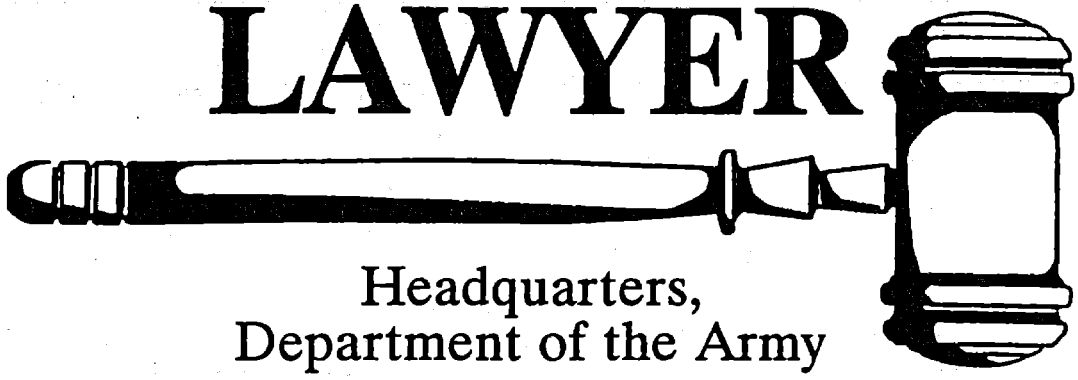
THE ARMY LAWYER



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Editor
Captain John B. Jones, Jr.

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Article 107, Uniform Code of Military Justice: Not a License to Lie

Lieutenant Brent G. Filbert
Instructor, Professional Development Division
United States Naval Academy

Introduction

Several Navy and Marine Corps Officers are alleged to have made false official statements during the investigation of the 1991 Tailhook Convention.[1] One issue in the cases arising out of the Tailhook investigation was the propriety of a false official statement charge against a suspect who lied to investigators. This article will examine judicially created limitations on the accountability of suspects charged with violating Article 107 of the Uniform Code of Military Justice (UCMJ).[2] In particular, the "exculpatory no" doctrine—a defense potentially applicable to cases like those arising out of the Tailhook investigation—will be addressed.

Interpretation of Article 107 since its enactment in 1950 has been based in large part on the construction by the federal courts of a similar federal statute, 18 U.S.C. § 1001 (§ 1001).[3] Several judicially created doctrines have challenged the applicability of § 1001 to persons under investigation for criminal conduct. Because of Article 107's dependency on § 1001, the limitations placed on the latter have affected the scope of the former with regard to military suspects.[4]

Article 107 provides that "[a]ny person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or *makes any other false official statement knowing it to be false*, shall be punished as a court-martial may direct."[5] Section 1001 contains similar language.[6]

Although the two statutes have comparable language, nothing in the legislative history of Article 107 links it with § 1001.[7] The congressional intent was, instead, to incorporate previous laws addressing false musters into Article 107, and to create the new offense of making "any other false official statement."[8] No evidence in the legislative history of Article 107 indicates an intent to limit its reach to certain types of statements.[9] Following the enactment of Article 107, military courts initially construed the law without limitation in accordance with its plain language.[10]

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[1] One officer received Admiral's Mast (nonjudicial punishment) for making false statements to Tailhook investigators in violation of Article 107. At the time of this writing, no officers have been convicted at courts-martial for violating Article 107 in cases arising out of the Tailhook investigation.

[2] UCMJ art. 107 (1988). Article 107 originally was enacted in 1950. Except for a minor revision in 1955, the current version of the statute is the same as originally enacted.

[3] 18 U.S.C. § 1001 (1988); *see infra* notes 90-195 and accompanying text.

[4] *See infra* notes 11-23 and accompanying text.

[5] UCMJ art. 107 (1988) (emphasis added). The elements of Article 107 are as follows:

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with intent to deceive.

[6] 18 U.S.C. § 1001 (1988) provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . *makes any false, fictitious or fraudulent statements or represent actions, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry,* shall be fined not more than $10,000 or imprisoned not more than five years or both.

(emphasis added).

[7] *See* H.R. REP. NO. 2498, 81st Cong., 1st Sess. 1230 (1951); *see also* United States v. Hutchins, 18 C.M.R. 46, 49 (C.M.A. 1955); United States v. Goldsmith, 29 M.J. 979, 982 (A.F.C.M.R. 1990).

[8] *See* H.R. REP. NO. 2498, 81st Cong., 1st Sess. 1230 (1951).

[9] *Id.*

[10] *See* United States v. Cliette, 8 C.M.R. 40, 42 (C.M.A. 1953) (Army lieutenant's conviction upheld for giving false information regarding his failure to report to his detachment in a timely fashion).

The association between Article 107 and § 1001 has its roots in *United States v. Hutchins.*[11] In *Hutchins*, an Army major was accused of lying in a sworn statement submitted during a line of duty investigation. The accused asserted in a sworn statement that he had not authorized a corporal killed in a jeep accident to drive the vehicle. Based partly on the statement of the accused, the line of duty investigating officer concluded that the corporal's death was not in the line of duty. The accused later admitted he had ordered the corporal to drive the jeep to the unit's headquarters to deliver a message.[12]

The issue in *Hutchins* was whether Article 107 required that the falsity in question concern a "material" matter. A number of federal cases previously had concluded that materiality was an element of § 1001.[13] In *Hutchins*, the United States Court of Military Appeals (COMA) held that a "general analogy" between Article 107 and § 1001 existed and that the similarity in language between the two statutes was "undeniably present."[14] The COMA also held that the purpose of both statutes was identical—"to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."[15] Despite this similarity, the COMA found that materiality was not an essential element of proof required for a conviction. The COMA reasoned as follows:

> Materiality has significance. But, its importance is in relation to the intent to deceive. If the falsity is in respect to a material matter, it may be considered by the court-martial as evidence of an intent to deceive. On the other hand, if the statement is false in an immaterial respect, the immateriality may tend to show the absence of such intent.[16]

The "Duty to Account" Rule

Development of the Rule

The *Hutchins* decision was important, not only because the holding resisted limiting the scope of Article 107, but also because it firmly established the link between Article 107 and § 1001—a connection still recognized today.[17] This bond between the two statutes was the basis for the decision in *United States v. Aronson*[18] two years later. In *Aronson,* the COMA specifically addressed the issue of whether a false statement made by a suspect was "official" for purposes of Article 107. Aronson was charged with lying to investigators about money missing from a fund entrusted to him. After being warned of his rights under Article 31 of the UCMJ,[19] he falsely stated to investigators that he had not taken the missing money and signed a written statement to that effect a few days later.[20]

The COMA framed the issue in terms of deciding what Congress meant by the phrase "official statement" contained in Article 107. In deciding this question, the COMA first expanded the conclusion in *Hutchins* that Article 107 and § 1001 were closely related. The COMA found the word "official" in Article 107 to be the "substantial equivalent" of the phrase "any matter within the jurisdiction of any department or agency of the United States" found in § 1001. The COMA then adopted the rule conceived in *United States v. Levin,*[21] for a declarant to violate § 1001 he or she must have been "under a legal obligation to speak."[22] Applying this rule to the facts in *Aronson*, the COMA found that "from the very moment the accused assumed control over the fund he was . . . 'under [a] legal obligation to speak'" and, therefore, the false

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[11] 18 C.M.R. 46 (C.M.A. 1955).

[12] *Id.* at 47-48.

[13] *See* Cohen v. United States, 201 F.2d 386, 393 (9th Cir. 1953), *cert. denied,* 345 U.S. 951 (1953); Todorow v. United States, 173 F.2d 439, 444-45 (9th Cir. 1949), *cert. denied,* 337 U.S. 925 (1949); United States v. Marzani, 71 F. Supp. 615, 618 (D.C. 1947); *aff'd,* 168 F.2d 133 (D.C. Cir. 1948).

[14] *Hutchins,* 18 C.M.R. at 50-51.

[15] *Id.* at 51 (quoting United States v. Gilliland, 312 U.S. 86, 93 (1941)).

[16] *Id.*

[17] *See infra* notes 74-90 and accompanying text. The COMA reiterated the connection between the two statutes two years after *Hutchins* in United States v. Arthur, 24 C.M.R. 20 (C.M.A. 1957).

[18] 25 C.M.R. 29 (C.M.A. 1957).

[19] UCMJ art. 131 (1988).

[20] *Aronson,* 25 C.M.R. at 31.

[21] 133 F. Supp. 88 (Colo. 1953).

[22] *Aronson,* 25 C.M.R. at 32 (citing *Levin,* 133 F. Supp. at 90). The COMA noted other cases that looked to a broader application of § 1001, citing Marzani v. United States, 168 F.2d 133 (D.C. Cir.), *aff'd,* 335 U.S. 895 (1948); Cohen v. United States, 201 F.2d 386 (9th Cir. 1953); United States v. Silver, 235 F.2d 375 (2d Cir. 1956).

statement was "official."[23] The COMA went to great lengths, however, to contrast the facts in *Aronson* from the situation where the false statement was fabricated by a person suspected of a crime unrelated to any particular duty or responsibility. The COMA opined as follows:

> The situation here . . . is not at all comparable to one in which a person suspected or accused of a crime unrelated to any duty or responsibility imposed upon him gives a statement to a law enforcement agent investigating the alleged offense. In the latter instance the agent has no right or power "to require the statement from the accused." And the accused has no obligation whatsoever to give the statement to the agent. From the accused's standpoint, therefore, the statement has no officiality. Moreover, from the standpoint of the Government the statement, however false, is hardly calculated to pervert the function of the investigating agency. On the contrary, the only possible effect a statement received from a suspect or an accused can have is to stimulate the agency to carry out its function, namely to discover the person or persons, who have committed the offense. . . . Whatever offense the accused might commit by lying under these circumstances, his statement is not 'official' within the meaning of Article 107.[24]

Thus, the COMA laid the groundwork for the "duty to account" rule—that statements made by suspects without an independent duty to speak could not be criminalized under Article 107.

One year after *Aronson*, in *United States v. Osborne*,[25] the COMA first used the "duty to account" rule to overturn a conviction under Article 107. *Osborne* involved a sailor accused of making false statements to investigators on information in his Personal History Statement.[26] In support of its holding, the COMA cited the following language from *Levin*:

> Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he willfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted.[27]

This language illustrates the COMA's concern that a conviction under Article 107 could occur even though the falsity involved an unimportant matter. This concern was a reincarnation of the "materiality" argument which the COMA had rejected in *Hutchins*.[28] Nonetheless, this language became an additional justification supporting employment of the "duty to account" rule.

Osborne also quoted with approval language from *Levin* regarding the congressional intent behind § 1001. *Levin* concluded that it was "inconceivable" that Congress intended a "literal construction" of the statute because such an interpretation would bring about "absurd consequences" or "flagrant injustices."[29] This language was included to resolve the apparent inconsistency of the "duty to account" rule with the plain language of Article 107.[30]

In *Osborne*, Judge Latimer dissented on the basis that service members should not be permitted to lie with impunity during questioning—regardless of whether they had an independent duty to account. He argued that "[i]t is quite necessary to a properly functioning military establishment that

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[23] *Aronson*, 25 C.M.R. at 33.

[24] *Id.* at 34 (citations omitted); *see* United States v. Washington, 25 C.M.R. 393, 395 (C.M.A. 1958).

[25] 26 C.M.R. 235 (C.M.A. 1958).

[26] *Id.* at 236.

[27] United States v. Levin, 133 F. Supp. 88, 90 (Colo. 1953).

[28] United States v. Hutchins, 18 C.M.R. 46, 51 (C.M.A. 1955).

[29] *Osborne*, 26 C.M.R. at 237 (quoting *Levin*, 133 F. Supp. at 90).

