balance due by filing *Form 4868*[9] not later than 15 April 1994.

If you are living outside the United States or Puerto Rico on 15 April 1994, you are allowed an automatic extension of two months. You do not have to file a request to obtain this extension.[10] This automatic extension applies not only to filing your 1993 federal income tax return, but also to paying any tax due. The IRS will charge you interest, however, on your unpaid federal income tax, from 15 April 1994—the normal filing deadline—until you actually pay your taxes. If you use the automatic extension, you should attach a statement to your return, stating that you were living outside the United States and Puerto Rico on 15 April. You may obtain an additional two-month extension—until 15 August 1994—by filing *Form 4868* not later than 15 June 1994. To obtain this additional extension, you must pay any tax due when you file the *Form 4868*. You also must write "Taxpayer Abroad," in the top margin of the form.

What Are the 1993 Tax Rates?

The tax rates for 1993 are 15%, 28%, 31%, 36%, and 39.6%. The following tables show the adjusted tax rates by filing status for 1993:

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[4] This update will be included in *JA 269, Tax Information Series,* a handbook of tax information flyers that The Judge Advocate General's School publishes annually in January. This publication contains a series of camera-ready tax information handouts that may be reproduced for use in local preventive law programs. This update also has been uploaded in ASCII format on the Legal Automation Army-Wide System Bulletin Board as 93FTAXUP.ZIP. The 1994 edition of *JA 269* will be uploaded before the end of January 1994.

[5] Internal Revenue Serv., Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents (1993).

[6] Internal Revenue Serv., Form 1040A, U.S. Individual Income Tax Form (1993).

[7] Internal Revenue Serv., Form 1040, U.S. Individual Income Tax Form (1993).

[8] Another deadline extension provision is available to members who served, or are currently serving, in a combat zone. The deadline for filing federal income tax returns is extended for at least 180 days after the later of:

a. The last day a soldier is in a combat zone (or the last day the area qualifies as a combat zone); or

b. The last day of any continuous qualified hospitalization for injury from service in the combat zone.

For more information, consult IRS Publication 945, *Tax Information for those Affected by Operation Desert Storm* (1992).

[9] Internal Revenue Serv., Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (1993).

[10] This benefit no longer is available to taxpayers who merely are traveling outside the United States or Puerto Rico on the due date.

Married Individuals Filing Jointly and Surviving Spouses

If Taxable Income is:	*The Tax Is:*
Not over $36,900	15% of the taxable income
Over $36,900, but not over $89,100	$5,535 plus 28% of the excess over $36,900
Over $89,100, but not over $140,000	$20,165 plus 31% of the excess over $89,100
Over $140,000, but not over $250,000	$35,928.50 plus 36% of the excess over $140,000
Over $250,000	$75,528.50 plus 39.6% of the excess over $250,000

Heads of Households

If Taxable Income is:	*The Tax Is:*
Not over $29,600	15% of the taxable income
Over $29,600, but not over $76,400	$4,440.00 plus 28% of the excess over $29,600
Over $76,400, but not over $127,500	$17,544.00 plus 31% of the excess over $76,400
Over $127,500, but not over $250,000	$33,385.00 plus 36% of the excess over $127,500
Over $250,000	$77,485.00 plus 39.6% of the excess over $250,000

Unmarried Individuals (Other Than Surviving Spouses and Heads of Households)

If Taxable Income is:	*The Tax Is:*
Not over $22,100	15% of the taxable income
Over $22,100, but not over $53,500	$3,315.00 plus 28% of the excess over $22,100
Over $53,500, but not over $115,000	$12,107.00 plus 31% of the excess over $53,500
Over $115,000, but not over $250,000	$31,172.00 plus 36% of the excess over $115,000
Over $250,000	$79,772.00 plus 39.6% of the excess over $250,000

Married Individuals Filing Separate Returns

If Taxable Income is:	*The Tax Is:*
Not over $18,450	15% of the taxable income
Over $18,450, but not over $44,575	$2,767.50 plus 28% of the excess over $18,450
Over $44,575, but not over $70,000	$10,082.50 plus 31% of the excess over $44,575
Over $70,000, but not over $125,000	$17,964.25 plus 36% of the excess over $70,000
Over $125,000	$37,764.25 plus 39.6% of the excess over $125,000

What Are 1993's Standard Deductions?

The following table shows the standard deduction amounts for 1993:

Filing Status	*Amount*
Joint returns or surviving spouses	$6,200
Heads of household	$5,450
Unmarried individuals other than surviving spouses and heads of households	$3,700
Married filing separately	$3,100

The IRS allows the elderly and the blind to claim a higher standard deduction. Moreover, a minor child claimed as a dependent on another taxpayer's return is entitled to a standard deduction. A child who is claimed as a dependent by his or her parents, and who has only investment income, has a $600 standard deduction, no matter how much his or her investment income may be. On the other hand, a dependent child who earned wages exceeding $600 may claim a standard deduction equal to his or her wages, or the regular standard deduction for nondependents, whichever is less. Accordingly, the standard deduction for an eighteen-year-old dependent who earned $3,750 in wages in 1993 is $3,700—the maximum for a single dependent who is under age sixty-five and who is not blind.

What Is the 1993 Personal Exemption?

The personal exemption amount is increased to $2350 this year. You may not claim a person as your dependent if he or she may be claimed as a dependent on another taxpayer's return.[11] Personal exemption phaseouts begin at $162,700 for taxpayers filing joint returns and surviving spouses; $135,600 for taxpayers filing as heads of household; $108,450 for

[11] If you wish to claim a personal exemption for a child aged one or over, you must report the child's social security number. *See* I.R.C. § 6109(e)(2) (Maxwell MacMillan 1991). If your child has not been assigned a social security number, you should contact your local legal assistance office or social security office as soon as possible to obtain an application for a social security number; *see generally* TJAGSA Practice Note, *Social Security Numbers for Dependents*, ARMY LAW., Dec. 1991, at 51.

unmarried taxpayers, other than surviving spouse or heads of household; and $81,350 for married taxpayers filing separately.

Personal Interest

A taxpayer may not deduct interest paid on personal loans, credit card bills, car loans, or educational loans; however, if the taxpayer intends to itemize deductions, he or she may use a home equity loan to avoid this personal interest restriction and deduct some interest.

Uniformed Services Former Spouses' Protection Act Update

Alabama Divides Military Retired Pay as Property

In *Vaughn v. Vaughn*, the Alabama Supreme Court reversed Alabama law on the division of military retirement pay in divorce.[12] The court held that "disposable military retirement benefits . . . accumulated during the marriage constitute marital property and, therefore, are subject to equitable division as such."[13] The potential for retroactive application of this holding is uncertain, although legislation addressing this issue is under study.

In 1983, the Uniformed Services Former Spouses' Protection Act[14] specifically authorized states to divide military retired pay in divorce proceedings. With its recent decision in *Vaughn,* Alabama becomes the fiftieth state to divide military retired pay as property. Puerto Rico remains the only United States forum that has not affirmatively acknowledged authority to divide military retired pay as property of the marriage. Practitioners must be aware that although Mississippi has divided retired pay based on vesting that occurred in other states, Mississippi recognizes no vested interest in a spouse's military retirement pension that arises under Mississippi law. The critical distinction is discussed below.

Despite the general consensus that military retired pay is divisible as property, questions of when a right to military retired pay vests and, if vested, how much is subject to division remain sensitive issues for the practitioner. For example, the Alabama Supreme Court's decision in *Vaughn* refers to division of military retirement benefits "accumulated during the marriage,"[15] suggesting a possible limit on how much retired pay is divisible if there is not a complete overlap of marriage and service.

Mississippi Divides Retired Pay—Sometimes

In its very recent *Flowers* decision,[16] the Mississippi Supreme Court clarified that Mississippi law does *not* grant a spouse an interest in, or right to, a portion of the spouse's retirement pension—to include a military pension. However, Mississippi courts will respect pension rights granted under the laws of *another* jurisdiction in which the military member was domiciled for all or part of the period of service, and divide military pensions accordingly. Furthermore, even if retirement pay is determined to be separate property, Mississippi continues to regard retirement benefits as income that will be considered in fixing alimony.[17]

When advising clients who have Mississippi connections about pension division issues, the correct answer to the question, "Is the pension divisible?" is "It depends." If a member has been domiciled in Mississippi for the entire duration of his or her military service, or for all military service that overlaps with the marital period, the pension is separate property of the member under Mississippi law and will not be divided by Mississippi courts. Attorneys advising a Mississippi domiciliary should exercise extreme caution not to consent to jurisdiction over this issue by any court outside Mississippi. When a member has consented to jurisdiction elsewhere, he or she should argue that Mississippi law should be applied to the issue of pension division because that is the state of the member's domicile for the relevant period when pension rights were acquired. Conversely, attorneys advising a spouse should try to steer the case away from Mississippi and argue that the law of the non-Mississippi forum should be applied in the case.

If a member was domiciled in another state that permits division of military pensions for all or any portion of the period of military service that overlaps with marriage, then division of all or some of the pension is possible in a Mississippi proceeding, even if the member is currently domiciled in Mississippi. Whether division must be proportional to the time spent domiciled in a state other than Mississippi, or is to be made in whatever manner the court deems proper and equitable under the circumstances, remains to be seen.

An important tool for military practitioners working in this area is the *State-by-State Analysis of the Divisibility of Military Retired Pay.*[18] Updates of this analysis have been distributed at The Judge Advocate General's School (TJAGSA) Legal Assistance short courses and redistributed by sister services. A further revision will be loaded onto the Legal Automated Army-Wide System (LAAWS) Bulletin Board System in the near future (instructions for downloading files from the LAAWS Bulletin Board System can be found in the "Current Material of Interest" section located in this issue). In the

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[12] No. 1911634, 1993 LEXIS 841, at *1 (Ala. Aug. 27, 1993).

[13] *Id.* at *10.

[14] 10 U.S.C. § 1408 (1988).

[15] *Id.*

[16] Flowers v. Flowers, No. 91-CA-1154, 1993 Miss. LEXIS 426, at *1 (Miss. Sept. 30, 1993).

[17] Brown v. Brown, 574 So. 2d 688, 691 (Miss. 1990).

[18] *See* ADMIN. & CIVIL L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 274, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (Nov. 1992); *see also* Family Law Note, *State-by-State Analysis of the Divisibility of Military Retired Pay,* ARMY LAW., May 1992, at 37.

interim, existing copies of the analysis should be annotated to include Alabama's *Vaughn* decision and Mississippi's *Flowers* decision.

To ensure that the *State-by-State Analysis* is as current as possible, we rely extensively on input from the field.[19] Please contact MAJ Greg Block in the TJAGSA Administrative & Civil Law Division, (804) 972-6367, fax (804) 972-6377, if you are aware of updates in your local area that should be incorporated into the analysis. Major Block.

Administrative Law Note

Casualty Assistance

Administrative law attorneys occasionally provide regulatory guidance to Casualty Assistance Officers (CAO). Most attorneys generally are aware of *AR 600-8-1*.[20] The National Defense Authorization Act[21] imposed a requirement to provide survivors of deceased service members complete access to the records and reports related to their deaths.[22] The Direc-

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[19] In this regard, special thanks to Majors J.L. Edwards and Thomas F. Dougall for submissions from Wyoming and South Carolina respectively, and to LTC Bryant A. Whitmire, Jr., for forwarding Alabama's *Vaughn* decision. Special thanks also are extended to CDR Kevin McMahon, the Navy's Deputy Assistant Judge Advocate General (Legal Assistance), who provided a copy of the *Flowers* decision and shared his analysis of its impact which provided the basis for these practice notes.

[20] DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1].

[21] *See* Pub. L. 102-484, § 1072 (1992) (codified at 10 U.S.C.A. § 113 (West 1993) (note)).

[22] Section 1072 provides: "Survivor Notification and Access to Reports Relating to Service Members Who Die.

(a) Availability of fatality reports and records.—

(1) Requirement.—The Secretary of each military department shall ensure that fatality reports and records pertaining to any member of the Armed Forces who dies in the line of duty shall be made available to family members of the service member in accordance with this subsection.

(2) Information to be provided after notification of death.—Within a reasonable period of time after family members of a service member are notified of the member's death, but not more than 30 days after the date of notification, the Secretary concerned shall ensure that the family members—

(A) in any case in which the cause or circumstances surrounding the death are under investigation, are informed of that fact, of the names of the agencies within the Department of Defense conducting the investigations, and of the existence of any reports by such agencies that have been or will be issued as a result of the investigations; and

(B) are furnished, if the family members so desire, a copy of any completed investigative report and any other completed fatality reports that are available at the time family members are provided the information described in subparagraph (A) to the extent such reports may be furnished consistent with sections 552 and 552a of title 5, United States Code.

(3) Assistance in obtaining reports.

(A) In any case in which an investigative report or other fatality reports are not available at the time family members of a service member are provided the information described in paragraph (2)(A) about the member's death, the Secretary concerned shall ensure that a copy of such investigative report and any other fatality reports are furnished to the family members, if they so desire, when the reports are completed and become available, to the extent such reports may be furnished consistent with sections 552 and 552a of title 5, United States Code.

(B) In any case in which an investigative report or other fatality reports cannot be released at the time family members of a service member are provided the information described in paragraph (2)(A) about the member's death because of section 552 or 552a of title 5, United States Code, the Secretary concerned shall ensure that the family members—

(i) are informed about the requirements and procedures necessary to request a copy of such reports; and

(ii) are assisted, if the family members so desire, in submitting a request in accordance with such requirements and procedures.

(C) The requirement of subparagraph (B) to inform and assist family members in obtaining copies of fatality reports shall continue until a copy of each report is obtained, or access to any such report is denied by competent authority within the Department of Defense.

(4) Waiver.—The requirements of paragraph (2) or (3) may be waived on a case-by-case basis, but only if the Secretary of the military department concerned determines that compliance with such requirements is not in the interests of national security.

(b) Review of combat fatality notification procedures.—

(1) Review.—The Secretary of Defense shall conduct a review of the fatality notification procedures used by the military departments. Such review shall examine the following matters:

(A) Whether uniformity in combat fatality notification procedures among the military departments is desirable, particularly with respect to—

(i) the use of one or two casualty notification and assistance officers;

(ii) the use of standardized fatality report forms and witness statements;

(iii) the use of a single center for all military departments through which combat fatality information may be processed; and

(iv) the use of uniform procedures and the provision of a dispute resolution process for instances in which members of one of the Armed Forces inflict casualties on members of another of the Armed Forces.

(B) Whether existing combat fatality report forms should be modified to include a block or blocks with which to identify the cause of death as 'friendly fire', 'U.S. ordinance', or 'unknown'.

(C) Whether the existing 'Emergency Data' form prepared by members of the Armed Forces should be revised to allow members to specify provision for notification of additional family members in cases such as the case of a divorced service member who leaves children with both a current and a former spouse.

(footnote 22 continued on pg. 29)

tor, Casualty and Memorial Affairs, recently issued implementing guidance in a 15 October 1993 memorandum.[23] The memorandum directed that CAOs be familiar with the recent change in the law and that CAOs inform survivors of the availability of records and reports. Administrative law attorneys should emphasize this information when briefing CAOs. Lieutenant Colonel Hancock.

Criminal Law Notes

Godinez v. Moran Clarifies the Standard of Competency Necessary for an Accused to Waive Counsel and Conduct a *Pro Se* Defense

Introduction

In *Godinez v. Moran*,[24] the United States Supreme Court ruled that the competency standard for an accused waiving his or her right to counsel is the same as the competency standard for standing trial. Although the Court previously had held that, with a knowing and intelligent waiver, an accused has the right under the Sixth Amendment to conduct his or her own defense,[25] prior to its decision in *Moran*, the Court never had directly addressed the standard of competency issue. *Moran* appears to overrule decisions from several federal circuit courts of appeal that have employed either a higher "reasoned choice"[26] standard to waivers of counsel, or have indicated that the standard is, at least, "vaguely higher"[27] than the competency standard to stand trial.[28]

This decision may change military practice. Recent United States Court of Military Appeals' (COMA) decisions in *United States v. Mix*[29] and *United States v. Streator*,[30] address the level of inquiry necessary to establish a valid waiver of counsel under Rule for Court-Martial (R.C.M.) 506(d),[31] but do not specifically mention whether the level of mental competency

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(footnote 22 continued from pg. 28)

(D) Whether the military departments should, in all cases, provide family members of a service member who died as a result of injuries sustained in combat with full and complete details of the death of the service member, regardless of whether such details may be graphic, embarrassing to the family members, or reflect negatively on the military department concerned.

(E) Whether, and when, the military departments should inform family members of a service member who died as a result of injuries sustained in combat about the possibility that the death may have been the result of friendly fire.

(F) The criteria and standards which the military departments should use in deciding when disclosure is appropriate to family members of a member of the military forces of an allied nation who died as a result of injuries sustained in combat when the death may have been the result of fire from United States armed forces and an investigation into the cause or circumstances of the death has been conducted.

(2) Report.—The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report on the review conducted under paragraph (1). Such report shall be submitted not later than March 31, 1993, and shall include recommendations on the matters examined in the review and on any other matters the Secretary determines to be appropriate based upon the review or on any other reviews undertaken by the Department of Defense.

(c) Definitions.—In this section:

(1) The term 'fatality reports' includes investigative reports and any other reports pertaining to the cause or circumstances of death of a member of the Armed Forces in the line of duty (such as autopsy reports, battlefield reports, and medical reports).

(2) The term 'family members' means parents, spouses, adult children, and such other relatives as the Secretary concerned considers appropriate.

(d) Applicability.—(1) Except as provided in paragraph (2), this section applies with respect to deaths of members of the Armed Forces occurring after the date of the enactment of this Act [Oct. 23, 1992].

(2) With respect to deaths of members of the Armed Forces occurring before the date of the enactment of this Act [Oct. 23, 1992], the Secretary concerned shall provide fatality reports to family members upon request as promptly as practicable."

[23] Memorandum, HQDA, TAPC-PEZ, subject: Survivor Notification and Access to Reports (U) (15 Oct 1993). The memorandum was distributed through personnel channels to Army commands around the world. *Army Regulation 600-8-1* is pending editorial review prior to printing. Chapter 6 of the revision includes sample request forms for use by the next of kin in obtaining several reports—such as, autopsy, accident, criminal investigation division, military police, and reports of investigation. These same forms are already available through the Casualty Area Command.

[24] 113 S. Ct. 2680 (1993).

[25] *See* United States v. Faretta, 422 U.S. 806 (1975); *see also* United States v. Mogavero, 20 M.J. 762 (A.F.C.M.R. 1985).

[26] *See, e.g.*, United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976); *Moran*, 113 S. Ct. at 2684 n.5.

[27] *See, e.g.*, United States *ex rel.* Koningsberg v. Vincent, 526 F.2d 131, (2d Cir. 1975), *cert. denied* 426 U.S. 937 (1976); United States v. McDowell, 814 F.2d 245 (6th Cir. 1986), *cert. denied* 484 U.S. 980 (1987); Blackmon v. Armontrout, 875 F.2d 164 (8th Cir. 1988), *cert. denied* 493 U.S. 939 (1989).

[28] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 909(a) (1984) requires that an accused be able to "understand the nature of the proceedings against that person," and be able to "to conduct or cooperate intelligently in the defense of the case." [hereinafter MCM] *See, e.g.*, Dusky v. United States, 362 U.S. 402 (1960) (per curium); United States v. Proctor, 37 M.J. 330 (C.M.A. 1993).

[29] 35 M.J. 283 (C.M.A. 1992).

[30] 32 M.J. 337 (C.M.A. 1991).

[31] MCM, *supra* note 28, R.C.M. 506(d). For more information on *pro se* representation by military accused in general, see 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT MARTIAL PROCEDURE, § 5-80.00 (1991).

differs from that required to stand trial. While the COMA has never specifically addressed this issue, in *United States v. Freeman*,[32] the United States Navy-Marine Corps Court of Military Review (NMCMR) noted that a "higher standard of competence must exist for an accused to waive counsel and conduct his own defense than would be required to merely assist in his own defense while being represented by counsel."[33]

The Case of Godinez v. Moran

In *Moran*, the accused, Richard A. Moran, after discharging his court-appointed attorneys, pleaded guilty to three counts of first degree murder. Moran indicated that he was discharging his counsel to prevent the presentation of mitigating evidence at his sentencing proceeding. Two psychiatrists concluded that Moran was competent to stand trial.[34] The trial court made specific findings that Moran "understood the nature of the criminal charges against him," was "able to assist in his defense," "knowingly and intelligently" waived his right to the assistance of counsel," and that his guilty pleas were "freely and voluntarily" entered.[35] As a result of his pleas, on January 21, 1985, a three-judge panel sentenced Moran to death for each of the killings.[36]

After an unexplained apparent change of heart, and after seeking, but being denied, postconviction relief in state court, Moran filed a habeas corpus petition in the United States District Court for the District of Nevada. The district court denied the respondent's petition for relief, but the Ninth Circuit Court of Appeals reversed, holding that the "state court's postconviction ruling was premised on the wrong legal standard of competency."[37] The Ninth Circuit found that competency to waive constitutional rights—including the right to waive counsel—requires "a higher level of mental functioning than that required to stand trial."[38] The circuit court also held that a defendant is competent to waive counsel or plead guilty only if he has "the capacity for 'reasoned choice' among the alternatives available to him."[39]

The Supreme Court reversed the Ninth Circuit in a seven-to-two decision delivered by Justice Thomas.[40] The Supreme Court relied on its prior decision in *Dusky v. United States*,[41] which established the minimal level of mental competency necessary to stand trial: a factual understanding of the proceedings and sufficient present ability to consult with counsel with a "reasonable degree of rational understanding."[42] In overturning the Ninth Circuit's "reasoned choice" standard, the Court determined that "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights."[43]

The Court rejected arguments that a defendant who represents himself should possess "greater powers of comprehension, judgment, and reason that would be necessary to stand trial."[44] Furthermore, the Court determined that the competence necessary for a criminal accused to waive counsel is the "competence to waive the right, not the competence to represent himself."[45] Finally, while acknowledging that in most

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[32] 28 M.J. 789 (N.M.C.M.R. 1989).

[33] *Id.* at 792.

[34] Godinez v. Moran, 113 S. Ct. 2680, 2682 (1993). Both psychiatrists indicated that Moran was in full control of his faculties, would be able to assist in his own defense, could determine right from wrong, and recall evidence and give testimony if called on to do so.

[35] *Id.* at 2683.