[30] *See infra* notes 67-90 and accompanying text.

subordinates be required to furnish certain information to those in authority, under pain of violating Article 107 . . . ."[31] He further asserted that the accused did have an independent duty to provide accurate information during questioning regarding entries in his official records. In support of his position, Judge Latimer stated the following:

> It must indeed be a strange concept which underlies the principle that a serviceman may with impunity falsify to his commander about entries in his official records. For my part, I prefer to believe that Congress, when it enacted Article 107 of the Uniform Code of Military Justice, 10 U.S.C. § 907, intended to hold service personnel to a higher standard.[32]

Application of the "Duty to Account" Rule

Because of *Aronson* and *Osborne*, subsequent cases involving false statements by suspects resulted in analyzing the officiality of the falsehood using the "duty to account" rule.[33] Because most suspects do not have responsibility for funds or property, a suspect with a "duty to account" was the *exception* and not the rule.[34] Consequently, the "duty to account" rule significantly limited the scope of Article 107. Because military courts also applied the rule to false statements made outside of the investigative setting, it also restricted the reach of the statute with respect to nonsuspects.[35]

In the thirty years following the adoption of the "duty to account" standard, the decisions addressing the officiality issue reached inconsistent and, oftentimes, illogical results. Illustrative of the inconsistent nature of these decisions are *United States v. Arthur*[36] and *United States v. Davenport*.[37] In *Arthur*, the accused lied to an Air Force captain attempting to apprehend him for striking a woman. The accused falsely claimed that he was an law enforcement official who was beyond the captain's authority to apprehend.[38] The COMA held the statement was not "official" because nothing the accused had said "could possibly pervert the performance of a governmental operation."[39] *Davenport* involved an escaped prisoner who lied regarding his identity to a Marine Corps staff sergeant attempting to return him to custody.[40] In contrast to *Arthur*, the COMA determined that Davenport had "'an obligation to account' within the meaning of *Aronson*."[41] The COMA reasoned that the accused had a responsibility to account "for his personal services owed to the Armed Forces."[42] Consequently, the COMA found that the false identification by the accused impeded the "governmental function of maintaining the armed forces—a function that cannot be performed unless those forces know who are their members and what are their whereabouts."[43] The COMA acknowledged that the officiality question was easier when a clear benefit would be gained by the false identification such as access to an otherwise off limits area. The COMA found, however, that the benefit the accused had gained of "avoiding obligations to which he has earlier committed himself is, in our view, adequate for invoking Article 107."[44]

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[31] *Osborne*, 26 C.M.R. at 237.

[32] *Id.* at 238.

[33] *See* MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 31(c)(6) (1984) [hereinafter MCM], which provides the following:

> A statement made by an accused or suspect during an interrogation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak. If a suspect or accused does have an independent duty or obligation to speak, as in the case of a custodian who is required to account for property, a statement by that person during an interrogation into the matter is official. While the person could remain silent (Article 31 (b)), if the person chooses to speak, the person must do so truthfully.

[34] *See infra* notes 50-58 and accompanying text.

[35] *See infra* notes 50, 53, 55, 60-65 and accompanying text.

[36] 24 C.M.R. 20 (C.M.A. 1957).

[37] 9 M.J. 364 (C.M.A. 1980).

[38] *Arthur*, 24 C.M.R. at 20.

[39] *Id.* at 21.

[40] *Davenport*, 9 M.J. at 366.

[41] *Id.* at 368.

[42] *Id.*

[43] *Id.*

[44] *Id.*

Unquestionably, any distinction between *Davenport* and *Arthur* with regard to the governmental function impeded was insignificant. The false statement in *Arthur* was a potentially more serious impediment because it pertained to the authority of an officer to apprehend a person suspected of a crime—a basic military function addressed in the *Manual for Courts-Martial*.[45] In *Davenport*, the falsity only related to the identity of the accused and did not involve the power of the noncommissioned officer to return the accused to custody.

As *Arthur* and *Davenport* suggest, military courts had difficulty in consistently applying the "duty to account" standard.[46] The Air Force Court of Military Review (AFCMR) in *United States v. Goldsmith*[47] found its efforts to develop a plausible theory to harmonize the "duty to account" cases "evaporate after a few moments reflection like some legal Brigadoon."[48] Because of this difficulty, it is best simply to organize the "duty to account" decisions with regard to the officiality determination.[49] A review of the cases reveals that the following statements were found to be "official": signing false invoices indicating the receipt of bread at the base commissary;[50] lying to a judge advocate and the commanding officer regarding payment to a civilian creditor;[51] and lying to the commanding officer concerning dishonored checks.[52] In comparison, the following statements were held not to be "official": falsely informing a sergeant that on-base motorcycle insurance had been obtained;[53] while under investigation for bad checks, lying to investigators about the amount of money in a bank account;[54] making false statements in Navy Relief Society documents;[55] in investigation for breach of the peace, falsely denying to investigators presence at the incident;[56] falsely implicating other sailors in illicit drug use to investigators;[57] and making false statements to investigators regarding marital status in a nonsupport case.[58]

Rejection of the "Duty to Account" Test

Military courts applied the "duty to account" rule to both suspects and nonsuspects.[59] In *United States v. Collier*,[60] the COMA attempted to limit the reach of the "duty to account" standard as applied to nonsuspects. Collier, an Army specialist, reported to military police that a stereo reverberator had been stolen from his car. However, other evidence established that Collier had pawned the unit earlier in the day.[61] After reviewing its holding in *Aronson* and *Osborne*, the COMA stated "they [*Aronson-Osborne*] do not constitute precedent to the effect that *only* statements required to be made as a part of official duty are actionable under Article 107, UCMJ."[62] The COMA distinguished *Aronson* and *Osborne* on the basis that Collier's false statement was a voluntary report by a person not suspected of a crime.[63] It opined that because the rationale of the "duty to account" rule was bottomed on the provi-

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[45] *See* MCM, *supra* note 33, R.C.M. 302.

[46] To avoid the effect of the "duty to account" rule, investigators now commonly swear suspects to statements to charge false swearing under Article 134 of the UCMJ. *See* United States v. Gay, 24 M.J. 304, 306 (C.M.A. 1987); United States v. Claypool, 27 C.M.R. 376, 378-81 (C.M.A. 1958).

[47] 29 M.J. 979 (A.F.C.M.R. 1990).

[48] *Id.* at 982.

[49] *See id.* at 983-84.

[50] United States v. Ragins, 11 M.J. 42, 42-46 (C.M.A. 1981).

[51] United States v. Reams, 26 C.M.R. 476, 479-80 (C.M.A. 1958).

[52] United States v. Torbett, 17 C.M.R. 650, 663-64 (A.F.B.R. 1954).

[53] United States v. Cummings, 3 M.J. 246, 247-48 (C.M.A. 1977).

[54] United States v. Washington, 25 C.M.R. 393, 395 (C.M.A. 1958).

[55] United States v. Lauderdale, 19 M.J. 582, 585-87 (N.M.C.M.R. 1984).

[56] United States v. Johnson, 26 C.M.R. 222, 223 (C.M.A. 1958).

[57] United States v. Gilfilen, 6 M.J. 699, 702-03 (N.M.C.M.R. 1978).

[58] United States v. Gieb, 26 C.M.R. 172, 174 (C.M.A. 1958).

[59] *See supra* note 35 and accompanying text; *see also* United States v. Colby, 25 C.M.R. 727, 731 (C.M.A. 1958).

[60] 48 C.M.R. 789 (C.M.A. 1974).

[61] *Id.*

[62] *Id.* at 791.

[63] *Id.*

sions of Article 31, it was not binding precedent in *Collier*.[64] The COMA further reasoned that the military obviously will take action to investigate the report of a crime and, therefore, a false report perverts its investigative function.[65] Although the holding in *Collier* appeared to limit the applicability of the "duty to account" rule to suspects, subsequent use of the "duty to account" test still was common in nonsuspect scenarios.[66]

The United States Supreme Court considered the scope of § 1001 in the case of *United States v. Rodgers*.[67] Rodgers had reported to the Federal Bureau of Investigation (FBI) that his wife had been kidnapped. He later contacted the Secret Service and reported that his "estranged girlfriend" was involved in a plot to assassinate the President.[68] The Eighth Circuit Court of Appeals had upheld the district court's dismissal of the indictment on the grounds that the investigation of kidnapping and the protection of the President are not matters "within the jurisdiction" of the FBI and the Secret Service because investigative agencies do not have the power to "dispose of the problem giving rise to the inquiry."[69] The Eighth Circuit Court of Appeals developed this principle in *United States v. Friedman*.[70] A unanimous Supreme Court held, however, that based on the legislative history of the statute, the restrictive interpretation used by the court of appeals was "unduly strained" and that the term "jurisdiction" covers "all matters confided to the authority of an agency or department" and was not limited to "the power to make final or binding determinations."[71] Therefore, the Supreme Court reasoned that § 1001 "clearly encompasses criminal investigations conducted by the FBI and the Secret Service."[72] Citing the "valid legislative interest in protecting the integrity of official inquiries," the Court held that § 1001 applied to false reports of crime to federal law enforcement agencies such as the FBI and the Secret Service.[73]

In *United States v. Jackson*,[74] the COMA relied on the *Rodgers* decision to further erode the "duty to account" rule. Jackson was the acquaintance of the primary suspect in a homicide investigation and although not suspected of any wrongdoing, she lied to investigators regarding the last time she had seen the suspect.[75] The COMA examined the *Rodgers* opinion and concluded that it should construe Article 107 in a manner consistent with the broad interpretation given § 1001 by the Supreme Court in *Rodgers*.[76] Using this expansive reading of Article 107, the COMA found that the accused had violated the statute when she gave misleading information to investigators regarding the murder suspect's whereabouts.[77] To justify its reliance on the ruling in *Rodgers*, the COMA stated:

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[64] *Id.*

[65] *Id.* The COMA stated the following:

> Having voluntarily undertaken to report the theft of his stereo, appellant assumed the obligation to report it truthfully. The report of a crime to law enforcement personnel carries with it indicia of officiality. Upon receipt of such a report it is reasonable to assume that the agency will take action in an effort to apprehend the criminal and recover the stolen property. A service person has the obligation not to pervert the [g]overnment machinery designed to accomplish that goal. Making a false report which triggers this machinery into needless acts is a perversion of investigatory process which was intended by Congress to be punishable under Article 107.

Id.

[66] *See* United States v. Ragins, 11 M.J. 42, 43-46 (C.M.A. 1981); United States v. Cummings, 3 M.J. 246, 247-48 (C.M.A. 1977); United States v. Lauderdale, 19 M.J. 582, 585-87 (N.M.C.M.R 1984).

[67] 466 U.S. 475 (1984).

[68] *Id.* at 477.

[69] United States v. Rodgers, 706 F.2d 854 (8th Cir. 1983).

[70] 374 F.2d 363 (8th Cir. 1967). Two other courts of appeals have rejected the reasoning in *Friedman; see* United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974); United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967).

[71] *Rodgers*, 466 U.S. at 478-82. *See* 78 CONG. REC. S11,513 (daily ed. June 14, 1934); 78 CONG. REC. H11,270-71 (daily ed. June 13, 1934); 78 CONG. REC. H8136-37 (daily ed. July 4, 1933).

[72] *Rodgers*, 466 U.S. at 479.

[73] *Id.* at 481.

[74] 26 M.J. 377 (C.M.A. 1988).

[75] *Id.* at 378. The accused initially told investigators that she had seen the suspect "two weeks ago;" she later admitted that he had been in her quarters at 0300 the morning of the murder.

[76] *Id.* at 379. The COMA also cited United States v. Collier, 48 C.M.R. 789 (C.M.A. 1974) in support of its holding. The COMA recently cited *Rodgers* and *Jackson* to support its holding that a private party may be the victim of the false statement for purposes of Article 107; *see* United States v. Hagee, 37 M.J. 484, 486-86 (C.M.A. 1993).

[77] *Jackson*, 26 M.J. at 379.

> Certainly, Congress never intended that this Article would fail to provide to military investigators the support available to FBI and Secret Service agents under 18 U.S.C. Sec. 1001. Thus, even if not subject to an independent 'duty to account,' a service member who lies to a law-enforcement agent conducting an investigation as part of his duties has violated Article 107.[78]

Less than a month after *Jackson,* the COMA considered the case of *United States v. Harrison.*[79] Harrison presented a pay inquiry to his company commander requesting to go to the division finance office. The company commander wrote on the form, "SM needs to know why he is getting paid so low at mid-month." Before submitting the request, the accused altered the document so that it appeared that his company commander was requesting health and welfare payments on the accused's behalf. When presenting the pay inquiry to the pay clerk at the finance office, the accused responded in the affirmative when specifically asked whether his company commander had written the line pertaining to health and welfare payments.[80] On appeal, the accused asserted that his pleas were improvident because he did not have an official duty to answer the pay clerk's questions. The COMA held the argument to be without merit, finding *Jackson* controlling.[81]

Although *Jackson* and *Harrison* clearly held that the "duty to account" rule no longer applied to nonsuspects, the AFCMR addressed the issue at length in *United States v. Goldsmith.*[82] *Goldsmith* was similar to *Jackson* and *Harrison* in that the accused was not a suspect at the time of the false statement.[83] Despite unambiguous language by the COMA, the AFCMR in *Goldsmith* still felt compelled to extensively review development of the rule and to examine the arguments for and against the test.[84] Based on its analysis, the AFCMR determined that the "dictum/holding of *Aronson* that a nonfiduciary may lie at will to investigators has been overtaken by later cases" and the decision in *Jackson* clarified "the place where the legal line is to be drawn for today's military attorneys: 18 U.S.C. § 1001 is to be viewed in a forthcoming, liberal fashion."[85]

The COMA answered any question on the viability of the "duty to account" rule concerning suspects the following year in *United States v. Prater.*[86] Prater was suspected of fraudulently claiming that he was married in order to receive basic allowance for quarters at the "with dependent" rate. Military investigators questioned him on three different occasions regarding his marital status and during each of these interviews he falsely maintained that he was married.[87] On appeal of his conviction of an Article 107 violation, the accused asserted that he did not have "an independent duty to answer" questions about his marital status.[88] The COMA rejected the accused's contention and concluded that "where warnings under Article 31, UCMJ, are given to the criminal suspect, as in the present case, his duty to respond truthfully to criminal investigators, if he responds at all, is now sufficient to impute officiality to his statements for purposes of Article 107."[89] Thus, *Prater* established the rule that statements made after a declarant has been warned of his or her rights automatically will be considered "official" without regard to any obligation to account. The COMA has applied this rule on officiality in all subsequent cases.[90]

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[78] *Id.*

[79] 26 M.J. 474 (C.M.A. 1988).