[36] *Id.* The Nevada Supreme Court subsequently reversed one of the death penalties imposed for the murder of Moran's ex-wife, but confirmed death sentences imposed for the killing of a bartender and patron in a prior armed robbery. Moran v. State, 743 P.2d 712 (Nev. 1987).

[37] Moran v. Warden, 972 F.2d 263 (9th Cir. 1992). The Supreme Court previously had denied the respondent's appeal from the Nevada Supreme Court. Moran v. Warden, 810 P.2d 335 (Nev. 1989), *cert. denied* 493 U.S. 874 (1989).

[38] *Moran*, 972 F.2d at 268.

[39] *Id.* at 266.

[40] Chief Justice Rehnquist, Justices White, O'Connor, and Souter concurred with Justice Thomas' opinion. Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which Justice Scalia joined. Justice Blackmun filed a dissenting opinion, in which Justice Stevens joined.

[41] 362 U.S. 402 (1961).

[42] *Id.*

[43] United States v. Moran, 113 S. Ct. 2680, 2686 (1993).

[44] *Id.*

[45] *Id.*

instances defendants are much better served when properly represented by qualified counsel, the Court categorically declared that "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation."[46]

R.C.M. 506(d) and The Right of a Military Accused to Waive Counsel

Rule for Courts-Martial 506 governs competency of military personnel to waive counsel.[47] Under R.C.M. 506, a military accused may waive the right to counsel only "if the military judge finds the accused is competent to understand the disadvantages of self-representation and the waiver is voluntary and understanding."[48] The rule also provides that the military judge may require the defense counsel to remain present even if the accused's *pro se* request is granted,[49] and for the revocation of the right to waive counsel if the accused is "disruptive or fails to follow basic rules of decorum and procedure."[50]

Recent COMA decisions focus on the validity of an accused's waiver of counsel in accordance with R.C.M. 506, but do not address the mental capacity necessary to make such a decision. In *United States v. Streator,* the COMA ruled that it was error for a military judge to fail to make "explicit findings on the record, either at the outset of trial or after [the military judge] had sufficient time to observe appellant in the courtroom, that he was equal to the task of choosing."[51] In *United States v. Mix,* the COMA reaffirmed the explicit findings requirements of *Streator* and also noted that "future issues on this subject could be precluded or at least expedited on appeal" by following a recommended inquiry (colloquy), which the COMA provided in the appendix to the decision.[52] While the COMA in *Streator* cited to the NMCMR's prior decision in *Freeman* on the issue of the need for a "particularized inquiry"[53] by the military judge on the issue of waiver, the "higher standard of competence" requirement set forth in *Freeman* is not addressed in *Streator* or in any subsequent COMA decisions.

In both *Streator* and *Mix*, the COMA—via hindsight—reviewed the accused's actual performance as a *pro se* advocate to determine whether the accused was "competent" to represent himself. Both cases—using identical language—point out that the accused "handled himself very well."[54] Arguably, prior to *Moran*, these findings might have lent support to contentions that a military accused must, at a minimum, have the mental capacity to put forth an active and viable defense.

Conclusion

The *Moran* case overrules previous federal and military decisions that explicitly or implicitly establish higher standards of competency for waivers of counsel. Furthermore, because the Supreme Court previously had determined in *United States v. Faretta*[55] that an accused has a constitutional right to self-representation,[56] now, when an accused executes a knowing and intelligent waiver in accordance with R.C.M. 506(d), the right to waive counsel appears virtually absolute.

Moran also should put an end to the tendency of appellate courts to give apparent legal consideration to the advocacy skills exhibited by a *pro se* accused (except perhaps as such consideration might reflect on the validity of the accused's initial waiver of counsel). Whether an accused "handles himself very well," is ineffective in his or her defense, or offers no defense whatsoever, is immaterial so long as the accused is competent to stand trial and executes a valid waiver of counsel.

The *Moran* decision highlights the need for military judges to ensure that accused service members are fully apprised of the unique disadvantages and significant hazards of proceeding without counsel. Additionally, should the occasion arise, defense counsel must be ready to argue that if an accused is

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[46] *Id.* at 2682.

[47] MCM, *supra* note 28, R.C.M. 506.

[48] *Id.* R.C.M. 506(d).

[49] *Id.*

[50] *Id.*

[51] United States v. Streator, 32 M.J. 337, 339 (C.M.A. 1991).

[52] United States v. Mix, 35 M.J. 283, 289-90 (C.M.A. 1992).

[53] *Streator,* 32 M.J. at 338.

[54] *Id.* at 339; *Mix,* 35 M.J. at 286.

[55] United States v. Faretta, 422 U.S. 806 (1975).

[56] *Id.*; *Mix,* 35 M.J. at 285; *Streator,* 32 M.J. at 338.

denied the right to a *pro se* defense, then the accused—at least by implication—is incompetent to stand trial. Finally, *Moran* significantly broadens the holding in *United States v. Faretta*,[57] and perhaps signals a greater willingness to allow a criminal accused the right to make those decisions that determine his or her own fate, whether wisely made or not. Major Winn.

United States v. Pollard: Improper Impeachment by Prior Inconsistent Statements

Is there anything more satisfying for the trial practitioner conducting cross-examination than to ask a witness if he or she was lying on a previous occasion, or is lying to the court-martial? Evidence that on a previous occasion a witness made a statement inconsistent with his or her present testimony is "probably the most effective and most frequently employed" attack on witness credibility.[58] Saying one thing on the stand and something different previously means that a witness "is blowing hot and cold, and raises a doubt as to the truthfulness of both statements."[59]

The Military Rules of Evidence (MRE) make impeachment with prior inconsistent statements a simple matter.[60] Contrary to former military practice, MRE 613(a) does not require acquainting a witness with an inconsistent statement before conducting cross-examination concerning it.[61] Impeachment, however, is not the only possible use of a prior inconsistent statement. These statements are admissible *substantively* as an exemption to the rule against hearsay when three requirements are met: the statement is inconsistent with the declarant's testimony; the declarant made the statement under oath subject to the penalty of perjury; and the statement was made at a trial, hearing, or other proceeding, or in a deposition.[62] Failure to satisfy these requirements prohibits substantive consideration of the prior inconsistent statement.[63]

For purposes of impeachment, a witness need not be adverse. Military Rule of Evidence 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness."[64] The rule contemplates impeachment, however, not the attempted introduction of evidence which otherwise is hearsay.[65] Put differently, the government may not use impeachment by prior inconsistent statement as a "subterfuge" to avoid the hearsay rule.[66] Problems still arise in this area. In the recent case of *United States v. Pollard*,[67] the court held, *inter alia*, that trial counsel may

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[57] *Faretta*, 422 U.S. at 806.

[58] C. MCCORMICK, MCCORMICK ON EVIDENCE § 33 at 111-12 (4th ed. 1992).

[59] *Id.* at 114 (footnote omitted).

[60] *See* MCM, *supra* note 28, MIL. R. EVID. 613, which provides the following:

> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. R. Evid. 801(d)(2).

[61] *Id.* MIL. R. EVID. 613(a) analysis, app. 22, at A22-40. The former foundational requirements, set forth in Manual for Courts-Martial, ¶ 153b (2)(c) (rev. ed. 1969), required counsel to direct "the attention of the witness to the time and place of the statement and the person or persons to whom it was made, and asking the witness if he made it." Military Rule of Evidence 613(b), however, requires that a witness be given an opportunity to explain or deny a prior inconsistent statement when a party offers extrinsic proof of the statement.

[62] *Id.* MIL. R. EVID. 801(d)(1)(A) provides the following:

> A *statement is not hearsay if*. . . [t]he *declarant testifies* at the trial or hearing and *is subject to cross-examination* concerning the statement, and the statement is (A) *inconsistent* with the declarant's testimony, and was *given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding,* or in a deposition.

(emphasis added).

[63] *See* United States v. LeMere, 22 M.J. 61, 67 (C.M.A. 1986) (extrajudicial statement which was not "inconsistent," "under oath," or made in some "proceeding" or "deposition," could not be admitted under MRE 801(d)(1)(A)).

[64] MCM, *supra* note 28, MIL. R. EVID. 607.

[65] *See* SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE, Military Rule of Evidence 607, at 640 (editorial comt.) (3d ed. 1991).

[66] United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985).

[67] 38 M.J. 41 (C.M.A. 1993).

not use "the guise of impeachment" by a prior inconsistent statement when counsel's "primary purpose" is to place before the court-martial substantive evidence that is not otherwise admissible.[68] The COMA held that permitting such "impeachment" constituted an abuse of discretion by the military judge.[69]

In *Pollard*, the declarant (*"M"*) was a thirteen-year-old female. During a visit to *M*'s house by a friend named Ann, the declarant's stepfather called *M* into his bedroom several times for up to thirty minutes in each instance. *M* appeared upset afterwards and her friend asked what was wrong. *M* said that her stepfather had "been messing with her and stuff."[70] The girls visited a friend of Ann's family ("Coach"). *M* confided to Coach that her stepfather was sexually abusing her. At his suggestion, *M* prepared a brief handwritten statement that Coach provided to local police authorities.[71] A police officer specially trained in child sexual abuse investigations interviewed *M* and her two siblings several days later.[72] *M* made a sworn statement to the police officer which described indecent acts that she alleged her stepfather had performed on her. The next day, she called the police officer and recanted, stating that her statement was a lie designed to get her stepfather in trouble.[73] Several days later, however, *M* executed a second sworn statement that said that the first statement and the facts she had related to Coach were true.[74]

M again recanted her accusations during litigation of motions concerning the admissibility of her statements. She testified that her stepfather never had abused her, and tried to explain away her prior inculpatory written statements.[75] The military judge held that the first sworn statement made by *M* to the police lacked the particularized guarantees of trustworthiness required for admission under MRE 803(24).[76] The military judge did permit trial counsel to call *M* as a hostile witness during her case-in-chief on the merits. Ostensibly, the Government called *M* as a witness to establish that she was thirteen years old. During the examination, however, the trial counsel questioned *M* by quoting extensively from her prior statements to Coach and the police. The defense counsel objected that trial counsel was "back-dooring the [prior] ruling" excluding the statements. Nevertheless, the military judge admitted the written statements by *M* as prior inconsistent statements.[77] The military judge subsequently gave three limiting instructions to the members, directing them to limit their consideration of the statements to the impact that they might have on *M*'s credibility.[78]

The COMA unanimously concluded that the admission of *M*'s pretrial statements was prejudicial error that required reversal.[79] The COMA found that even if the members were able to follow the military judge's instructions, and concluded that the victim was not telling the truth in court, the members "necessarily would infer that the converse of her blanket recantation was true, *i.e.* that she had been abused as the prosecution contended and as [her siblings] had described in their pretrial statements, which were already before the court."[80]

The *Pollard* decision quotes *United States v. Hogan* for the "black-letter" legal proposition that a "prosecutor may not use [a prior inconsistent statement] under the guise of impeachment for the *primary* purpose of placing before the jury sub-

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[68] *Id.* at 50 (quoting United States v. Hogan, 763 F.2d at 702).

[69] *Id.* at 50-51.

[70] *Id.* at 43.

[71] *Id.* at 43-44.

[72] *Id.* at 44. The military judge admitted the statements made by the siblings pursuant to the residual exception to the rule against hearsay, MCM, *supra* note 28, MIL. R. EVID. 803(24). The court found that the circumstances surrounding the statements of the two siblings were sufficient to establish their reliability. *Pollard*, 38 M.J. at 47.

[73] *Id.* at 46.

[74] *Id.*

[75] *Id.* at 47.

[76] *Id.* at 46.

[77] *Id.*

[78] The statements on which the military judge provided limiting instructions included the letter to Coach, and the two written statements given by *M* to the police. *Id.* at 47-48.

[79] *Id.* at 51-52. The issue of waiver was not before the COMA. In the *Hogan* decision, however, the introduction of such "impeachment" evidence was held to constitute plain error, notwithstanding the failure of the defense counsel to request a limiting instruction. United States v. Hogan, 763 F.2d 697, 703 (5th Cir. 1985).

[80] *Pollard*, 38 M.J. at 52.

stantive evidence which is not otherwise admissible."[81] This "primary purpose" rule is controlling precedent not only in the military courts, but in all the federal circuits that have considered the subterfuge question.[82] In *Pollard*, the COMA had no difficulty in discerning the trial counsel's primary purpose, because the victim's age was the only information properly sought.[83] Naturally, each case must be determined based on its own facts. A scenario in which a trial counsel might seek a wider range of testimony than in *Pollard* is not difficult to imagine. In that situation, determining the primary purpose could be more difficult.

Several factors exist that could guide this subjective inquiry. One such factor is simply to consider how necessary the evidence is to the government's case. For example, impeachment of a witness which merely duplicates evidence already properly before the factfinder may be cumulative, but probably would not constitute an impermissible subterfuge. By contrast, opposing counsel and the military judge should carefully scrutinize the primary purpose of impeachment with noncumulative statements adverse to the accused and beneficial to the prosecution.[84] A second possible factor is the extent to which the witness previously has indicated that his or her testimony will contradict the prior statement or statements. In *Pollard*, for example, the trial counsel and military judge knew that *M* would contradict her prior statements when she took the stand.[85] The greater the certainty that the witness will disavow his or her prior statements, the more likely it may be that the primary purpose of impeachment is to place those statements before the factfinder.[86] A third factor is to determine what proportion of examination of a witness concerns arguably inadmissible evidence, as opposed to that portion which involves clearly admissible evidence. In *Pollard*, cross-examination concerning inadmissible evidence greatly outweighed the portion pertaining to admissible evidence. These factors are not exhaustive, but they will provide counsel with a place to start analyzing an opponent's impeachment by means of prior inconsistent statements. For defense counsel, *Pollard* shows that by making a timely objection, a meaningful remedy may be available on appeal. Major O'Hare

The COMA Finds Unwarned Protected Sexual Intercourse by HIV-Infected Soldier an Aggravated Assault

Recently, in *United States v. Joseph*,[87] the COMA affirmed the aggravated assault conviction of an HIV-infected sailor who engaged in sexual intercourse without informing his partner about his deadly infection.[88] The difference between this case and past military HIV cases, however, is that Joseph wore a protective condom during the sexual act. Despite this precaution, the COMA concluded that Joseph's conduct amounted to an aggravated assault in violation of Article 128, Uniform Code of Military Justice (UCMJ).[89] Because of the COMA's holding and because this type of case is becoming increasingly common in both the military and civilian criminal systems, *Joseph* merits closer scrutiny from both trial and defense counsel.[90]

The Facts

In June 1988, Journalist Second Class (JO2) John Joseph, United States Navy, initially tested positive for the HIV virus.

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[81] *Id.* at 50 (quoting *Hogan*, 763 F.2d at 702) (other citations omitted).

[82] *Id. See generally* Don Johnsen, *Impeachment With An Unsworn Prior Inconsistent Statement As Subterfuge*, 28 WM. & MARY L. REV. 295 (1987).

[83] The court observed:

> Trial counsel's stated motive in this case was transparent. Establishing *M*'s age required one question and answer in the record. Her age could have been established by Mrs. Pollard, Ann, [*M*'s siblings]; by official records; or by stipulation. Trial counsel and the judge knew beforehand that *M* would recant her pretrial statements in front of the court members, because she had done so in the hearing on admissibility of her pretrial statements.

Pollard, 38 M.J at 50-51.

[84] Johnsen, *supra* note 82, at 325.

[85] *See supra* note 83 and accompanying text.

[86] Johnsen, *supra* note 82, at 325-27. The evident surprise of the trial counsel at a witness's testimony, or evidence of hostility by the witness toward the counsel are factors potentially related to this inquiry. *See generally* Sheila A. Skojec, Annotation, *Propriety Under Federal Rule of Evidence 607, of Impeachment of Party's Own Witness*, 89 A.L.R. FED. 13 (1988).

[87] 37 M.J. 392 (C.M.A. 1993).

[88] HIV is the short-hand term for the Human Immunodeficiency Virus. This virus is the progenitor that leads to the currently incurable and deadly Acquired Immune Deficiency Syndrome (AIDS). *See* United States v. Womack, 29 M.J. 88 (C.M.A. 1989).

[89] UCMJ art. 128(b)(1) (1988) provides: "Any person subject to this chapter who . . . commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm . . . is guilty of aggravated assault and shall be punished as a court-martial may direct."

[90] *See Womack*, 29 M.J. at 88 ("safe sex" order for HIV-infected service member held constitutional); United States v. Stewart, 29 M.J. 92 (C.M.A. 1989) (aggravated assault conviction affirmed when accused knowingly exposed victim to HIV-virus); United States v. Negron, 29 M.J. 287 (C.M.A. 1989) (conviction for violating "safe sex" order affirmed); United States v. Johnson, 30 M.J. 53 (C.M.A. 1990) (specification for aggravated assault with HIV-virus found to be sufficient); United States v. Dumford, 30 M.J. 137 (C.M.A. 1990) ("safe sex" order not overbroad because it protects civilians as well as military members); *see also* Justin Blum, *3 With HIV Accused of Attempted Murder; Virginia Case Based on Alleged Unprotected Sex*, WASH. POST, July 3, 1993, at B1; Wilda L. White, *Trial to Begin For Rape Suspect With AIDS Virus; Attempted-Murder Charges Filed;* TIMES PICAYUNE (MIAMI), July 8, 1993, at A2; T.J. Milling, *Woman Claims Lover Hid His HIV*, HOUSTON CHRON., Aug. 17, 1993, at A14.

He was then sent to the Oakland Medical Center for further tests and counseling. After additional tests confirmed the accused was HIV positive, health officials counseled him about the disease. As part of the counseling, Joseph was advised that the virus was extremely dangerous, that it could be transferred through sexual intercourse, and "that death or great bodily harm was a probable and eventual consequence of infecting someone with the HIV virus."[91] In addition, Joseph received a four-page counseling sheet which indicated that the use of a condom along with nonoxynol-9, a spermatocide, would help to reduce, but not eliminate, the chance for spread of the infection during sexual intercourse.[92]

After his release from the Oakland Medical Center, JO2 Joseph met Petty Officer *W*, a female naval reservist. Despite his knowledge about the associated risks, on January 22, 1989, they engaged in a one-time act of sexual intercourse. At the time Joseph did not inform Petty Officer *W* that he was positive for the HIV virus; he did, however, wear a condom, which may or may not have contained nonoxynol-9. Sometime after their encounter, Petty Officer *W* became ill and learned that she was positive for HIV.[93]

At trial, the accused was charged and convicted, *inter alia*, of aggravated assault in violation of Article 128, UCMJ. The accused was sentenced "to a dishonorable discharge, reduction to pay grade E-1, forfeiture of all pay and allowances, and confinement for 30 months."[94]

Analysis

Recognizing that all aggravated assaults are predicated on one form or another of simple assault, the COMA first looked to see whether one of the three theories of simple assault was present based on the facts.[95] The COMA said, "one means of proving an assault is to prove a battery (in military parlance, 'an assault consummated by a battery')."[96] Finding that a deliberate physical touching had occurred under these facts—that is, sexual intercourse—the COMA then questioned whether the touching was an offensive touching. In this regard, the COMA said, "we can think of no reason why a factfinder cannot rationally find it to be an 'offensive touching' when a knowingly HIV-infected person has sexual intercourse with another, without first informing his sex partner of his illness—regardless whether protective measures are utilized."[97]

Finally, the COMA considered whether the "assault-by-unwarned-sexual-intercourse was a 'means or force likely to produce death or grievous bodily harm.'"[98] The COMA had little difficulty affirmatively answering this question, especially because intimate sexual contact is one of the two primary means of HIV transmission, the other being intravenous drug use.[99]

The most interesting aspect of the COMA's analysis on this issue was its interpretation of the word "likely," in the phrase, "a means likely to produce death or grievous bodily harm."[100] Comparing the HIV virus to a rifle bullet, the COMA said

> The question [if this were a rifle bullet] would be whether the bullet is likely to inflict death or serious bodily harm *if* it hits the victim, not the statistical probability of the bullet hitting the victim. The statistical probability of hitting the victim need only be "more than merely a fanciful, speculative, or remote possibility."[101]

In other words, as long as a reasonable chance exists that the victim could be infected by the AIDS virus, the question is not how likely it is that the victim will be infected by the AIDS virus, but how likely it is the victim will suffer death or grievous bodily harm if infected by the AIDS virus. Under the cir-

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[91] *Joseph*, 37 M.J. at 393.

[92] *Id.*

[93] United States v. Joseph, 33 M.J. 960 (N.M.C.M.R. 1991).

[94] *Joseph*, 37 M.J. at 393.

[95] As noted by the concurring opinion of Chief Judge Sullivan, military law recognizes three theories of simple assault: assault by attempt (attempted battery theory); assault by offer (intentionally or negligently placing a victim in fear of receiving immediate bodily harm); and the intentional or culpably negligent battery (an offensive touching). *Id.* at 398.

[96] *Id.* at 395.

[97] *Id.*

[98] *Id.* at 396.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 396-97.

cumstances, the COMA determined that a reasonable factfinder could find that unwarned sexual intercourse by an HIV-infected person, even if wearing a condom, was an aggravated assault.

Two additional comments in the opinion merit consideration by trial and defense counsel. The first is the COMA's statement that "ANY TIME A PERSON WILLFULLY OR DELIBERATELY EXPOSES AN UNSUSPECTING VICTIM TO A DEADLY OR DEBILITATING DISEASE OR INFECTION, SUCH AS HIV, POLIO, HEPATITIS B, OR CERTAIN VENEREAL DISEASES, THE ACTOR MAY BE LIABLE FOR AN AGGRAVATED ASSAULT—OR WORSE."[102] This statement presents a number of questions. For example, what venereal diseases will support aggravated assault charges? Must they be incurable deadly diseases or would curable—but potentially deadly—diseases such as gonorrhea or syphilis suffice? Most importantly, what offense could the government charge that is worse than aggravated assault?

The most logical answer to the last question is that, in the appropriate case, attempted murder could be charged for acts that might result in infection with the HIV virus. There have been numerous HIV-related civilian cases where attempted murder was charged.[103] But would attempted murder be a good charge for the typical military case where an HIV-infected soldier simply ignores a safe-sex order and engages in unprotected and unwarned sexual intercourse? The answer is probably not.