[80] *Id.* at 475.

[81] *Id.* at 476.

[82] 29 M.J. 979 (A.F.C.M.R. 1990).

[83] *Id.* at 980.

[84] *Id.* at 980-83.

[85] *Id.* at 984.

[86] 32 M.J. 433 (C.M.A. 1991).

[87] *Id.* at 435.

[88] *Id.* at 437.

[89] *Id.* at 438.

[90] *See* United States v. Frazier, 34 M.J. 135, 138 (C.M.A. 1992); *see also* United States v. Dorsey, 38 M.J. 244, 248 (C.M.A. 1993) (accused's false statement to military investigator regarding scheduling polygraph examination was "official" because conducting a polygraph was part of the investigator's duties and a legitimate investigative tool).

"Exculpatory No" Defense

Development of the Doctrine

Also affecting the scope of Article 107 is the "exculpatory no" defense. The doctrine originated in connection with § 1001, and despite the Supreme Court's expansive interpretation of that statute in *Rodgers,* several federal circuits have adopted the doctrine.[91] Although the COMA has recognized the defense, it never has employed it to overturn an Article 107 conviction.[92]

The District Court for Maryland first articulated the doctrine in 1955 in *United States v. Stark.*[93] Stark was charged with violating § 1001 by falsely denying to FBI agents that he had bribed employees of the Federal Housing Administration.[94] In its opinion, the district court distinguished between affirmative representations made for "the purpose of making a claim upon or inducing action by the government" and exculpatory denials made to investigators, concluding the latter were not "statements" within the meaning of § 1001.[95] The district court reasoned that the limitation on the scope of the statute was necessary because its purpose was to "protect the government from affirmative or aggressive and voluntary actions of persons who take the initiative, or, in other words, to protect the government from being the victim of some positive statement, whether written or oral, which has the tendency and effect of perverting its normal proper activities."[96] The district court reasoned that because negative exculpatory denials do not pervert the activities of the government, they should not be the basis of a charge under § 1001.[97]

The Fifth Circuit Court of Appeals was the first court of appeals to recognize the defense. In *Paternostro v. United States,*[98] the defendant was charged with violating § 1001 for falsely telling an Internal Revenue Service (IRS) agent that he was not involved in the distribution of graft money among members of the New Orleans police force.[99] The court of appeals distinguished the facts in *Paternostro* from cases where defendants were making claims against the government or seeking government employment.[100] The court also found that the defendant's statements were "mere negative responses to questions propounded to him by an investigating agent" and, therefore, he "did not aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of [g]overnment."[101] Consequently, the court of appeals ruled that the defendant's statements did not violate § 1001.

Fifth Amendment Basis

Since recognition of the "exculpatory no" defense in *Paternostro*, a majority of federal circuits have adopted the doctrine. Although the doctrine has gained wide recognition, legal and policy bases cited in support of the doctrine have varied significantly. Numerous cases have recognized the "exculpatory no" principle based on concern for the defendant's Fifth Amendment right against self-incrimination.[102] The concern voiced by these courts is that suspects may be forced to either incriminate themselves by answering investigative questions candidly or violate § 1001 by responding untruthfully. *United States v. Bush,*[103] a Fifth Circuit Court of Appeals case, is one of the first decisions to justify adopting

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[91] *See* United States v. Steele, 933 F.2d 1313 (6th Cir. 1991); United States v. Taylor, 907 F.2d 801 (8th Cir. 1990); United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988); United States v. Tabor, 788 F.2d 714 (11th Cir. 1986); United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), *cert. denied,* 425 U.S. 935 (1976); United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972); United States v. Paternostro, 311 F.2d 298 (5th Cir. 1962).

[92] *See infra* notes 180-98 and accompanying text.

[93] 131 F. Supp. 190 (D. Md. 1955).

[94] *Id.* at 191.

[95] *Id.* at 206.

[96] *Id.* at 205.

[97] *Id.* at 206.

[98] 311 F.2d 298 (5th Cir. 1962).

[99] *Id.* at 300.

[100] *Id.* at 305.

[101] *Id.*

[102] U.S. CONST. AMEND. V ("no person . . . shall be compelled in any criminal case to be a witness against himself"). The additional rationale for the "exculpatory no" exception based on the concern for the defendant's right against self-incrimination was first expressed in United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974).

[103] 503 F.2d 813 (5th Cir. 1974).

the "exculpatory no" doctrine based on Fifth Amendment concerns. In *Bush,* two IRS agents interviewed the defendant twice regarding the tax returns of one of his business associates. Following the interviews, the defendant signed two affidavits prepared by the agents. Further investigation revealed that both affidavits contained several falsehoods regarding the business dealings of the defendant. At no time during the questioning was the defendant informed by the agents that he was under investigation or that he was suspected of criminal conduct.[104] Although the affidavits contained detailed descriptions of the business transactions of the defendant, the court of appeals found that the statements in the affidavits were essentially negative responses to the questions offered by the agents and noted that "there is a valid distinction between negative exculpatory denial of a suspected misdeed and an affirmative representation of facts peculiarly within the knowledge of the suspect not otherwise obtainable by the investigator."[105] The court stated:

> Bush cannot be prosecuted for making a statement to Internal Revenue Service agents when those agents aggressively sought such statement, when Bush's answer was essentially an "exculpatory no" as to possible criminal activity, and when there is a high likelihood that Bush was under suspicion himself at the time the statement was taken and yet was in no way warned of this possibility.[106]

The Eleventh Circuit Court of Appeals followed the Fifth Circuit and recognized the defense in *United States v. Tabor.*[107] In *Tabor,* an IRS agent questioned the defendant at her home about a mortgage that she had notarized in her capacity as a Florida notary. Florida law required the person whose signature was being notarized to appear in person before the notary and provide proof of identity. When shown a satisfaction of the mortgage by the IRS agents, the defendant claimed that she had notarized the document in accordance with Florida law. However, neither of the two people who had signed the document had appeared before the defendant, and one had died five weeks earlier. Although the agent knew the notarization was fraudulent, he never informed the defendant that she was under investigation or of the possible consequences of her statements.[108] The court of appeals, citing Fifth Circuit precedent, recognized the doctrine and noted the "additional rationale that application of the statute . . . was proscribed by considerations underlying the Fifth Amendment."[109] In overturning the conviction, the court of appeals relied heavily on the agent's failure to advise the defendant that she was under investigation, stating "the agent, acting in a police role, aggressively sought a statement from a person under suspicion and not warned."[110]

The Fourth Circuit Court of Appeals also embraced the "exculpatory no" doctrine based in part on its anxiety that a criminal suspect could be forced to incriminate himself or herself to avoid punishment under § 1001. In *United States v. Cogdell,*[111] the defendant was under investigation by the IRS for fraudulently claiming nonreceipt of her tax refund check. During questioning, IRS agents initially told her that they believed she had received and cashed the check. Notwithstanding this disclosure, the defendant still maintained that she had never received the check. After being advised of her *Miranda* rights, the defendant continued to deny receiving or cashing the refund check and signed a statement to that effect.[112] The court of appeals in *Cogdell* reasoned that "Section 1001 plays an important role in protecting the effectiveness of government agencies whose functions require them to rely on information they receive. The statute, however, was not intended to compel persons suspected of crimes to assist criminal investigators in establishing their guilt."[113] The court held that these falsehoods were not within the reach of § 1001 because "they were not intended to induce government action, but instead were exculpatory responses to questioning initiated by government agents."[114]

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[104] *Id.* at 815-17.

[105] *Id.* at 818.

[106] *Id.* at 819.

[107] 788 F.2d 714 (11th Cir. 1986).

[108] *Id.* at 715-16.

[109] *Id.* at 717.

[110] *Id.* at 719.

[111] 844 F.2d 179 (4th Cir. 1988).

[112] *Id.* at 180.

[113] *Id.* at 182.

[114] *Id.*

The Sixth Circuit Court of Appeals also justified adoption of the doctrine based on Fifth Amendment concerns in *United States v. Steele*,[115] holding that the doctrine was "anchored, *inter alia*, upon the Fifth Amendment's protection against self-incrimination through the use of compelled statements."[116] Steele had been convicted of submitting false statements to the IRS regarding fraudulent real estate transactions to which he was a party.[117] The IRS agents had requested information from him as part of their investigation of the other party to the real estate arrangements who was suspected of tax evasion and various drug offenses. The agents never advised Steele that they suspected him of committing a crime, even though it was apparent that his truthful answers to questions about the real estate transactions would be incriminating. Because of the failure to advise the defendant of the consequences of his statements, the court of appeals concluded that he could not be prosecuted under § 1001.[118]

Impact of Rights Warnings

Despite the substantial reliance on the Fifth Amendment to justify the "exculpatory no" exception, several cases have applied the doctrine to false statements made *after* defendants have waived their *Miranda* rights. In *United States v. Perez*,[119] the Ninth Circuit Court of Appeals applied the exception to a defendant convicted of making false statements to Drug Enforcement Agency (DEA) agents regarding her attempt to drive a truck containing marijuana into the United States.[120] Before she made the falsehoods to the DEA agents, the agents advised her of her *Miranda* rights.[121] The court of appeals cited with approval case law justifying the "exculpatory no" doctrine on the basis of the Fifth Amendment, yet issued the blanket holding that "Section 1001 does not apply to a criminal defendant's responses to investigative officers during a postarrest interrogation . . . ."[122] Amazingly, the opinion failed to address the inconsistency between relying on the Fifth Amendment as a justification for the "exculpatory no" doctrine and applying the "exculpatory no" principle in a situation where the defendant would always have been advised of his or her self-incrimination rights—in a postarrest interview.[123] Instead, the court of appeals supported its holding using the following reasoning:

> In a postarrest criminal investigative setting, a competent government investigator will anticipate that the defendant will make exculpatory statements. A defendant who meets this expectation cannot possibly pervert the investigator's police function. We presume that a thorough agent would continue vigorous investigation of all leads until he personally is satisfied that he has obtained the truth.[124]

Although as a general rule the existence of *Miranda* warnings has not prevented employment of the "exculpatory no" doctrine, several cases have based use of the exception on the failure to give such warnings or to advise the defendant that he or she was under investigation.[125] In contrast, very few cases have held the exception inapplicable because the defendant was warned of his or her *Miranda* rights prior to the false statement.[126] At least one circuit has precluded, however, use of the "exculpatory no" principle with regard to statements made after the defendant had been warned of his *Miranda* rights. In *United States v. King*,[127] the Seventh Circuit Court of Appeals found *Miranda* warnings to be a bar to utilization of the "exculpatory no" defense. The court of appeals reasoned that the defendant obviously knew he was under inves-

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[115] 896 F.2d 998 (6th Cir. 1990).

[116] *Id.* at 1001.

[117] *Id.* at 999-1000.

[118] *Id.* at 1000; *see* United States v. Equihua-Jaurez, 851 F.2d 1222, 1227 n.10 (9th Cir. 1988) ("exculpatory no" doctrine due to the latent distaste for application of § 1001 that is uncomfortably close to the Fifth Amendment).

[119] 799 F.2d 540 (9th Cir. 1986).

[120] *Id.* at 540-42.

[121] *Id.* at 544.

[122] *Id.* at 546.

[123] *Id.* at 547.