The charge of attempted murder under Article 80, UCMJ, would require proof of a specific intent to kill or cause serious bodily injury.[104] That intent is simply not going to be susceptible of proof in the typical unprotected, uninformed, HIV sexual intercourse case. This statement should not be interpreted to mean the required intent could never be proven. There are numerous fact scenarios where the intent could easily be proven or at least inferred. For example, what if an HIV-infected individual has unprotected, uninformed, sexual intercourse and then gleefully tells the victim something like, "You are going to die now because I am infected with AIDS!" Or consider the situation where an HIV-infected person in confinement, or one about to be apprehended, tries to bite a prison guard or police officer. Attempted murder charges would seemingly be supportable in those situations because an intent to kill through transmission of the virus is clearly present. That intent, however, will not be present in the typical HIV sexual intercourse case.[105]

A second comment by the COMA also merits consideration. The COMA stated, "We recognize further that 'informed consent' can convert what might otherwise be an offensive touching into a non-offensive touching. In addition, we acknowledge that the defense of 'assumption of the risk,' in some circumstances, supplies a defense to what might otherwise be an assault."[106] This statement is extremely important for defense counsel because both the Army and Navy-Marine Corps Courts of Military Review have issued opinions rejecting consent as a defense.[107] This statement at the least provides a possible defense that appeared heretofore to have been rejected.

Conclusion

Joseph puts to rest any question about whether the use of a condom by an HIV-infected soldier will provide an effective defense to an assault-by-unwarned-sexual-intercourse charge. It will not. Furthermore, it provides trial counsel with an opportunity to expand the aggravated assault charge to include other deadly diseases and infections. It even invites trial counsel, in the appropriate case, to charge more serious offenses such as attempted murder. Finally, it leaves open, at least for the time being, the possibility that knowing consent can be a defense to an assault-by-sexual-intercourse charge. Major Hunter.

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[102] *Id.* at 396.

[103] *See supra* note 90.

[104] *The Manual for Courts-Martial* lists the following as the elements of proof for an attempt under Article 80, UCMJ:

(1) That the accused did a certain overt act;
(2) That the act was done with the specific intent to commit a certain offense under the code;
(3) That the act amounted to more than mere preparation; and
(4) That the act apparently tended to effect the commission of the intended offense.

MCM, *supra* note 28, pt. IV, para. 4b.

[105] While the UCMJ lists four theories of murder under Article 118, the government should avoid charging attempted murder based on an Article 118(3) theory. This theory—murder while engaged in an act inherently dangerous to others—would not require proof of a specific intent to kill if a death actually occurred, however, where an attempted murder is charged using this theory, proof of a specific intent to kill is required. *See* United States v. Roa, 12 M.J. 210 (C.M.A. 1982).

[106] *Joseph*, 37 M.J. at 396 n.5.

[107] In United States v. Morris, 30 M.J. 1221, 1228 (A.C.M.R. 1990), the ACMR affirmed the conviction of an HIV-infected soldier convicted of wanton disregard of human life in violation of Article 134, UCMJ, for engaging in consensual unprotected sexual intercourse. The court specifically rejected the accused's argument that the victim knowingly consented to the intercourse. The court said, "We believe that society has an interest in preventing such conduct as committed by appellant in this case, whether the victim consents or not." Likewise, in United States v. Joseph, 33 M.J. 960, 963 n.1 (N.M.C.M.R. 1991), the Navy-Marine Corps Court of Military Review stated, "The general rule . . . is that one cannot lawfully consent to a battery that is likely to produce death or serious bodily injury."

Small Business Nonresponsibility: The New DOD Rules

Prior to the passage of the 1993 Department of Defense (DOD) Authorization Act,[108] DOD contracting officers had great difficulty making nonresponsibility determinations involving small businesses. Under the prior rules,[109] a DOD contracting officer desiring to declare a small business nonresponsible, with certain limited exceptions,[110] withheld contract award and referred the matter to the nearest regional office of the Small Business Administration (SBA) for action.[111] The referral process required the contracting officer to create and forward to the SBA an administrative report containing, at a minimum:

> (1) the contracting officer's recommendation and the specific elements of responsibility that the contracting officer found lacking;[112]
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> (2) a copy of the solicitation;
>
> (3) a copy of the preaward survey findings;
>
> (4) a copy of any pertinent technical and financial information;
>
> (5) a copy of the abstract of bids (if available); and,
>
> (6) "any other pertinent information that supports the contracting officer's determination."[113]

If the contracting officer desired to find more than one small business nonresponsible, the FAR required submission of only one referral to the SBA at a time.[114]

The FAR required the SBA regional office—within fifteen business days of receiving the referral from the contracting officer—to inform the small business of the contracting officer's recommendation, and to offer it an opportunity to apply for a certificate of competency (COC), which is an SBA determination that the small business is responsible.[115] If the small business elected to apply for a COC, then the SBA regional office sent a fact-finding team to investigate whether the small business lacked the specific elements of responsibility as stated by the contracting officer, and to make recommendations concerning the small business's responsibility to the SBA regional administrator.[116]

If the regional administrator agreed with the contracting officer, the regional administrator notified the parties and the matter was closed.[117] On the other hand, if the regional administrator disagreed with the contracting officer, the administrator unilaterally issued the COC for contracts less than $500,000[118] and gave notice of the decision and its underlying rationale to the small business and to the contracting officer.[119] For larger contracts, the regional administrator referred the matter to the SBA Central Office for final action.[120] The only recourse available to the contracting officer from an adverse decision of the regional administrator was to request that the regional administrator forward the action to the SBA Central Office for final review.[121]

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[108] National Defense Authorization Act of 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

[109] 15 U.S.C. § 637(b)(7)(B) (1988 & Supp. 1993); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION 19.602 (1 Apr. 1984) [hereinafter FAR].

[110] FAR 19.602-1(a)(2).

[111] FAR 19.602-1(a).

[112] These elements include, but are not limited to, competency, capability, capacity, credit, integrity, perseverance, and tenacity. FAR 19.602-1(a).

[113] FAR 19.602-1(c).

[114] FAR 19.602-1(d).

[115] 15 U.S.C. § 637(b)(7)(B) (1988 and Supp. 1993).

[116] FAR 19.602-2(a).

[117] FAR 19.602-2(b)(1).

[118] FAR 19.602-2(b)(2).

[119] FAR 19.602-2(a)(3).

[120] FAR 19.602-2(b)(3).

[121] FAR 19.602-3(a). Although specific language requiring the regional administrator to forward this request to the SBA Central Office does not exist, the language in this section requiring the contracting officer and the SBA to "make every effort to reach a resolution before the SBA takes final action on a COC," strongly suggests that the regional administrator should forward the issue to the Central Office for review if the contracting officer so requests.

When a COC determination was referred to the SBA Central Office for final decision, the Central Office informed the contracting officer whether it concurred with the regional administrator's findings.[122] If the contracting officer disagreed with the Central Office's determination, the contracting officer could ask the director of the agency's Office of Small and Disadvantaged Business Utilization (SADBU) to request reconsideration of the decision.[123] However, the SBA Central Office's decision after reconsideration was final,[124] and the issuance of the COC conclusively established the small business's responsibility.[125]

Although this prior COC procedure was designed to be completed in fifteen working days,[126] the experience within the DOD indicated that the process actually took from forty-five to ninety days.[127] During this time, the contracting officer withheld contract award. Prior to the recent changes, the COC procedure delayed all procurements involving potentially nonresponsible small businesses.[128] Small Business Administration data indicated that sixty percent of small businesses did not request SBA review of the contracting officer's recommendation.[129] The referral of uncontested nonresponsibility determinations therefore unnecessarily delayed a large number of procurements. Consequently, in each year since 1988, the DOD requested Congress to grant some form of relief from the mandatory COC requirement.[130]

Congress' answer to the DOD finally came with the passage of section 804 of the 1993 DOD Authorization Act.[131] Under section 804, Congress amended the Armed Services Procurement Act[132] to allow DOD, NASA, and Coast Guard contracting officers, until September 30, 1995, to make small business nonresponsibility determinations without referral to the SBA. However, to protect the rights of affected small businesses,[133] Congress required contracting agencies:

> (1) to place notice of small businesses' right to request a COC from the SBA in all solicitations, except for acquisitions using small purchase procedures;[134] and,
>
> (2) to notify small businesses in writing of nonresponsibility determinations, and of their right to request a COC from the SBA within fourteen days after receipt of the contracting officer's written notice.[135]

To implement section 804, the DOD amended subpart 219.6 of the DOD FAR Supplement (DFARS), effective April 30, 1993. Under the new DFARS provisions,[136] contracting officers must notify small businesses in writing of nonresponsibility determinations and of their right to request a COC from the SBA. The contracting officer must withhold award until:

> (1) fourteen days pass after the small business receives the written notice of the contracting officer's determination and the business does not respond; or,

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[122] FAR 19.602-3(b).

[123] DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 219.602-3 (1 Dec. 1991) [hereinafter DFARS]. The contracting officer must make the request within five working days after receiving the Central Office's written decision. If the agency SADBU director agrees with the contracting officer, the agency SADBU director must notify the SBA of the agency's intent to appeal within ten working days after the agency receives the Central Office's written decision. Additionally, the agency SADBU director must file the appeal within ten working days after initially notifying the SBA. FAR 19.602-3(c).

[124] FAR 19.602-3(d).

[125] 15 U.S.C. § 637(b)(7)(C) (1988 & Supp. 1993).

[126] FAR 19.602-2(a).

[127] S. REP. NO. 352, 102d Cong., 2d Sess. 225-26 (1992).

[128] Delay occurred in *every* instance of a nonresponsible small business because the Small Business Act required contracting officers to refer every determination to the SBA for final resolution before disqualifying a small business from award, even if the small business did not disagree with the contracting officer. 15 U.S.C. § 637(b)(7)(a) (1988 & Supp. 1993); FAR 19.602-1(a).

[129] S. REP. NO. 352, 102d Cong., 2d Sess., 225-26 (1992).

[130] *Id.*

[131] Pub. L. No. 102-484, § 804, 106 Stat. 2447 (1992).

[132] 10 U.S.C. §§ 2301-31 (1988).

[133] H.R. CONF. REP. NO. 966, 102d Cong., 2d Sess. 724-25 (1992).

[134] Pub. L. No. 102-484, § 804(a), 106 Stat. 2447 (1992).

[135] *Id.*

[136] DFARS 219.602-1(a).

(2) the small business requests a COC determination, in which case the contracting officer must refer the issue to the SBA and continue to withhold award until the SBA resolves the issue; or,

(3) the small business advises the contracting officer that it will not seek SBA review, which allows the contracting officer to proceed with award.[137]

The DFARS also requires contracting officers to insert a new solicitation clause[138] in all solicitations except small purchase solicitations. Finally, the DFARS extends the requirement for written notice of nonresponsibility determinations to small businesses competing under small purchase procedures.[139]

The new requirements create a "good news-bad news" situation. The "good news" is that, at least until 30 September 1995, DOD contracting officers no longer must refer all small business nonresponsibility cases to the SBA, which should lessen the burden of preparing administrative reports to the SBA. However, the "bad news" is that contracting officers who wish to declare small businesses nonresponsible should allow, at a minimum, an additional fourteen days of lead time in their procurement cycle to permit small businesses an opportunity to appeal to the SBA.[140] If an appeal is filed, the procedures in place prior to the passage of the new legislation continue to apply.[141] Contract attorneys should make sure that contracting officers and small business specialists are aware of these statutory and regulatory changes. Major Hughes.

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[137] *Id.*

[138] DFARS 252.219-7009.