[124] *Id.*

[125] *See* United States v. Tabor, 788 F.2d 714, 718 (11th Cir. 1986); United States v. Bush, 503 F.2d 813, 819 (5th Cir. 1974).

[126] *But see* United States v. Johnson, 530 F.2d 52, 55 (5th Cir.), *cert. denied*, 429 U.S. 833 (1976) (defendant "knew of the criminal investigation and had been given his *Miranda* warnings on several occasions").

[127] 613 F.2d 670 (7th Cir. 1980).

tigation at the time of questioning and, therefore, any concerns that he unknowingly would incriminate himself were eliminated.[128]

Intent to Pervert a Governmental Function

Since its recognition of the "exculpatory no" doctrine in *Paternostro* and *Bush*, the Fifth Circuit Court of Appeals has continued to expand the scope of the exception and, in so doing, limit the reach of § 1001. An example of this expansion occurred in *United States v. Schnaiderman*,[129] where the court of appeals affixed an intent element to § 1001. Schnaiderman was a Venezuelan resident who told a customs officer that he was entering the United States with less than $5000 in cash. In actuality, he was carrying over $8000. After customs discovered the true amount of cash and advised the defendant of the requirement to report cash in excess of $5000, he declared the actual amount he was carrying. The court reversed the conviction under § 1001 because it found that he had not made a positive or affirmative statement intended to pervert a governmental function.[130] Because a question existed as to whether the defendant knew of the reporting requirement, the court determined that the defendant could not have possessed the requisite intent.[131]

The Fifth Circuit Court of Appeals extended the scope of the intent element developed in *Schnaiderman* in *United States v. Rodriguez-Rios*,[132] where it overturned the conviction of a defendant who had falsely told a customs agent that he was carrying approximately $1000 in cash when he actually possessed almost $600,000. Unlike *Schnaiderman*, the defendant in *Rodriguez-Rios* refused to recant his falsehood once informed of the reporting requirement. Although the defendant completed a customs form with the amount of $530,000 claimed, he refused to submit the form to customs agents. Only after customs officials informed him that the cash had been discovered in his car and he was placed under arrest, did the defendant acknowledge that he was carrying approximately $500,000 (still $100,000 less than the actual amount).[133]

The court began its opinion by ruling that the defendant's falsehood was "a generally negative and exculpatory response made by a subject of a criminal investigation in reply to questions directed to him by investigating officers."[134] Following this rather remarkable conclusion, the court found that the false statement was not "calculated to pervert the legitimate functions of [g]overnment" and, therefore, not subject to prosecution under § 1001.[135] The court acknowledged that the defendant did not adequately clarify the false impression left by his initial misstatement, however, it concluded that because he did not "restate misleading facts or affirmatively deny that he was carrying more than $10,000," he did "not continue in his falsehood."[136] Consequently, the court held that no evidence existed of a "calculating deceit" on the defendant's part.[137] Thus, the court of appeals expanded the *Schnaiderman* ruling—that a declarant cannot be held accountable under § 1001 if he recants his or her false statement once advised of a reporting requirement—to eliminate the need for a recantation by the defendant. Stated succinctly, the defense only must show that the defendant was unaware of a reporting requirement at the time of the false statement to prove lack of intent to pervert a governmental function.[138]

In *Rodriguez-Rios*, Judge Higginbotham concurred in the court's application of Fifth Circuit precedent. He believed, however, that the court had permitted the "exculpatory no" exception to "run too far afield."[139] Judge Higginbotham felt that the doctrine had drifted from its original purpose of excluding "mere negative responses" from the scope of § 1001.[140] He argued that "[w]hile providing a salutary check

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[128] *Id.* at 675; *see Johnson*, 530 F.2d at 55.

[129] 568 F.2d 1208 (5th Cir. 1993).

[130] *Id.* at 1213.

[131] *Id.*

[132] 992 F.2d 167 (5th Cir. 1993).

[133] *Id.* at 168.

[134] *Id.*

[135] *Id.* at 170.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 169-70. The court of appeals distinguished two earlier Fifth Circuit cases involving similar fact scenarios; *see* United States v. Berisha 925 F.2d 791 (5th Cir. 1991); United States v. Anderez 661 F.2d 404 (5th Cir. 1981).

[139] *Rodriguez-Rios*, 992 F.2d at 170 (Higginbotham, J., concurring).

[140] *Id.* (Higginbotham, J., concurring).

on abuse of Section 1001, if unfettered the doctrine could undermine its operation, a statute read by the Supreme Court to cover a broad range of conduct."[141] He specifically disagreed with the intent element originated in *Schnaiderman*, commenting that "[w]e have taken the observation that Mr. Paternostro did not "aggressively and deliberately" misstate the truth and made it a mantra."[142]

The Perez *Test*

The Fifth Circuit Court of Appeals developed a structured analysis to consider the "exculpatory no" defense. In *United States v. Bedore*[143] the court considered whether the "exculpatory no" doctrine protected a defendant who misidentified himself to FBI agents attempting to serve a subpoena.[144] The court held that the statement must satisfy the following three-part test: (1) it must not have been made in pursuit of a claim to a privilege or a claim against the government; (2) it must have been made in response to inquiries initiated by a federal agency or department; and (3) it must not have perverted the basic functions entrusted by law to the agency involved.[145] Using this test, the court held that the defendant's false identification of himself did not fall within the scope of § 1001. Six years later in *United States v. Rose*,[146] the court of appeals expanded the three-factor test set forth in *Bedore*. The court did not invoke the exception for a defendant convicted of lying to a customs agent for the purpose of gaining entry into the United States. In addition to those established in *Bedore*, the court determined that the statement also must satisfy the following two factors: (1) it must have been made in the context of an investigation rather than in the routine exercise of administrative responsibility; and (2) it must have been made in a situation in which a truthful answer would have incriminated the declarant.[147] The elements set forth in *Bedore* and *Rose* were combined into a single five-part standard in *United States v. Perez*—commonly referred to as the "*Perez* test."[148] As previously noted, *Perez* held that statements made in a postarrest interview are not within the scope of § 1001 because such statements do not pervert the function of the investigating agency.[149]

A year after *Perez*, the Ninth Circuit Court of Appeals held that the "exculpatory no" doctrine was not available to a defendant charged with making false statements to a Secret Service agent investigating the defendant's claim of nonreceipt of a social security check. In *United States v. Olsowy*,[150] the court of appeals distinguished *Perez* on the grounds that the Secret Service agent was assisting the Treasury Department in resolving the validity of the defendant's claim. The court concluded that because the agent was supporting the Treasury Department's inquiry, he was not acting in a purely police capacity as required by *Perez*.[151] The court made this determination even though the Secret Service Agent, during the initial interview, clearly suspected the defendant of a crime and had warned him of his *Miranda* rights prior to the second interview.[152] The court also had to reconcile the facts of *Olsowy* with the holding in *Perez*—that statements made to an investigator in a postarrest interview do *not* pervert a governmental function. Consequently, the court concluded that the defendant's false statements in *Olsowy* perverted the Treasury Department's function of disposing of his claim of nonreceipt of his social security check.[153] The distinction made by the court of appeals between the governmental perversion in *Perez* and *Olsowy* was simply an exercise in semantics. With the exception that the government had placed the defendant under arrest at the time of her false statements in *Perez*, the facts in the two cases were not distinguishable.

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[141] *Id.* at 171 (Higginbotham, J., concurring). Judge Higginbotham's concurring opinion cited United States v. Rodgers, 466 U.S. 475 (1984) for the proposition that § 1001 covers a broad range of conduct.

[142] *Id.* (Higginbotham, J. concurring). In this statement, Judge Higginbotham was referring to the case of Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962).

[143] 455 F.2d 1109 (9th Cir. 1972).

[144] *Id.* at 1110.

[145] *Id.* at 1111.

[146] 570 F.2d 1358 (9th Cir. 1978).

[147] *Id.* at 1364.

[148] *See* United States v. Perez, 799 F.2d 540, 544-545 (9th Cir. 1986); *see also* United States v. Taylor, 907 F.2d 801, 805-806 (8th Cir. 1990).

[149] *Perez*, 799 F.2d at 546 (for a full discussion of the facts and holding *see supra* notes 119-24 and accompanying text).

[150] 836 F.2d 439 (9th Cir. 1987).

[151] *Id.* at 441-42.

[152] *Id.* at 442.

[153] *Id.*

The Eighth Circuit Court of Appeals adopted the *Perez* test in *United States v. Taylor.*[154] In *Taylor*, the court of appeals considered the applicability of the doctrine to a defendant's statements at a bankruptcy court hearing on his knowledge of who had forged his estranged wife's name on the bankruptcy petition.[155] The district court dismissed the charges against the defendant for violating § 1001 based on the "exculpatory no" exception and the court of appeals affirmed the dismissal order.[156] In its opinion, the court of appeals reviewed the different interpretations of the "exculpatory no" doctrine and concluded that it should be adopted, stating "the 'exculpatory no' doctrine is a narrow yet salutary limitation on a criminal statute which, because of its breadth, is subject to potential abuse."[157] The court utilized the five-factor *Perez* test in reaching its decision to affirm the district court's dismissal, rejecting the seemingly well-founded government argument that the defendant failed the *Perez* test because his false statements clearly impaired the bankruptcy court's basic function of determining whether the pleading was genuine.[158] Despite its finding that "[d]etermining the validity of the signatures was an essential judicial function,"[159] it rejected the government's argument by distinguishing between the impairing effect of a false filing and the impact of the allegedly false statements, reasoning that the latter, in the context they were made, were unlikely to impair the bankruptcy court's function. The court of appeals concluded that the bankruptcy court should not have been overly surprised that Taylor denied guilt, adding that "[a] false denial of guilt does not pervert the investigator's basic function in the manner the statute was intended to combat, but is merely one of the ordinary obstacles confronted in a criminal investigation."[160] Remarkably, the court of appeals also rejected the government's assertion that the defendant's statements were not made in the context of a criminal investigation and, instead, concluded that the civil bankruptcy hearing was an "investigative proceeding," and, thus, satisfied the administrative element of the *Perez* test.[161]

Affirmative Exculpatory Statements

Despite the "exculpatory no" doctrine's wide recognition and liberal interpretation, some courts still construe the defense in an exceptionally limited manner.[162] When first enunciated, the exception protected "negative exculpatory responses."[163] Two federal courts of appeals—the Seventh and Second—have strictly interpreted this phrase, limiting use of the exception to simple negative answers. In *United States v. King*,[164] the defendant was charged with four counts of making false statements to Social Security Administration claims representatives concerning his application for supplemental social security benefits by falsely telling them that he was not receiving workmen's compensation or any other income.[165] The court of appeals rejected the defendant's contention that the principle applied, stating that the defendant's argument "misconstrues the scope of the 'exculpatory no' doctrine, which stands as a very limited exception to Section 1001 . . . . [T]he doctrine is limited to simple negative answers . . . without affirmative discursive falsehood."[166] Because the defendant had made *affirmative* false statements to the claims representatives regarding his income, the court concluded that his falsehoods rendered the doctrine inapplicable.[167]

In *United States v. Capo*,[168] the Second Circuit Court of Appeals took a similar position to that announced in *King*. The defendants in *Capo* were convicted of making false state-

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[154] 907 F.2d 801 (8th Cir. 1991).

[155] *Id.* at 802-03.

[156] *Id.* at 803-07.

[157] *Id.* at 805 (quoting United States v. Cogdell, 844 F.2d 179, 183 (9th Cir. 1986)).

[158] *Id.* at 806.

[159] *Id.*

[160] *Id.* (quoting *Cogdell*, 844 F.2d at 184)).

[161] *Id.*

[162] *See infra* notes 163-73.

[163] *See* United States v. Paternostro, 311 F.2d 298, 305 (5th Cir. 1962).

[164] 613 F.2d 670 (7th Cir. 1980) (for a discussion of the facts and holding *see supra* notes 127-28 and accompanying text).

[165] *Id.* at 671-72.

[166] *Id.* at 672.

[167] *Id.*

[168] 791 F.2d 1054 (2d Cir. 1986).

ments to FBI agents regarding the illegal selling of jobs at Eastman Kodak Company. On appeal, the defendants urged the court to adopt the exception. The court declined to do so and held that the defendants' statements violated § 1001.[169] The court opined that the facts in *Capo* did not fit the court's construction of the doctrine, explaining that "[w]hile this court has never quite embraced the 'exculpatory no' exception, we have consistently stated that if we adopt it we would construe it narrowly, ruling that any statement beyond a simple 'no' does not fall within the exception."[170] The Ninth Circuit Court of Appeals used similar language in two cases—*United States v. Duncan*[171] and *United States v. Moore*[172]—where the court ruled that the defendants in those cases did more than "merely say no," they offered "affirmative statements," rendering the "exculpatory no" defense unavailable.[173]

While in a limited number of cases the "exculpatory no" principle has been restricted to negative exculpatory responses—such as, "no, I did not do it" or "no, I am not guilty"—many other decisions have not limited the exception to such statements.[174] When the defendant has made affirmative false statements—such as, "I was at home at the time of the crime"—several cases have resolved the issue by holding that the statements were equivalent to an "exculpatory no."[175] In *United States v. Thevis*[176] the defendant falsely told investigators that she did not know a cosuspect in a bank fraud case. She then claimed that she had met him two weeks earlier, only to change her story once again and assert that he was her husband of eight years. Finally, she pretended to be the cosuspect's sister.[177] Incredibly, the District Court for Connecticut concluded that these fabrications were an "exculpatory no" not subject to prosecution.[178]

Other federal cases have addressed the matter by simply eliminating the notion that the doctrine is confined to simple negative responses. In *Perez*, the Ninth Circuit Court of Appeals reviewed several decisions considering the issue and concluded "[w]e fail to see, in the context of a postarrest interrogation, any meaningful distinction between an exculpatory 'no, I am not guilty,' and a more complete, evasive exculpatory response to a direct question."[179]

Military Cases

In *Davenport*,[180] the COMA first considered recognition of the "exculpatory no" doctrine. The COMA noted that several federal circuits had applied the doctrine and commented, "since there is a 'general analogy' between 18 U.S.C. Sec. 1001 and Article 107, [f]ederal court interpretations of that provision are quite persuasive."[181] The COMA acknowledged that some cases had limited the defense to simple negative responses without affirmative discursive falsehood.[182] Citing the pre-*Rodgers* construction of § 1001, the COMA held, "like 18 U.S.C. § 1001, Article 107 should be construed narrowly and the 'exculpatory no' exception should be recognized . . . ."[183]

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[169] *See Capo*, 791 F.2d at 1056-58; *see also* United States v. White, 887 F.2d 267, 274 (D.C. Cir. 1989) (court of appeals declined to adopt the "exculpatory no" doctrine).

[170] *See* United States v. White, 791 F.2d at 1069; *see also* United States v. Bakhtiari, 913 F.2d 1053, 1061-62 (2d Cir. 1990) (while still declining to adopt the "exculpatory no" doctrine, court of appeals found statements were affirmative in nature making defense unavailable).

[171] 693 F.2d 971 (9th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983).

[172] 638 F.2d 1171 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[173] *Duncan*, 693 F.2d at 976.

[174] *See supra* notes 162-73.

[175] *See* United States v. Tabor, 788 F.2d 714, 718 (11th Cir. 1986) (defendant falsely stated two people had personally appeared before her and produced identification prior to notarization of documents; court of appeals found that she "did no more than disclaim involvement in possible criminal activity"); United States v. Bush, 503 F.2d 813, 819 (5th Cir. 1974) (defendant completed a detailed two-page affidavit; court of appeals held the essence of the statements was an "exculpatory no"); United States v. Bedore, 455 F.2d 1109, 1110-11 (9th Cir. 1972) (defendant falsely identified himself as a FBI agent attempting to serve subpoena; court of appeals held statement equivalent to "exculpatory no").

[176] 469 F. Supp. 490 (D. Conn. 1979), *cert. denied*, 446 U.S. 908 (1980).

[177] *Id.* at 498.

[178] *Id.* at 513-14.

[179] United States v. Perez, 799 F.2d 540, 546 n.9 (9th Cir. 1986) (for a discussion of the facts and holding *see supra* notes 119-24 and accompanying text).

[180] United States v. Davenport, 9 M.J. 364 (C.M.A. 1980) (for a discussion of the facts and holding *see supra* notes 37-44 and accompanying text).

[181] *Id.* at 370 (quoting United States v. Aronson, 25 C.M.R. 29, 32 (C.M.A. 1957)).

[182] *Id.*

[183] *Id.*

Although the COMA recognized the viability of the doctrine, it concluded that the "exculpatory no" exception did not apply to the current case, reasoning that the "appellant's false statement to Staff Sergeant Welch—a statement which went beyond a mere denial—tended to impede a 'governmental function.' Since Davenport had a duty to account to the armed forces for his time and whereabouts so that he could be utilized for military service, his falsehood impeded performance of that duty."[184]

Following *Davenport*, the COMA in *United States v. Gay*[185] concluded that the "exculpatory no" doctrine did not apply to a false-swearing offense under Article 134.[186] Gay was convicted of violating Article 134 by falsely asserting in sworn statements that he had no knowledge concerning two arson fires that he had set at an Army installation.[187] On appeal, the accused contended that he had given nothing more than "simple negative responses" under oath which should be protected by the "exculpatory no" exception.[188] The COMA rejected the accused's assertion on the grounds that the "solemnity or sanctity" of the oath is the paramount concern of a false-swearing charge, not the "efficient functioning of administrative programs," as with Article 107.[189] The accused also argued that the investigative practice of securing sworn statements violated the Fifth Amendment and Article 31, UCMJ.[190] Citing *King*[191] and *Johnson*,[192] the COMA found that "such a claim in general has been found to be without merit where a suspect has been given proper advice concerning his right against self-incrimination."[193] Thus, the COMA reached the important conclusion that a Fifth Amendment argument becomes baseless when a suspect has been warned of his or her rights against self-incrimination.

In addition to addressing the "duty to account" rule, the COMA in *Prater* also considered the applicability of the "exculpatory no" exception to false official statements.[194] Although the COMA acknowledged that several federal circuits recognized the exception, it noted some of the limitations placed on the reach of the doctrine.[195] Following its review of the different limitations on the "exculpatory no" doctrine, the COMA acknowledged that "our court has recognized this defense and its possible application to a false-official-statement charge under Article 107."[196] The COMA then explained that "we too have never suggested that it applies to all questioning of a suspect by criminal investigators."[197] The COMA found that all three of the noted limitations applied to the accused—the questioning concerned a claim against the government, the accused had been advised of his Article 31 rights, and his response was much more than a simple "no." As a result, the COMA concluded that no "substantial basis" existed for the "exculpatory no" defense.[198]

Analysis of the Bases for the "Exculpatory No" Doctrine

Historical Context

Judicial endeavors to restrict the reach of § 1001 began shortly after its enactment in its present form in 1934. By 1941, the Supreme Court already was considering the first judicially created constraint on § 1001. In *United States v. Gilliland*,[199] the Supreme Court considered the rule adopted by some lower federal courts that the reach of the statute was confined to "matters in which the [g]overnment has some

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[184] *Id.*

[185] 24 M.J. 304 (C.M.A. 1987).

[186] *Id.* at 306.

[187] *Id.* at 305.

[188] *Id.*

[189] *Id.* at 306.

[190] *Id.*

[191] 613 F.2d 670 (7th Cir. 1980).

[192] 530 F.2d 52, 55 (5th Cir.), *cert. denied*, 429 U.S. 833 (1976).

[193] *Gay*, 24 M.J. at 306.

[194] United States v. Prater, 32 M.J. 433 (C.M.A. 1991) (for a discussion of the facts and holding *see supra* notes 86-90 and accompanying text).

[195] *Id.* at 436.

[196] *Id.*

[197] *Id.* at 437.

[198] *Id.*

[199] 312 U.S. 86 (1941).

financial or propriety interest."[200] Based on the legislative history of § 1001, the Supreme Court found no basis for such a limitation, holding instead that the statute should be construed broadly.[201] During the same period, several federal courts also developed the rule that the false statement must address a "material" matter.[202] As previously discussed, the COMA considered and rejected this idea in *Hutchins*.[203] The Eighth Circuit developed the principle that § 1001 only applied to agencies with "the power to make final or binding determinations." This limitation effectively restricted use of the statute by investigating agencies because they could not "dispose of the problem or compel action."[204] As addressed above, a unanimous Supreme Court rejected this restrictive reading of the statute in *Rodgers*.[205] In addition to these examples, the Supreme Court also has rejected narrow readings of § 1001 by lower federal courts on at least two other occasions.[206]

The desire to restrain the use of § 1001 also explains the increased recognition of the "exculpatory no" defense and its expansive reading since the Supreme Court's declaration in *Rodgers* that the statute should be applied broadly.[207] Because *Rodgers* appeared to remove constraints on the criminalization of false statements made to investigating agencies, another means to limit use of the statute in the investigative setting was necessary. Hence, the increase in the use of the "exculpatory no" defense. The circumvention of *Rodgers* is evident in the Eighth Circuit Court of Appeals; the court which produced the restrictive interpretation of the term "jurisdiction" rejected in *Rodgers* in 1984.[208] In 1990, the Eighth Circuit Court of Appeals embraced the "exculpatory no" exception in *Taylor*,[209] concluding that the statute "because of its breadth, is subject to potential abuse."[210] Consequently, the military courts, in considering the "exculpatory no" doctrine, should understand the causal relationship between the *Rodgers* decision and the growing acceptance of the defense.

The discussions of the "duty to account" rule and the "exculpatory no" defense reveal that in many instances the same grounds have been used to justify these doctrines. Understanding the history of § 1001 helps explain the strong similarity in the legal and policy arguments supporting these defenses and is fundamental in analyzing the propriety of utilizing the "exculpatory no" exception in military cases. Thus, the "exculpatory no" defense must be examined with the understanding that it, as well as the "duty to account" doctrine, are but two of many judicial efforts to confine § 1001.

Congressional Intent

The Supreme Court has held in several cases that nothing in the legislative history of § 1001 indicates a congressional intent to restrict the statute's reach.[211] The Supreme Court also has found that the enactment of the statute in its current form "was not limited by any specific set of circumstances that may have precipitated its passage,"[212] and "[t]here is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted."[213] Based on the legislative history of § 1001, the Supreme Court in *Rodgers* held that the statute should be construed broadly—without limitation—in accordance with

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[200] *Id.* at 91.

[201] *Id.* at 93.

[202] *See supra* notes 11-17 and accompanying text.

[203] United States v. Hutchins, 18 C.M.R. 46, 50-51 (C.M.A. 1955).

[204] *See* United States v. Friedman, 374 F.2d 363, 367 (8th Cir. 1967); United States v. Rodgers, 706 F.2d 854, 855-56 (8th Cir. 1983).

[205] *See supra* notes 67-73 and accompanying text.

[206] *See* United States v. Bryson, 396 U.S. 64, 70-71 (1969) (statute applied to affidavit filed by union officer with National Labor Relations Board falsely denying affiliation with Communist Party); United States v. Bramblett, 348 U.S. 503, 509 (1955) (statute applied to fraudulent representations by Congressman to Disbursing Office of House of Representatives).

[207] *Rodgers*, 466 U.S. at 481-82.

[208] *See supra* note 70 and accompanying text.

[209] United States v. Taylor, 901 F.2d 801 (8th Cir. 1990) (for discussion of facts and holding *see supra* notes 154-61 and accompanying text).

[210] *Id.* at 805 (quoting United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988)).

[211] *See Rodgers*, 466 U.S. at 479-84; United States v. Bramblett, 348 U.S. 503, 507 (1955); United States v. Gilliland, 312 U.S. 86, 93 (1941).

[212] *See* Rodgers, 466 U.S. at 480; 78 CONG. REC. S11,513 (daily ed. June 14, 1934); 78 CONG. REC. H11,270-71 (daily ed. June 13, 1934); 78 CONG. REC. H8,136-37 (daily ed. July 4, 1933).

[213] *Bramblett*, 348 U.S. at 507; *see also* 78 CONG. REC. S11,513 (daily ed. June 14, 1934); 78 CONG. REC. H11,270-71 (daily ed. June 13, 1934); 78 CONG. REC. H8,136-37 (daily ed. July 4, 1933).

its plain language, noting that "[r]esolution of the pros and cons of whether a statute should sweep 'broadly or narrowly is for Congress.'"[214]

In view of the close relationship between § 1001 and Article 107, when judging the "exculpatory no" doctrine, military courts should use the *Rodgers*' "plain language" analysis adopted by the COMA in *Jackson* and *Prater* to abolish the "duty to account" rule.[215] As with § 1001, Article 107's legislative history does not indicate that it was intended to have a limited reach.[216] Consequently, because of Article 107's clear and broad language and the absence of any other intended interpretation, the congressional intent was to have Article 107 apply as written—to "[a]ny person . . . who makes any other false statement knowing it to be false."[217]

Fifth Amendment Justification

Many federal circuits have justified adoption of the "exculpatory no" defense on the grounds that the Fifth Amendment rights of a person—unaware that he or she is under investigation—are jeopardized when that individual is placed in the position of either incriminating himself or herself or of violating § 1001.[218] An evaluation of this justification in the military context must include consideration of Article 31, which provides as follows:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may intend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[219]

Accordingly, a military member suspected of a crime always will be aware that he or she is under investigation and of the right to remain silent. If a member is not so advised, then any statement provided cannot be used against that member. Because a civilian is only advised of his or her *Miranda* rights during a custodial interrogation,[220] the Fifth Amendment argument may have some validity in that circumstance, although, as a general rule, the federal courts have disregarded the effect of *Miranda* warnings on the "exculpatory no" defense.[221] Because of Article 31, the quandary of a suspect unknowingly self-incriminating himself or herself or violating Article 107 is not present in the military.