[139] DFARS 219.602-70.

[140] This fourteen-day period follows receipt of the written notice that a contracting officer must provide a nonresponsible small business. *See supra* text accompanying note 137.

[141] DFARS 219.602-1(a)(ii)(A).

Claims Report

United States Army Claims Service

Personnel Claims Notes

Internal Damage to Electronic Items—Revisited

Pending a decision by the Comptroller General on a United States Army Claims Service (USARCS) appeal of an internally damaged electronic item case, the USARCS continues to look for ways to improve the carrier recovery process on electronic items or appliances. In May 1993, the USARCS provided guidance on how to "perfect" carrier recovery demands for internal damage to electronic components.[1] That note highlighted various methods to show whether the claimed damage was caused during shipment; all Army claims offices should still follow its guidance. In the meantime, however, another issue concerning electronic components is becoming more frequently litigated by carriers.

A prima facie case of carrier liability is established by showing that the item was given to the carrier in a certain condition (tender), that the item was damaged in shipment, and the value of that damage (usually established by a repair or replacement estimate).[2] For an electronic item or appliance, tender means establishing that the item was "*tendered to the carrier in good condition*" by showing that the item actually worked when it was given to the carrier. Unlike many other household goods items—such as furniture—the inventory prepared by the carrier will be of little use in resolving this issue.

Carriers are *not* required to know or note the working condition of electronic items or appliances prior to shipment. The tender of service and many decisions of the Comptroller General preclude the government from arguing that the absence of inventory notations establishes a presumption that the item was in good working condition prior to shipment. These decisions recognize that for both practical and safety reasons, carriers cannot be expected to plug in electronic items to see if they work (for many items this would be especially difficult, if not impossible).

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[1] *See* Claims Report, *Internal Damage to Electronic Items*, ARMY LAW., May 1993, at 50.

[2] Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134 (1964).

Therefore, even when it can be shown that an electronic item has been damaged in shipment, an additional issue often becomes whether the item worked in the first place—that is, whether the item was tendered in good condition—or whether the damage was pre-existing. Claims offices often can assist claimants by providing valuable information on how to establish condition at tender for electronic items or appliances and specifically document this information in the claims file.

Usually, only claimants or their families will know whether an item worked just prior to shipment. Claims offices should ask the claimant to provide a specific statement on this tendered condition. For example, was the stereo, VCR, or computer used shortly before the move? Was the item relatively new? Had it recently been repaired? Can visitors or neighbors establish the working condition prior to shipment? Note that such statements must *not* be mere fill-in-the blank type forms. They must be specifically tailored to the items in question, the damage to the item, and any surrounding conditions.

Claims offices are encouraged to build solid cases of carrier liability for all claimed items, but to be especially vigilant of the need for documentation when items are electronic. Proper carrier recovery will encourage better carrier quality and return valuable funds to the claims system. Please give this note immediate attention and wide dissemination in your claims offices. Colonel Bush.

Claims for TVs and VCRs Shipped Inside POVs

The pamphlet, *Shipping Your POV*, distributed by Military Traffic Management Command (MTMC) through Personal Property Shipping Offices (PPSO), establishes items authorized for shipment inside privately owned vehicles (POV) in transit. Televisions and VCRs are listed as items not authorized for this type of shipment.

Army Regulation 27-20[3] prohibits payment for items shipped in violation of local law or competent regulations or directives. Therefore, payment is not authorized for TVs or VCRs shipped inside POVs, even if the items are installed. Ms. Zink.

[3] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 11-5h (28 Feb. 1990).

Professional Responsibility Notes

DA, Standards of Conduct Office

Ethical Awareness

The following case summary describes the application of the *Army's Rules of Professional Conduct for Lawyers* (*Army Rules*)[1] to an actual professional responsibility case. To stress education and protect privacy, neither the identity of the military unit nor the names of the attorneys are published. Mr. Eveland.

Case Summary

Army Rule 1.1 (Competence)
Army Rule 1.3 (Diligence)

Reserve judge advocate (JA) officer who carelessly told clients to sign ambiguous forms waiving hearing rights—when the clients really wanted to preserve their hearing rights—committed no ethical violations but was counseled by The Assistant Judge Advocate General.

Assistant staff judge advocate (SJA) who provided substandard legal review of administrative elimination packets—which contained ambiguous forms waiving hearing rights—committed minor breaches of duty of competency owed to command and was orally counseled by his Continental United States Army (CONUSA) SJA.

Army Rule 1.6 (Confidentiality)
Army Rules 1.7 and 1.8 (Conflict of Interest)

Reserve JA officer who counseled a group of four clients among whom no conflicts of interest existed—but neither discussed individual case information nor revealed client confidences—did not violate ethics rules.

Army Rule 8.4 (Misconduct)

Reserve JA officer, who represented another reservist for a fee in a civilian criminal matter, and who had previously

[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

advised the other reservist on an unrelated legal assistance matter while they were both on duty status, committed no ethical or regulatory violations.

Army Rule 7.1
(Communications Concerning a Lawyer's Services)

Reserve JA officer who made comment disparaging the value of legal advice provided by JA officers did not violate ethics rules.

A preliminary screening inquiry examined the competency of representation provided by two reserve JA officers, Lieutenant Colonel *A* and Major *B*. Lieutenant Colonel *A* counseled four reservists facing administrative eliminations. Major *B* performed legal reviews of the same eliminations for his command. Also, two additional unrelated allegations were lodged against Lieutenant Colonel *A*.

Three Allegations Made Against Lieutenant Colonel A

Lieutenant Colonel *A* faced the following three allegations:

> (1) Failing to competently represent and exercise due diligence in counseling four soldiers notified of potential administrative elimination;
>
> (2) Improperly representing a former military legal assistance client in a civil criminal case for a fee; and
>
> (3) Improperly implying that soldiers should not seek legal advice from JA officers, because it is of little value, by stating during instruction to soldiers that "JAG legal advice is worth what you pay for it."

Administrative Eliminations

The facts concerning the first allegation showed that Lieutenant Colonel *A*, acting as counsel for consultation, saw four reservists who had been "notified" of potential administrative elimination for positive urinalysis results. Feeling the pressure, the four reservists were in a hurry to see a JA officer so that they could get into drug rehabilitation programs and possibly have the separation actions withdrawn. However, because the personnel processing the cases neglected to establish appointments with Lieutenant Colonel *A* until the last minute, all four reservists made appointments with Lieutenant Colonel *A*'s civilian office while he was away in court.

After court, Lieutenant Colonel *A* returned to his civilian office and attempted to accommodate the soldiers, even though he was not on a drill status, "for the love of God and country." (an expression used by reservists for the voluntary, uncompensated time devoted to official duties). Neither Lieutenant Colonel *A* nor any of the four reservists were on duty, in uniform, or in an official duty status.

Group Counseling

Lieutenant Colonel *A* counseled the reservists in a group and reviewed their paperwork. The fact-finding officer analyzed Lieutenant Colonel *A*'s decision to talk to them in a group and found no violations of Army rules or regulations. No conflicts of interest existed among the four soldiers, and Lieutenant Colonel *A* neither discussed individual case information nor revealed client confidences in the group setting.

Negligent Representation

Before the four reservists left Lieutenant Colonel *A*'s office they executed inconsistent rights election forms (provided by their unit) both exercising their rights to appear before a board represented by counsel *and* conditionally waiving those same rights. Three of the soldiers were subsequently discharged without hearings, against their wishes, based on the conditional rights waiver forms they had executed.

The preliminary screening official (PSO) and supervisory JA concluded that Lieutenant Colonel *A* failed to exercise reasonable care in reviewing the documents and that his carelessness contributed to the soldiers' being discharged without an opportunity to exercise their rights. Nonetheless, the PSO and the supervisory JA concluded—without legal analysis or discussion—that Lieutenant Colonel *A*'s carelessness did not violate the *Army Rules*. The Standards of Conduct Office (SOCO) disagreed, concluding that, under the circumstances, Lieutenant Colonel *A*'s actions constituted minor violations of the *Army Rules*. Lieutenant Colonel *A* simply failed to provide his clients with an informed understanding of their rights or to explain the practical implications of their signing the waivers.[2] Lieutenant Colonel *A* acknowledged his own inexperience in discharge actions. When a client's needs exceed a lawyer's competence, the lawyer should refer the client to someone else with the requisite competence.[3]

Representing a Reservist for a Fee

The second allegation concerned Lieutenant Colonel *A*'s representing a different reservist in a civilian criminal matter. Six years earlier, while at a USAR school, that reservist had approached Lieutenant Colonel *A* for advice on how to handle a traffic ticket. He told her how he thought she should resolve the matter and charged no fee. The two had no further professional contact until when, on the recommendation of a friend whose divorce had been successfully handled by Lieutenant

[2] *Id.* para. 6b ("Preamble: A Lawyer's Responsibility").

[3] *Id.* rule 1.1 (comment).

Colonel *A*, the reservist sought him out at his private law office. They did not meet in a reserve center, on reserve time, or in uniform. The reservist was pleased with Lieutenant Colonel *A*'s representation in the civilian criminal matter and paid him for his services. The PSO and supervisory JA concluded that Lieutenant Colonel *A* did not violate the *Army Rules* or the prohibition against acceptance of compensation from a client.[4]

Disparaging the Value of JA Legal Services

Regarding the third allegation, Lieutenant Colonel *A* admitted having said "JAG legal advice is worth what you pay for it," but asserted that, in context, it was an appropriate comment. He told the fact-finding officer that he was making the point that reserve JAs are competent, dedicated, and available to advise reservists, but may not provide representation in civilian matters, and that in serious situations it is always best to consult civilian counsel. The PSO and supervisory JA agreed that, although making the comment may have been inappropriate, Army rules and regulations were not violated.

Major B's Negligent Legal Review

Major *B* was the full-time Active Guard/Reserve (AGR) Assistant SJA who reviewed the elimination packets of the four reservists misadvised by Lieutenant Colonel *A*. Major *B* relied on the rights election forms (in which the soldiers conditionally waived hearings) to the exclusion of the other forms in which they requested hearings, personal appearances, and representation. Despite the inconsistencies, Major *B* advised his command that the elimination actions were legally sufficient. He viewed the conditional waivers, under which the soldiers would receive discharges under honorable conditions, as favorable outcomes.

In his own defense, Major *B* stated that he was overwhelmed by the massive workload he inherited shortly after his assignment as the AGR at his United States Army Reserve Command (USARCOM). He was described by his superiors as a "competent 'can-do' lawyer who tries to do everything for everyone" who "enjoys a solid reputation."

OTJAG Action

Even though both Lieutenant Colonel *A* and Major *B* failed their clients, neither failure was of such magnitude to warrant referral to TJAG's Professional Responsibility Committee (PRC) or state licensing authority.

Major *B*, in hindsight, recognized that the inconsistencies in the elimination files should have been resolved by returning the files to the soldiers for clarification. His flawed resolution of the inconsistencies resulted in discharges that were subject to challenge. Because he already had been counseled by the CONUSA SJA, his case was closed without further action by the SOCO.

Lieutenant Colonel *A*, on the other hand, had not been counseled before SOCO reviewed the PSO's and supervisory JA's findings and recommendations. Lieutenant Colonel *A* did not thoroughly review the inconsistent rights election forms signed by his clients. The reservists did not have the benefit of his counsel concerning the nature of the inconsistencies and potential consequences. Lieutenant Colonel *A* not only blamed the errors on the soldiers themselves for executing the inconsistent forms, but also pointed to his own inexperience in discharge actions. He never acknowledged that his failure to review adequately his clients' papers contributed to their being discharged with no opportunity to exercise their rights.