As a general proposition, the Fifth Amendment justification for the "exculpatory no" doctrine is indefensible. The "uncomfortable" feeling with false statement prosecutions expressed by some courts does not mean individuals have a constitutional right to lie to investigators with impunity. As the Supreme Court stated in *United States v. Bryson*, "[o]ur legal system provides methods for challenging the [g]overnment's right to ask questions—lying is not one of them."[222] The Fifth Amendment permits certain individuals to *refuse to answer* questions of investigators. Persons who have the right to remain silent and elect to speak, should not be issued a license to make false statements.

Perversion Aspect

Like the "duty to account" rule, proponents of the "exculpatory no" doctrine justify it on the basis that such statements do not pervert a governmental function. The COMA impliedly rejected this argument on the "duty to account" rule in *Jackson*[223] and *Prater*.[224] The COMA concluded in these cases that Article 107 should be interpreted in a manner consistent with the holding in *Rodgers*, that providing false infor-

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[214] *Rodgers*, 466 U.S. at 484.

[215] *See supra* notes 74-90 and accompanying text.

[216] *See supra* notes 7-9 and accompanying text.

[217] 10 U.S.C. § 907 (1988).

[218] *See supra* notes 102-18 and accompanying text.

[219] 10 U.S.C. § 831 (1988).

[220] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[221] *See supra* notes 119-28 and accompanying text.

[222] United States v. Bryson, 396 U.S. 64, 72 (1969).

[223] United States v. Jackson, 26 M.J. 377, 379 (C.M.A. 1988).

[224] United States v. Prater, 32 M.J. 433, 437 (C.M.A. 1991).

mation perverts the function of an investigating agency.[225] Although the reasoning used by the COMA in *Rodgers* to reject the "duty to account" rule applies to the "exculpatory no" doctrine, the perversion caused by a false statement by a military suspect is even more fundamental than previously discussed.

A commanding officer must take steps to ensure that an inquiry into any suspected crime is conducted immediately.[226] The purpose of the investigation is to allow the commanding officer to make an informed and intelligent decision regarding disposition of the suspected offense—to prefer or dismiss charges, impose nonjudicial punishment, or utilize nonpunitive measures.[227] The inquiry's function is not to build a case against a suspect. Instead, an investigation "may ultimately aid the suspect by exonerating him . . . ."[228] Consequently, the investigation of crimes must be seen as an integral part of the commanding officer's function of properly administering military justice, which is a fundamental component of his or her larger role of maintaining good order and discipline. Therefore, a false statement to military investigators, whether in the form of an "exculpatory no" or an affirmative falsehood, unquestionably impedes their ability to gather evidence on which the commanding officer will base his or her disposition of the offense. Ultimately, the effect of such an impediment is to pervert the commanding officer's function of maintaining good order and discipline in his or her command.[229]

Future Use of the "Exculpatory No" Doctrine by the Military Courts

Military courts should view the "exculpatory no" test as an outcome of the desire to limit the reach of § 1001. The grounds justifying the defense should be viewed in the same context. Military courts analyzing the exception in this manner should conclude that as with the "duty to account" rule, the bases for the "exculpatory no" principle are unfounded.

In rejecting the "duty to account" doctrine, the COMA in *Jackson* reasoned that military investigators should have the same support from Article 107 as provided to other federal agents by § 1001.[230] This statement implies that military investigators should be able to use Article 107 as a method to ensure that statements made during an investigation are truthful. Suspects who are advised that they face prosecution under Article 107 if they lie to investigators are much more likely to be forthright. Accepting the "exculpatory no" defense would seriously narrow the usefulness of this meaningful investigative tool.[231]

Like the "duty to account" rule, the "exculpatory no" test has been applied in an illogical manner. The inconsistent interpretation and use of the "exculpatory no" defense results from a weak constitutional basis and the absence of any congressional intent to support and guide its use. The lack of legislative design was the cause of the uneven application of the "duty to account" rule and, ultimately, an important reason for its downfall.[232] If the military courts embrace the "exculpatory no" defense, they will inherit the already puzzling line of federal cases in this area and will encounter the same difficulties that existed with the application of the "duty to account" exception. Admittedly, some courts have devised structured tests to assist in application of the "exculpatory no" defense.[233] However, these attempts to define the circumstances where the "exculpatory no" defense is appropriate have not resulted in more even use of the doctrine.[234]

If the military courts ultimately decide to adopt the "exculpatory no" defense, the exception should be interpreted in a restricted manner. First, the defense should be construed in accordance with the original intent of the doctrine—to shield "mere exculpatory denials" from prosecution.[235] Statements that are more than a simple "no" should not be protected by the "exculpatory no" defense. To construe the doctrine otherwise would circumvent Article 107 in the investigative setting, as has occurred in some federal circuits with respect to § 1001. Second, the doctrine should be held absolutely unavailable to military members advised of their rights under Article 31. Application of the defense after investigators have issued Article 31 rights would provide unwarranted protection for suspects who lie during the course of an investigation.[236]

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[225] *See supra* notes 74-90 and accompanying text.

[226] *See* 10 U.S.C. § 830(b) (1988); United States v. Washington, 25 C.M.R. at 398 (Latimer, J., dissenting).

[227] *See Washington*, 25 C.M.R. at 398 (Latimer, J., dissenting).

[228] *Id.*

[229] *Id.*

[230] *See* United States v. Jackson, 26 M.J. 377, 379 (C.M.A. 1988).

[231] *Id.*

[232] *See supra* notes 67-90 and accompanying text.

[233] *See supra* notes 143-61 and accompanying text.

[234] *See supra* notes 150-61 and accompanying text.

[235] *See supra* notes 93-101 and accompanying text.

[236] *See supra* notes 102-18 and 218-20 and accompanying text.

Conclusion

Until its repudiation, the "duty to account" rule had virtually precluded the use of Article 107 with respect to suspects. Illustrative of this point is that the "duty to account" exception would prevent punishment under Article 107 of individuals who made false statements during the Tailhook investigation. The potential power of the "exculpatory no" doctrine to limit prosecutions for false statements is evident in the federal cases discussed above. The "exculpatory no" defense poses the danger of significantly restricting the applicability of Article 107 to the investigative setting and giving suspects a new license to lie. Consequently, the military courts should decisively reject the "exculpatory no" defense, as well as future doctrines that attempt to limit the reach of Article 107.

Training Trial and Defense Counsel: An Approach for Supervisors

Major David L. Hayden
Instructor, Criminal Law Division
The Judge Advocate General's School, U.S. Army

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

Major Donna L. Wilkins
Instructor, Criminal Law Division
The Judge Advocate General's School, U.S. Army

Introduction

During the past several years, the number of courts-martial being tried by Army lawyers has steadily declined.[1] Consequently, the first-level supervisory positions in the Army's criminal justice system are currently being filled by attorneys who have considerably less trial experience than their predecessors. As a result, new trial and defense counsel will not have the benefit of their supervisors' experience to the same extent that their predecessors had.

[1] Statistics compiled during fiscal years 1981 through 1992 and retained in the files of the Criminal Law Division, The Judge Advocate General's School, United States Army, show the following court-martial rates during fiscal years 1981 through 1992:

	FY81	FY82	FY83	FY84
GCM	1,426	1,500	1,581	1,442
BCD	1,792	2,556	2,075	1,403
SPCM	2,802	1,649	768	461
SCM	4,418	4,151	2,856	1,645
TOTAL	10,438	9,856	7,280	4,951
	FY85	FY86	FY87	FY88
GCM	1,420	1,431	1,462	1,631
BCD	1,304	1,247	1,051	923
SPCM	363	271	214	182
SCM	1,308	1,373	1,492	1,410
TOTAL	4,395	4,322	4,219	4,146
	FY89	FY90	FY91	FY92
GCM	1,585	1,451	1,173	1,168
BCD	850	771	585	543
SPCM	185	150	92	70
SCM	1,365	1,121	931	684
TOTAL	3,985	3,493	2,758	2,465

In addition, the Commandant of The Judge Advocate General's School, United States Army (TJAGSA) recently announced a major change in the curriculum for the Judge Advocate Officer's Basic Course. Because new judge advocates are seldom assigned directly to trial or defense counsel positions, some criminal trial advocacy training will be eliminated for Basic Course students. The hours that had been devoted to criminal advocacy training now will be filled with additional administrative law training, including litigating a mock administrative board proceeding.[2]

This combination of reduced basic course criminal trial advocacy training and the loss of experience at the first-line supervisor level has the potential to adversely affect the advocacy skills of new trial and defense counsel. The adverse effect at the supervisory level is already apparent in the field. For example, at a recent continuing legal education course for criminal lawyers in Germany, many of the course evaluations suggested that trial advocacy instruction by TJAGSA instructors be added to the curriculum. Surprisingly, many of the individuals requesting such training were chiefs of criminal law or senior defense counsel.

In today's "right-sizing" Army with its ever shrinking budget, little chance exists that trial advocacy training by TJAGSA instructors will be available to the extent that some practitioners would desire. Accordingly, chiefs of criminal law and senior defense counsel need to consider how they will provide this necessary and important training to their subordinates. This article contains several suggestions on how supervisors of trial and defense counsel can conduct thorough, inexpensive, and quality in-house criminal law and advocacy training for their subordinates.

Meeting The Players

New counsel will be most effective if they know the various individuals involved in the military justice process. These players include the following: the chain of command—the noncommissioned officers (NCO) and commissioned officers who rely on the trial counsel for advice and the defense counsel for legal representation of their soldiers; other legal personnel—legal specialists, paralegals, court reporters, judges and opposing counsel; and finally, law enforcement personnel—military police, criminal investigators, evidence custodians, and laboratory technicians. Supervisors need to implement policies that not only encourage counsel to get to know these players, but also promote these relationships for the duration of the counsel's assignment.

One of the best ways for counsel to meet the chain of command is to visit them in their units. Ideally, both the trial and defense counsel should meet all commanders within their assigned jurisdictions, including those at company and battery level. Departing counsel or supervisors can assist by accompanying new counsel on their initial unit visits. The importance of close relationships between counsel and the chain of command cannot be stressed enough and counsel should strive to cultivate these relationships by attending staff meetings, social events, and other unit functions as often as possible. These associations can become critically important when an advocate is trying to persuade the chain of command to take a certain action or disposition in a criminal case. The chain of command is more likely to make a favorable disposition if they know and trust the attorney who is advising them or trying to sway them in a particular direction.

Counsel should get to know and understand the chain of command's mission. Supervisors should encourage new counsel to attend unit training within their jurisdiction from time to time. A day spent on a field training exercise, firing weapons at the range, and eating "Army chow," will teach new counsel more about the Army and its mission than any other source of information. Supervisors also should encourage counsel to obtain specialized training like Airborne, Air Assault, and jungle warfare. Counsel may want to volunteer to provide professional development classes, particularly in subjects of immediate concern to junior leaders—such as search and seizure, rights warnings, nonjudicial punishment, and the authority of supervisors. The more that counsel know the chain of command and its business, the easier it becomes to work with them.

Counsel naturally will have more frequent contact with their assigned legal specialists and paralegals, but their relationships with judges, court reporters, and other counsel also need development. Consequently, supervisors need to stress not only the trial attorney's responsibility to oversee the activities of their assigned support personnel, but also of their responsibility for frequent and expeditious coordination with judges and opposing counsel on all legal actions. Inviting judges and opposing counsel to office social events also can pay great dividends in the long run.

Counsel should be advised to maintain cordial relations with court reporters. Court reporters are excellent sources of information on court-martial administrative problems, such as, the marking and placement of exhibits, preparing the record of trial, and dealing with court members. Counsel also should be reminded not to overlook the advice and assistance of other attorneys in their staff judge advocate (SJA) or trial defense service (TDS) office; sharing ideas and experiences decreases the amount of time new counsel will require to learn their trade.

Both trial and defense counsel need to become acquainted with law enforcement personnel as early as possible in their

[2]Colonel John T. Edwards, the Commandant of the Judge Advocate General's School, announced this change in the basic course curriculum to those officers who attended the October 1993 Worldwide JAG CLE. The primary rationale for the change in the curriculum is that very few basic course graduates are being assigned initially to trial or defense counsel positions. Generally, they are assigned to positions where knowledge of administrative law and legal assistance will be of greater importance.

assignment. Supervisors should insist that new counsel visit their local military police stations and criminal investigation division (CID) offices well before their first case. Also consider having counsel participate in military police "ride-along" programs, if available, so that the counsel become better acquainted with the clubs and bars soldiers like to frequent and where cases are likely to arise.

Have new counsel visit the police evidence custodians and solicit information on their procedures and storage facilities. In the first series of trials involving law enforcement personnel, direct counsel to interview law enforcement witnesses at their workplace rather than having them come to the counsel's office. These actions not only serve to educate the counsel, but they accomplish the equally important purpose of earning the respect and confidence of the law enforcement personnel. Finally, if possible, supervisors should arrange for new counsel to visit one of the CID crime laboratories or one of the Army's urinalysis laboratories to learn about the facilities' capabilities. A visit to one of the laboratories would be especially beneficial if it coincided with counsel's preparation of an actual case.

An often overlooked aspect of training new counsel is getting them to meet the players in the criminal justice process. Ensuring that new counsel address this area early in their assignment will make dealing with military justice actions much easier for the new counsel. Counsel will know who they are dealing with, what their responsibilities are, and how they can most effectively work together with all the other players involved.

Criminal Law SOP

A key training resource for every criminal law division or TDS office is an effective standard operating procedure handbook (SOP). "This handbook is actually the office memory, containing information from officer responsibilities to 'how to do the job' instructions."[3] Supervisors should provide an SOP handbook to newly assigned attorneys as soon as they arrive in the office. The SOP should be designed to allow the new attorney to read it and immediately understand his or her responsibilities and duties as a trial or defense counsel and how to carry out those duties.[4]

A good SOP will identify not only the trial or defense counsel's responsibilities, but also the responsibilities of all other persons assigned to the office. This includes legal specialists as well as court reporters and civilian employees. The SOP should describe the procedures and contain standardized forms and formats for all routine actions completed by the division, such as the processing of a court-martial for referral or the preparation of a Chapter 10[5] discharge request. In addition, the SOP should describe the procedures and contain standardized formats for responding to unusual actions—such as a request for deferment of confinement, a request for individual military counsel, or a letter from a soldier inmate who wants clemency from the convening authority.[6]

Writing and publishing a new SOP is a difficult and time consuming task. As a result, supervisors may want to take one of two possible shortcut approaches in the creation of their SOP. The first approach is to contact other criminal law division or TDS offices and inquire about copying their SOP. A suggested approach is to have it copied onto a computer disk. When the disk arrives, you can easily modify it to fit local formats and methods of operation. Once the "customization" is complete, you can provide a hard copy of the SOP to each person assigned to the office.

A second approach is to assemble your own SOP in a piecemeal fashion. As you complete an action, put a copy in a large three-ring binder along with an explanation of the procedures for that particular action. As the SOP becomes larger, add a table of contents or index. By maintaining all of these items on a computer disk, updating or revising the SOP will become much easier.

Finally, after you have developed a good SOP, ensure that your personnel are using it. After all, what good is a detailed SOP if no one knows where it is or how to use it? Every attorney, clerk, or court reporter assigned to the office should have a copy of the SOP and be familiar with its information. You also may want to ensure that the staff duty officer (SDO) or on-call attorney handbook for your office contains a copy of the SOP and that each attorney in the office is familiar with its contents in case a matter covered therein arises during his or her tour of duty.

Using Standardized Forms

The typical trial or defense counsel spends a considerable amount of time repeating the same tasks. Preparing questions for a witness interview, drafting the SJA's pretrial advice, or preparing a section III evidence disclosure, are among the myriad of responsibilities that soon will become routine. Standardized forms should exist for these tasks as well as for all the other routine functions the advocate will be asked to perform.

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[3] Jack B. Patrick, *Judge Advocate Training and Learning: "Newbees" and the Boss*, ARMY LAW., Oct. 1985, at 7, 8.

[4] Trial Defense Service counsel are extremely fortunate in that the TDS already has prepared an excellent SOP. That SOP—dated October 1985—is currently being revised.

[5] A Chapter 10 is a discharge in lieu of a court-martial. *See* DEP'T OF ARMY, REG. 636-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, ch. 10 (17 Sept. 1990).

[6] A sample SOP table of contents is set out at Appendix *A*. This table of contents was taken from the III Corps Criminal Law Division SOP, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas.

"When work is once well done in the office, it should not be necessary to do it all over again. This is the principle of *re-use*—utilizing work once completed."[7] This principle also provides the basis for the standardized formbooks that are so popular in the civil practice of law.[8] The premise of re-use is that once an attorney has developed a form for a particular action, it only makes sense to re-use that form when that type of action resurfaces. Using standardized forms eliminates the needless waste of time and effort needed to recreate a form and allows for higher quality legal work.[9]

Almost any task the trial or defense counsel performs on a routine basis can be the subject of a standardized form. Incorporate these forms in the office SOP or make them part of an office formbook. A formbook can be something as simple as a three-ring binder with a table of contents and dividers setting off the various forms. If a formbook is used separately from the SOP, brief each new counsel on its existence when they arrive in the office.

The *TJAGSA Trial Counsel and Defense Counsel Handbook (Handbook)*[10] provides several excellent examples of the types of standardized forms that have been developed for both the trial counsel and defense counsel. Other forms that would be beneficial—but not included in the *Handbook*—are trial and defense counsel pretrial preparation checklists, a character witness questionnaire, trial and defense counsel case preparation chronologies, and a form for court members to use to write their questions during trial.[11]

Trial Notebook

Trial attorneys must be organized and supervisors can quickly teach inexperienced counsel how to get organized for trial by requiring them to use a trial notebook. The trial notebook is an essential ingredient for success in the courtroom. A trial notebook ensures organization and fosters a smooth presentation at trial. More importantly, counsel are more responsive to the demands of the courtroom environment when they are armed with a good trial notebook.

Imagine trying a court-martial without a trial notebook. Seconds seem like hours as you fumble through your disorganized files and boxes in a futile attempt to retrieve what suddenly has become a pivotal fact in your impending cross-examination. A standardized trial notebook with a table of contents ensures that counsel can quickly locate essential documents or evidence when needed. Additionally, the trial attorney who uses a trial notebook projects the image of an organized professional to the military judge, panel, and other parties at trial.[12]

Remember two key principles when designing a standardized trial notebook for your subordinates: first, keep it simple; and second, be flexible in tailoring the trial notebook to a particular case.[13] Simplicity ensures that the notebook remains easy to use. It is human nature to avoid using complex organizational systems. The purpose behind a trial notebook can be frustrated by creating an intricate scheme of filing documents related to a specific case. Flexibility, on the other hand, provides a trial notebook that is more effective for a particular case. You are not "reinventing the wheel" by remaining flexible, you simply are tailoring the notebook to suit your needs for a particular case.

Where do you begin? The notebook should be your first consideration. Whenever possible try to place all documents, notes, and related materials in a single notebook. The most suitable trial notebook to accomplish this will vary depending on personal tastes, complexity of the case, degree of office uniformity desired, and resources available. Something as simple as a three-ring binder with dividers—readily available through normal military supply channels—normally will suffice. More sophisticated and better notebooks or file sorters also are available through military supply channels[14] as well

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[7] DWIGHT G. MCCARTY, LAW OFFICE MANAGEMENT, 260 (3d ed. 1955).

[8] *See* VANN H. LEFCOE, VIRGINIA CORPORATIONS, (1982); CLYDE W. GOLDMAN & AMY MORRIS HESS, VIRGINIA FORMS, (1978); MICHIGAN FAMILY LAW (Norman N. Robbins & Lynn M. Collins eds., 1988).

[9] Even noted trial lawyer F. Lee Bailey is an advocate of the use of standardized forms. In one of his books on investigating and preparing for the trial of criminal cases, he includes several examples of his own standardized forms. *See* F. LEE BAILEY & HENRY B. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES, (2d ed. 1985).

[10] CRIM. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 310, CRIMINAL LAW: TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK (May 1993) [hereinafter JA 310].

[11] Using a form for court members' questions solves two problems. First, it eliminates the need for the trial counsel to account for the small pieces of paper that court members invariably use in writing their questions. Second, the court reporter can assemble the record of trial without fear of losing one of these tiny scraps of paper.

[12] Professor James W. McElhaney stressed this point when discussing the need for trial notebooks in TRIAL NOTEBOOK 4 (2d ed. 1987); "Nothing so undermines the confidence of a court or jury in a lawyer as his constant groping and fumbling." (quoting J. APPLEMAN, SUCCESSFUL JURY TRIALS 100 (1952)). *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 1 (2d ed. 1988).

[13] MCELHANEY, *supra* note 12, at 5.

[14] Legal or letter size file folders, divided numerically into 31 sections, or alphabetically into 20 or more sections, are available through the United States General Services Administration (GSA) Federal Supply Service Supply Catalog—for example, letter size file folder, 31 sections, indexed numerically, FSN 7520-00-286-1724, page 89, GSA Supply Catalog, May 1992, at $6.62 each (price was raised to the listed amount in the April 1993 supplement to the GSA Federal Supply Service Catalog).

as civilian retailers.[15] Most of these come preindexed numerically, alphabetically, or topically. Some variations are even color coded to further aid the organization-minded practitioner. Identify how obsessive you want to be in your organization, keeping in mind the two key principles of simplicity and flexibility discussed earlier.

What should the trial notebook contain? The answer might depend on what you plan to litigate in a particular case. In one trial your focus may be on extensive pretrial motions on several case-dispositive legal issues; in another you may focus on sentencing following a guilty plea; or you may plan to completely litigate the facts of a particular incident. Whatever the approach, certain topics always will apply in any court-martial. These areas should serve as your starting point in creating a trial notebook.

Table of Contents

No trial notebook would be complete without an index or table of contents. The index may be a simple outline of the twenty to thirty major topic areas in the typical case or it may be a more detailed breakdown of all documents in a particular case. Remember, however, the principle of simplicity. Try to keep the index to one side of a single sheet of paper. At trial, place this sheet on top or inside of the front cover of your trial notebook. By simply glancing at the index you should be able to locate a document. Some counsel have preprinted forms to simplify this process.[16] Some practitioners, however, may prefer a more tailored index. In this age of word processing and individual computer work stations, you can easily maintain a draft index on your word processor that can be quickly tailored to fit a particular case.

Chronology

A detailed case chronology is indispensable at trial. Military judges often will question counsel when certain events occurred, particularly where speedy trial or sentence credit issues are concerned. In most instances, unless properly documented in a case chronology, counsel will be unable to remember every single action, communication, or conversation that occurred in a particular case. The chronology serves as the counsel's primary point of reference for remembering critical facts. Counsel should develop a standardized chronology form and it should be the first document that counsel adds to the case file.

Trial Brief

Most writers begin with an outline of the expected final product when scripting a play or drafting an article. Similarly, attorneys should prepare for trial by scripting the anticipated order of events at the trial. The trial brief should reflect all stages of the trial and the envisioned actions of both counsel.[17] Compiling the trial blueprint in this fashion will force counsel to make advance decisions regarding their case presentation. This process also allows counsel to identify tasks that must be completed before trial. In the tense atmosphere of the courtroom, the trial brief serves as a road map for the conduct of the trial to ensure that nothing is overlooked.

Original Documents

Counsel should bring to trial all original documents related to the processing of the court-martial, to include the following: charge sheets, convening orders with amendments, SJA pretrial advice, referral documents and endorsements. Counsel should provide these documents to the court reporter for inclusion in the original record of trial. These documents may be useful if questions arise on the preferral or referral process, selection of panel members, or other errors identified in the trial documents.