The Assistant Judge Advocate General counseled Lieutenant Colonel *A* in writing and admonished him to pay attention to detail, noting that it is the lawyer's responsibility to review and explain documents that he advised his clients to sign.

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[4] *See* DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 4-3*b,c* (15 Sept. 1989); *see also* DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 3-7*h* (avoiding appearance of favoritism); para. 3-7*i* (using referral lists permitted but discouraged); para. 4-7 (active and reserve component attorneys may not request or accept actual or constructive compensation or benefit for referrals in matters in which they first became involved in military legal assistance capacities; no referrals to self or private firm for same general matter for which the client sought legal assistance except on a no-fee basis) (27 Sept. 1992).

See generally Professional Responsibility Opinion Number 81-1, ARMY LAW., Sept. 1982 at 17 (reserve attorney's ethical and regulatory violations included using legal assistance mutual support duties to gain clients on fee basis for private practice, using government facility for private purpose, using official position for personal gain, and making unauthorized commercial solicitation).

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Official Photographs

The official photograph is an important part of every judge advocate's military personnel file. It is of particular interest to selection boards and career management activities. All new judge advocates who are not in a promotable status should have an initial photograph made within sixty days of arriving at their first permanent duty stations. New judge advocates who are in a promotable status should have an initial photograph made within sixty days of their promotion date. Thereafter, a periodic photograph will be made at least every fifth year. All officers whose records are being reviewed by a promotion or selection board are strongly urged to have as up-to-date a photograph as possible in their promotion file. While black and white photographs still are authorized, board members have reported that they find color photographs to be more helpful. Officers should consult *Army Regulation 640-30*[1] for the proper procedures for taking photographs and ensuring that their uniforms and authorized permanent accessories, decorations, and insignia are worn in accordance with *Army Regulation 670-1*.[2] Two prints of each official photograph should be delivered to the officer's supporting Personnel Service Company for processing. If the officer is within ninety days of a promotion or selection board, the photographs should be mailed directly to:

HQDA (DAJA-PT)
Pentagon Room 2E443
Washington, DC 20310-2200

Release of Promotion Lists

As a general rule, promotion lists are released approximately ninety days after the promotion board recesses. Individuals may learn the release date of a promotion list by calling Personnel Command at (703) 325-9340 or DSN 221-9340. A recorded message will list actual or projected release dates for upcoming Army promotion lists.

Filing of Commendatory Matters in the OMPF

There is much confusion over what, other than military awards, may properly be filed in the performance fiche of an officer's Official Military Personnel File (OMPF). Detailed rules on the composition of the OMPF can be found in *Army Regulation 600-8-104*.[3] Specifically, letters, memoranda, and messages of appreciation only can be filed in the OMPF if signed by one of the following officials: the President of the United States; the Vice President of the United States; the Secretary of Defense; the Service Secretaries; Chairman, Joint Chiefs of Staff, or the Chiefs of Services. In contrast, certificates of appreciation, commendation, or achievement authorized under *Army Regulation 672-5-1*,[4] can be filed in the OMPF. Questions on the filing of documents in the OMPF should be directed to MAJ Cullen (DAJA-PT), DSN: 225-8365.

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[1] DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY PERSONNEL FILES (1 Oct. 1991).

[2] DEP'T OF ARMY, REG. 670-1, UNIFORMS AND INSIGNIA: WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 Sept. 1992).

[3] DEP'T OF ARMY, REG. 600-8-104, PERSONNEL—GENERAL: MILITARY PERSONNEL INFORMATION MANAGEMENT/RECORDS, ch. 2 (27 Apr. 1992).

[4] DEP'T OF ARMY, REG. 672-5-1, DECORATIONS, AWARDS, AND HONORS: MILITARY AWARDS, ch. 8 (1 Oct. 1990).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Education Requirements for Promotion to Major

One of the main reasons why captains are nonselected for promotion by the annual Mandatory Promotion Board to Major is that they are not educationally qualified under *Army Regulation 135-155*,[1] Table 2-2 (*AR 135-155*). This table requires captains to complete an advanced course to be educationally qualified for promotion to major. Accordingly, judge advocates generally must complete both Phase I and Phase II of the Judge Advocate Officer Advanced Course (JAOAC) to be considered educationally qualified.

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[1] DEP'T OF ARMY, REG. 135-155, ARMY NATIONAL GUARD AND ARMY RESERVE: PROMOTION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OTHER THAN GENERAL OFFICERS (1 June 1990).

Two exceptions to the education requirement exist. First, *AR 135-155*, paragraph 2-6b(2) provides that an officer is deemed to be educationally qualified if he or she was released from active duty within three years of the date that the promotion board convened and the officer was not previously nonselected for promotion while on active duty. If you qualify under this exception, place in your file a statement explaining your eligibility for this exception. Second, *AR 135-155*,[2] and *AR 27-1*[3] provide that captains who are appointed within forty-two months of their promotion eligibility date are educationally qualified for promotion if they are progressing satisfactorily toward completing the advanced course at the time the board convenes. These officers may request a certificate of satisfactory performance by writing The Office of The Judge Advocate General, ATTN: JAGS-GRA, Charlottesville, Virginia 22903-1781.

If you do not qualify for one of these two exceptions, *AR 135-155*, paragraph 2-10b allows Headquarters, Department of the Army (HQDA), to approve general exceptions to nonstatutory promotion criteria such as education. Requests for such exceptions should be sent to HQDA, Office of Promotions (RC), ATTN: DAPC-MSL, 9700 Page Boulevard, St. Louis, Missouri 63132-5200.

To be promoted, you must be educationally qualified or qualify for an exception. Do not wait until the last minute and try to complete the necessary course work. This is particularly true for JAOAC which requires completion of the correspondence phase (Phase I) before attendance at the residence phase (Phase II). Officers who will be considered for promotion to Major in 1995 need to complete Phase I of JAOAC to attend Phase II in June 1994. Captain Parker.

The Reserve Component Library

This section will be a regular installment featuring publications of special interest to the Reserve Component. Judge advocates should add these publications to their Staff Judge Advocate office libraries.

This month's feature publication is *Field Manual 100-19, Domestic Support Operations,* July 1993. *Field Manual 100-19* provides the doctrine for United States Army and United States Marine Corps domestic support operations. This manual identifies the linkages and defines the relationships between federal, state, and local organizations along with other services that have roles and responsibilities in domestic support operations. Captain Parker.

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or CPT David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
8-9 Jan 94	Long Beach, CA 78th LSO Long Beach Marriott Inn Long Beach, CA 90815	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	 BG Sagsveen LTC McFetridge MAJ Burrell Dr. Foley	MAJ John C. Tobin 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 752-1455
21-23 Jan 94	San Antonio, TX 90th ARCOM San Antonio Airport Hilton San Antonio, TX 78216	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG Gray COL Cullen MAJ Emswiler LTC Dorsey CPT Schempf	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209 (210) 221-5164
29-30 Jan 94	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Criminal Law Int'l Law GRA Rep	MG Nardotti COL Cullen MAJ O'Hare LCDR Winthrop LTC Hamilton	MAJ Mark W. Reardon 6th LSO Bldg. 572 Fort Lawton, WA 98199 (206) 281-3002

[2] *Id.* tbl. 2-2, n.11.

[3] DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 10-7a(2) (15 Sept. 1989).

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
26-27 Feb 94	Salt Lake City, UT UT ARNG HQ, Utah National Guard 12953 Minuteman Drive Draper, UT 84020-1776	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Cullen MAJ Wilkins LTC Killham COL Schempf	MAJ Patrick Casaday HQ, UT ARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep	BG Magers BG Sagsveen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	MG Nardotti BG Sagsveen MAJ Hudson MAJ Jennings LTC Hamilton	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Winters MAJ Diner LTC Menk	CPT Robert J. Moore 10011 Indian Queen Pt Rd. Fort Washington, MD 20744 (202) 835-7610
19-20 Mar 94	San Francisco, CA 5th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep	MG Gray Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 20683 Greenleaf Drive Cupertino, CA 94014-8808 (408) 297-9172
25-27 Mar 94	New Orleans, LA 122nd ARCOM Sheraton on the Lake Hotel Metairie, LA 70033	AC GO RC GO Int'l Law Criminal Law GRA Rep	MG Nardotti COL Lassart MAJ Johnson MAJ Hunter Dr. Foley	LTC George Simno Leroy Johnson Drive New Orleans, LA 70146 (504) 282-6439
9 Apr 94	Indianapolis, IN INARNG TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 BG Sagsveen MAJ DeMoss MAJ Warren COL Schempf	MAJ George C. Thompson HQ, STARC P.O. Box 41326 Indianapolis, IN 46241-0326 (317) 247-3449 FAX (317) 559-5484
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden LTC Crane LTC Menk	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	BG Huffman BG Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Samuel A. Rumore 5025 Tenth Court, South Birmingham, AL 35222 (205) 323-8957

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
14-15 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane COL Schempf	LTC Thomas G. Shumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1994

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-8 April: 1st Criminal Law Advocacy Course (5F-F34).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

11-15 July: 6th STARC Judge Advocate Mobilization and Training Workshop.

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

April 1994

5-8, ESI: Contract Accounting and Financial Management, Washington, D.C.

11-13, ESI: Changes, Claims, and Disputes, Washington, D.C.

11-15, ESI: Federal Contracting Basics, Washington, D.C.

11-15, ESI: Managing Projects in Organizations, San Diego, CA.

12-15, ESI: Contract Pricing, Washington, D.C.

13-15, ESI: Continuous Improvement and Total Quality Management, Washington, D.C.

14, ESI: Protests, Washington, D.C.

18-19, GWU: Best-Value Source Selection, Washington, D.C.

18-22, GWU: Government Contract Law, Washington, D.C.

19-22, ESI: Procurement for Administrators, CORs, and COTRs, Washington, D.C.

21-22, GWU: Best-Value Source Selection, New Orleans, LA.

24-May 20, SLF: Advanced International Program in Oil & Gas Financial Management, Dallas, TX.

25-26, ESI: Terminations, Washington, D.C.

26-29, SLF: Short Course on Securities Regulation, Dallas, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1993 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-nine states currently have a mandatory continuing legal education (CLE) requirement.

In these MCLE states, all active attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	*Local Official*	*CLE Requirements*
Alabama*	MCLE Commission Alabama State Bar 415 Dexter Ave. Montgomery, AL 36104 205-269-1515	-Twelve hours per year. -Active duty military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona*	Director, Programs and Public Services Division 363 North First Ave. Phoenix, AZ 85003 602-252-4804	-Fifteen hours each year including two hours professional responsibility. -Reporting date: 15 July.
Arkansas*	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 501-664-8737	-Twelve hours per year. -Reporting date: 30 June.
California*	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 415-241-2100	-Thirty-six hours every thirty-six months. Eight hours must be on legal ethics and/or law practice management, with at least four hours in legal ethics, one hour of substance abuse and emotional distress, and one hour on the elimination of bias. -Attorneys employed by the federal government are exempt. -Reporting date: 1 February.
Colorado*	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 303-893-8094	-Forty-five hours, including two hours of legal ethics during three-year period. -Newly admitted attorneys also must complete fifteen hours in basic legal and trial skills within three years. -Reporting date: Anytime within three-year period.
Delaware*	Commission on CLE 831 Tatnall Street Wilmington, DE 19801 302-658-5856	-Thirty hours during two-year period. -Reporting date: 31 July.

State	*Local Official*	*CLE Requirements*
Florida*	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5690	-Thirty hours during three-year period, including two hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: Assigned month every three years.
Georgia*	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 404-527-8710	-Twelve hours per year, including one hour legal ethics, one hour professionalism and three hours trial practice (trial attorneys only). -Reporting date: 31 January.
Idaho*	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701-0898 208-42-8959	-Thirty hours during three-year period. -Reporting date: Every third year depending on year of admission.
Indiana*	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 317-232-1943	-Thirty-six hours within a three-year period (minimum six hours per year). -New admittees by examination are given three-year grace period beginning 1 January before admission. -Reporting date: 31 December.
Iowa*	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 515-281-3718	-Fifteen hours each year, including two hours of legal ethics during two-year period. -Reporting date: 1 March.
Kansas*	CLE Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 913-357-6510	-Twelve hours each year including two hours of ethics. -Reporting date: 1 July.
Kentucky*	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 502-564-3795	-Fifteen hours per year, including two hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.
Louisiana*	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-Fifteen hours per year, including one hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January.

State	*Local Official*	*CLE Requirements*
Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 517-372-9030	-Thirty or thirty-six hours (depending on whether admitted in first or second half of fiscal year) within three years of becoming active member of bar. Six or twelve hours the first year, twelve hours in the second year and twelve hours in the third year. Courses must be taken in sequence identified by CLE Commission. -Reporting date: 31 March.
Minnesota*	Director, Minnesota State Board of CLE 1 West Water St., Suite 250 St. Paul, MN 55107 612-297-1800	-Forty-five hours during three-year period. -Reporting date: 30 August.
Mississippi*	CLE Administrator Mississippi Commission on CLE P.O. Box 2168 Jackson, MS 39225-2168 601-948-4471	-Twelve hours per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December (in the process of changing to 1 August).
Missouri*	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-Fifteen hours per year, including three hours legal ethics every three years. -New admittees three hours professionalism, legal/judicial ethics, or malpractice in twelve months. -Reporting date: 31 July.
Montana*	MCLE Administrator Montana Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660	-Fifteen hours per year. -Reporting date: 1 March.
Nevada*	Executive Director Board of CLE 295 Holcomb Avenue Suite 5-A Reno, NV 89502 702-329-4443	-Ten hours per year. -Reporting date: 1 March.
New Hampshire*	New Hampshire Bar Association 18 Centre Street Concord, NH 03301 (603) 224-6942	-Twelve hours per year, including at least two hours of legal ethics, professionalism or the prevention of malpractice, substance abuse or attorney-client disputes. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 1 August.

State	*Local Official*	*CLE Requirements*
New Mexico*	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: thirty days after program.
North Carolina*	Executive Director The North Carolina State Bar 208 Fayetteville Street Mall P.O. Box 25148 Raleigh, NC 27611 919-733-0123	-Twelve hours per year including two hours of legal ethics. Special three-hour block of ethics once every three years. -New attorneys nine hours practical skills each of first three years of practice. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 28 February of succeeding year.
North Dakota*	North Dakota CLE Commission P.O. Box 2136 Bismarck, ND 58502 01-255-1404	-Forty-five hours during three-year period. -Reporting date: period ends 30 June; affidavit must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 East Broad Street Second Floor Columbus, OH 43266-0419 614-644-5470	-Twenty-four hours during two-year period, including two hours of legal ethics or professional responsibility every cycle, including instruction on substance abuse. -Active duty military are exempt, but pay a filing fee. -Reporting date: every two years by 31 January.
Oklahoma*	MCLE Administrator Oklahoma State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-Twelve hours per year, including one hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: 15 February.
Oregon*	MCLE Administrator Oregon State Bar 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 503-620-0222-ext. 368	-Forty-five hours during three-year period, including six hours of legal ethics. New admittees—Fifteen hours, ten must be in practical skills and two in ethics. -Reporting date: Initially date of birth; thereafter all reporting periods end every three years except new admittees and reinstated members—an initial one-year period.

State	*Local Official*	*CLE Requirements*
Pennsylvania	Pennsylvania CLE Board c/o Administrative Office of Pennsylvania Courts 5035 Ritter Road Suite 700 Mechanicsburg, PA 17055 717-795-2119	-Five hours per year. -Active attorneys must complete a minimum of five hours on ethics and professionalism each year. Up to ten hours may be carried forward and applied against the minimum requirement for either of the next two succeeding years. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: Annually as assigned.
Rhode Island*	Executive Director Rhode Island Mandatory Continuing Legal Education Commission 250 Benefit Street Providence, Rhode Island 02903	-Ten hours each year including two hours of legal ethics. -Reporting date: 30 June.
South Carolina*	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 803-799-5578	-Twelve hours per year, including six hours ethics/professional responsibility every three years in addition to annual MCLE requirement. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.
Tennessee*	Executive Director Commission on CLE 214 2nd Ave. Suite 104 Nashville, TN 37201 615-242-6442	-Twelve hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.
Texas*	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 512-463-1442	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Last day of birthmonth yearly.
Utah*	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 801-531-9077 800-662-9054	-Twenty-four hours during two-year period, plus three hours of legal ethics. -Reporting date: End of two-year period.

State	*Local Official*	*CLE Requirements*
Vermont*	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 802-828-3281	-Twenty hours during two-year period, including two hours of legal ethics. -Reporting date: 15 July.
Virginia*	Director of MCLE Virginia State Bar 801 East Main Street 10th Floor Richmond, VA 23219 804-786-5973	-Twelve hours per year including two hours of ethics. -Reporting date: 30 June (annual license renewal).
Washington*	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 6th Ave. Seattle, WA 98121-2599 206-448-0433	-Fifteen hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; $50 1st year; $150 2nd year; $250 3rd year, etc.).
West Virginia*	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 304-348-2456	-Twenty-four hours every two years, at least three hours must be in legal ethics or office management. -Reporting date: 30 June.
Wisconsin*	Director Board of Bar Examiners 119 Martin Luther King, Jr. Boulevard Room 405 Madison, WI 53703-3355 608-266-9760	-Thirty hours during two-year period including three hours of legal ethics. -Reporting date: 31 December every other year.
Wyoming*	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-Fifteen hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook Vol 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, Vol 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

*AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A269036 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

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

The following CID publication also is available through DTIC:

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

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

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(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.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a 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 DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. 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.)

(*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 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, 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*) *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 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *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 12-series forms through their

supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) ROTC elements. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. 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 Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] 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-NV, Alexandria, VA 22331-0302.

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 Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

1) Active duty Army judge advocates;

2) Civilian attorneys employed by the Department of the Army;

3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;

4) Active duty Army legal administrators, noncommissioned officers, and court reporters;

5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;

6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and

7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. ***The Army Lawyer*** will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or explode, the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. 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/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAW BBS, take the following steps:

(a) When ask to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When ask to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call t the exploded file "XXXXX.DOC", by following instruction in paragraph (4)(a), above.

e. *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*
1990_YIR.ZIP	January 1991	This is the 1990 Year in Review article in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
261.ZIP	April 1993	Legal Assistance Real Property Guide March 1993.
505-1.ZIP	March 1993	Contract Attorneys' Deskbook, Volume 1, 129th Contract Attorneys' Course, March 1993.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys' Course Deskbook.
506.ZIP	November 1991	The November 1991 Fiscal Law Deskbook from the Contract Law Division at TJAGSA.
93CLASS.ASC	July 1992	FY93 TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY93 TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY93 TJAGSA Course Schedule, ASCII.
93CRS.EN	July 1992	FY93 TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.TXT	June 1993	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	October 1992	Law of Federal Employment, October 1992.
JA211.ZIP	August 1992	Law of Federal Labor—Management Relations, July 1992.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235-92.ZIP	August 1992	Government Information Practices, July 1992 ed. Updates JA235.zip.

FILE NAME	UPLOADED	DESCRIPTION
JA235.ZIP	August 1993	Government Information Practices.
JA241.ZIP	March 1992	Federal Tort Claims Act.
JA260.ZIP	September 1983	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1992	Legal Assistance Real Property Guide.
JA262.ZIP	March 1992	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notarial Guide.
JA269.ZIP	January 1993	Federal Tax Information Series, December 1992.
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	March 1992	Senior Officer's Legal Orientation.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	July 1992	Unauthorized Absence—Programmed Text, July 92.
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992.
JA320.ZIP	July 1992	Senior Officers Legal Orientation Criminal Law Text, May 1992.
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, March 1992.
JA337.ZIP	July 1992	Crimes & Defenses Deskbook, July 1992.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	Volume 1, TJAGSA Contract Law Deskbook, May 1993.
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.
JA506.ZIP	June 1993	TJAGSA Fiscal Law Deskbook, May 1993.
JA509.ZIP	October 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, and Remedies Course held in September 1992.
JAGSCHL.WPF	March 1992	JAG School report to DSAT. ND-BBS.ZIPJuly 1992TJAGSA Criminal Law New Developments Course Deskbook August 1992.
V1YIR91.ZIP	January 1992	Volume 1 of Annual Year in Review for CY 1991 as presented at the January 1992 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's annual review of contract and fiscal law for CY 1991.

FILE NAME	*UPLOADED*	*DESCRIPTION*
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for CY 1991.
YIR89.ZIP	January 1990	Contract Year in Review, 1989.
NA241.ZIP	September 1993	Federal Tort Claims Act, updated August 1993.

f. 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 Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning 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, Virginia 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial: (703) 806-5764, DSN: 656-5764, or at the address in paragraph a, above.

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties:

Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. (1992).

Peter H. Berge, *Setting Limits on Involuntary HIV Antibody Testing Under Rule 35 and State Independent Medical Examination Statutes*, 44 FLA. L. REV. (1992).

Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. (1993).

Note, *The Genetic Defense: Excuse or Explanation?*, 35 WM. & MARY L. REV. (1993).

Case Comment, *Family Law: Burden of Proof in Child Support Modifications*, 44 FLA. L. REV. (1992).

5. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

6. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials 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 available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

SMCMC-GC, ATTN: Martha Morris, McAlester Army Ammunition Plant, McAlester, OK 74501-5000, DSN: 956-6439, commercial (918) 421-2439, has the following material:

- OSHR Reference Files 1, 2, & 3.
- OSHR Decisions.
- OSHR Current Reports Dec.-May binder.
- OSHR Current Reports June-Nov. binder (all items current thru 7-21-93).
- Occupational Safety Health Cases (OSHC), volumes 1-15, period covered thru 3-17-93.

- Medical Screening of Workers, by Mark A. Rothstein (1984).

- Aids in the Workplace, Resource Material 2d Ed, BNA (1987).

Staff Judge Advocate, HQ, USA Garrison, Attn: WO1 Melissa Weekley, Fort Devins, MA 01433-5050, DSN: 256-2255, commercial (508) 796-2255, has the following material:

- Bender's Federal Practice Manual

- Moore's Federal Practice Manual

- Moore's Federal Practice Rules

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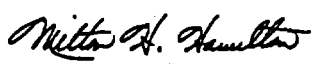

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