Proof Analysis

Early in their preparation, both trial and defense counsel should create a worksheet identifying every element of each specification that the government must prove. This worksheet can be a sheet of notepad paper with a line drawn down the middle. On one side counsel should list each element of proof and on the other side the witnesses and evidence necessary to prove those elements. This proof analysis will serve to identify potential weaknesses of proof, if any, that may exist. It also will facilitate development of the counsel's theory of the case, focusing future preparations based on the analysis. Finally, the proof analysis will serve as a checklist at trial for both the trial and defense counsel when they decide whether the government has introduced evidence on each element of proof.[18]

Pretrial Motions

This section should contain copies of all motions, any pertinent briefs, legal authorities, and a list of witnesses, docu-

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[15] An item that makes an excellent trial notebook is the "Favorite Deskfile/Sorter" manufactured by Wilson Jones Company. This sorter is designed to act as a temporary storage facility for documents that need to be filed in the future. It comes with a hard cover and 31 separate prenumbered compartments. The compartments are expandable to hold up to an inch-and-a-half of documents. It is available in most office supply stores at a cost of $9.00. The index located at Appendix *B* of this article was designed especially for this type of sorter.

[16] A sample format for an index to a trial notebook is shown at Appendix *B*.

[17] Examples of detailed trial notes for trial and defense counsel are found in figures 3-61 and 3-62 of JA 310, *supra* note 10, at 3-141 to 3-159.

[18] *Id.* at 3-82.

ments, or other evidence necessary for the motions hearing. More than one section may be dedicated to pretrial motions depending on the complexity of the issues involved. When several motions are involved, counsel will need a checklist to keep track of each motion's status and the judge's final ruling.

Pleas

Defense counsel should write out every plea, no matter how simple, to prevent any misstatement. When entering a plea, counsel should be able to quickly turn to this section and read it verbatim. Although it may appear difficult to incorrectly enter a simple plea of "guilty" or "not guilty to all charges and specifications," it happens, particularly with inexperienced counsel. For the more complicated pleas—involving exceptions and substitutions—written pleas can serve another important function. Providing a copy of the written plea to the court reporter, military judge, and opposing counsel can avoid any misunderstanding or the need to restate the plea several times.

Voir Dire

At a minimum, counsel should have an outline of the areas that they intend to explore during voir dire. This section also should contain a court member seating chart. The seating chart can be used to list background information on each member, to record the responses of individual members, and to keep track of challenges exercised against them.[19] Counsel also may want to use this section to file copies of court members' personnel records and completed court member questionnaires. Ordinarily these documents will have been reviewed prior to trial to delete unnecessary background questions about each member's career, education, and prior assignments.[20]

Another document that counsel should include in this section is the court member notification checklist. Because the trial counsel has the responsibility for notifying all court members of the date and time of a scheduled trial,[21] the trial counsel will use this checklist to record the date, time, name, and phone number of those court members contacted about the date and time of trial. The importance of having this information becomes apparent if one ever encounters a senior officer who appears in court on the scheduled day not having been informed a case was rescheduled.

Opening Statement

An outline of the opening statement, if not completely written out, should be included in the trial notebook. Record your opening statement in some fashion so you can refer to it while preparing closing arguments. The opening statement often will contain promises by counsel on what the evidence will show. Counsel should be prepared to revisit those promises during their closing argument.

Government Witnesses

Prior to trial, the trial counsel should prepare a list of all witnesses he or she intends to call. Background information on each witness should be recorded, including the name, rank, unit, address, and home and work telephone numbers (in the event a witness fails to appear for trial or the trial is rescheduled).[22] Ordinarily the witnesses should be listed in the order in which they will be called. Prior to trial, counsel should provide a copy of this list to the judge, court reporter, and opposing counsel. Not only will such a list force counsel to be better organized, but it helps the judge anticipate the length of the government's case so he or she can plan for recesses. Furthermore, this list helps the court reporter to understand and spell the names of witnesses in the record of trial. Both the trial counsel and defense counsel should use this list to ensure that they have prepared questions for each witness, whether on direct or cross-examination. Counsel also should identify in this section any exhibits the witness will deal with at trial, as well as any prior statements the witness may have made. Identify where prior statements are filed in the trial notebook, if they are located in another section.[23] Defense counsel will want to reference the location of any impeachment evidence for immediate retrieval.

Motion for a Finding of Not Guilty[24]

In this section counsel should keep a copy of the proof analysis worksheet mentioned earlier. Counsel also should insert a blank sheet of paper in this section to record any facts relevant to the motion. When the government concludes its case-in-chief, and if a motion for a finding of not guilty is appropriate, defense counsel can refer to these documents in formulating the motion. The trial counsel also can use these documents to list the evidence presented on each element when responding to a challenge under Rule for Courts-Martial 917.[25]

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[19] MAUET, *supra* note 12, at 4.

[20] JA 310, *supra* note 10, at 4-5 to 4-6.

[21] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 502(d)(5) discussion (1984) [hereinafter MCM].

[22] MCELHANEY, *supra* note 12, at 8.

[23] MAUET, *supra* note 12, at 7.

[24] MCM, *supra* note 21, R.C.M. 917.

[25] *Id.* R.C.M. 917(c).

Defense Witnesses

This section should duplicate the format used in the section for government witnesses, including lists of questions, background information, impeachment evidence (trial counsel), and prior statements. Professor McElhaney suggests including a short paragraph on each witness at the beginning of your list of examination questions indicating what you expect to prove with the witness.[26] This technique should help keep counsel focused during the subsequent examination.

Documentary and Physical Evidence

Both the trial and defense counsel need to identify what documentary and physical evidence they intend to offer at trial. Most practitioners do this when they prepare their trial brief. They then prepare a checklist to track the use of those exhibits at trial. This checklist can be designed in any number of ways. One approach is to list the exhibits down the left side of a page and list the prospective witness' names across the top. Then draw a series of grids across the page. After the counsel identifies which witness will be used to introduce a piece of evidence, the counsel places a slash mark in the box that corresponds to that witness and that piece of evidence. At trial, after the evidence is admitted, the trial counsel will place another slash mark in the box in the opposite direction, thus creating an *X*, to indicate that the evidence has been offered and admitted. Prior to resting the case, counsel can quickly examine this checklist to ensure that there is an *X* for each piece of evidence that he or she had planned to introduce. Use of an evidentiary checklist helps to avoid the situation where counsel inadvertently overlooks a piece of evidence or fails to move for its admission at trial.

Findings Instructions

All proposed instructions, with any supporting briefs or legal authorities, should be filed in this section. This will ensure that counsel are prepared for the Article 39a session on instructions immediately following the introduction of evidence. A copy of the *Military Judges' Benchbook (Benchbook)*[27] checklist for drafting final instructions also should be placed in this section. Counsel should use the checklist to annotate when an instruction is approved or denied, and when actually read to the panel, if at all.

Findings Worksheet

This section applies primarily to trial counsel, who, in a court-martial with members, must prepare a findings worksheet in accordance with appendix 10 of the *Manual*.[28] Provide a copy of the worksheet to opposing counsel well in advance of trial to resolve any objections and avoid the needless waste of court time. Complicated trials involving multiple specifications may require several alternative findings worksheets if any adverse rulings on pretrial motions and findings occur. Use word processing to respond to any unanticipated changes.

Closing Argument

One of the first steps counsel take in trial preparation is drafting their closing argument. The final product may be substantially different, but working backwards helps counsel focus on the evidence necessary to establish or disprove the elements of proof. An outline of the closing argument should be included in the trial notebook along with several blank pages. The blank pages are used to record additional facts, arguments, and ideas that arise during trial that were not otherwise included in the closing argument outline.[29] Counsel can use this outline and the notes in formulating their final closing argument. Including a list of your evidentiary exhibits in this section also is helpful. This will remind counsel to weave the exhibits into their final argument while simultaneously addressing opposing counsel's exhibits.

Sentencing Evidence

Include evidence in aggravation (for use by trial counsel) or extenuation and mitigation (for use by defense counsel) in this section. Examples of appropriate evidence would include documentary evidence from the accused's personnel files such as the *DA Forms 2* and *2A*, records of nonjudicial punishment, prior convictions, stipulations of fact or expected testimony, awards, letters, and witness information.[30]

Sentencing Instructions

This section should essentially be the same as the section for findings instructions, including the checklist from the *Benchbook* and all proposed instructions. Generally, sentenc-

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[26] MCELHANEY, *supra* note 12, at 9.

[27] DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, App. A (1 May 1982) [hereinafter BENCHBOOK].

[28] MCM, *supra* note 21, at A10-1.

[29] MAUET, *supra* note 12, at 8.

[30] In a case where the defense has a particularly large number of favorable documentary exhibits the risk exists that the court members will rush through the materials without giving each individual document enough attention to understand its importance. One technique that has proven effective for defense counsel in these situations is to organize all documentary evidence into a single defense exhibit with a one-page index or cover sheet. The one-page index allows the defense counsel to synopsize on a single page the importance of each individual document which they want to bring to the attention of the court members. Each court member will probably take the time to read the one-page index and if the member wants to look further at a particular document, it is available in the package of documents for additional review.

ing instructions are less detailed than findings instructions, but no less important. Counsel should use the checklist to record the status of instructions and to note when they are actually read to the members.

Sentence Worksheet

The trial counsel is responsible for preparing the sentence worksheet and providing it to the members prior to their deliberations on sentence.[31] As with the findings worksheet, provide a copy to opposing counsel well in advance of trial so that any objections can be resolved without wasting time in court. Although the sentence worksheet is unlikely to change at trial, counsel should maintain the ability to quickly modify the sentence worksheet if necessary.

Sentencing Argument

Maintain an outline of counsel's sentencing argument—with blank pages for making notes during trial—in the same manner as the closing argument outline. Exhibits will be admitted during sentencing. Include a list of exhibits admitted during sentencing in this section for easy referral.

Posttrial Matters

Defense counsel should brief their client prior to trial on appellate review if convicted. Counsel should then file the appropriate appellate rights form in this section, to be completed immediately after trial indicating the client's election of appellate rights.

The trial notebook is critical, not only for the actual trial, but for thorough pretrial preparation as well. The simple act of placing documents in the appropriate notebook sections serves as an additional checklist by alerting counsel to those areas needing further attention. Every supervisor of military trial lawyers needs to ensure that his or her subordinates have and use a trial notebook. Supervisors should inspect the notebook as a way of verifying that counsel are ready for trial.[32]

Improving Advocacy Skills

Every supervisor of trial attorneys should have a plan for training or improving their subordinates' advocacy skills. Not every office has the luxury of receiving experienced judge advocates for their trial attorney positions. Civilian trial advocacy training programs for counsel are probably an aberration and TJAGSA trial advocacy courses are infrequent and not always available when most needed by inexperienced counsel.

The best way for inexperienced counsel to learn advocacy skills is to try cases. One way of preparing counsel for the courtroom is to have them "second chair" several courts-martial before they try one on their own. Depending on their abilities and experience level, the counsel simply may sit at the counsel table throughout the trial or actually may assist in conducting parts of the trial. Sitting second chair provides new counsel the opportunity to observe the court-martial process first hand, without actually having the pressure or responsibility for trying a complete case.

If the office has several counsel, new counsel should sit second chair on at least two to four cases. After demonstrating some technical competence at the second chair level, the new counsel should then be assigned as lead counsel with an experienced attorney assigned to sit second chair. Having a more experienced counsel sit second chair provides the inexperienced counsel with an important safety net should some unexpected event arise.

Another excellent advocacy training technique is to have inexperienced counsel read old records of trial. Reading records of trial will, at a minimum, illustrate the court-martial process from beginning to end, as well as provide some real world examples of trial advocacy. In these days of dwindling courts-martial numbers, some counsel may not have the opportunity to sit second chair very often, or even at all. If counsel are not going to have the opportunity to observe a trial before they try their first one, reading records of trial will at least familiarize them with court-martial procedures.

In addition to counsel reading records of trial, the supervisor might use extracts from old records of trial as teaching points for counsel. Old records frequently will contain excellent examples of arguments, direct examination, cross-examination, or how to present a sentencing case. Old records of trial also can be used as examples of how *not* to do something. Remember, counsel can learn not only from their own mistakes, but from the mistakes of others.

Counsel also can enhance their advocacy skills by rehearsing before trial. Supervisors should consider having new counsel rehearse portions of their trial in front of either themselves or other attorneys in the office. Rehearsing the opening statement, direct examination, or the closing and sentencing arguments provides not only a valuable opportunity to critique the performance, but also an opportunity to ensure that the new counsel is adequately prepared and has a good grasp of the issues to be litigated. If possible, schedule these practice sessions several days before the actual trial. Scheduling a practice the day before trial only will serve to increase the anxiety level of the young counsel who probably needs that time to take care of last minute details before trial. In addition, a practice session the day before trial may not allow enough time for the counsel to absorb any suggestions made by the critiquer.

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[31] JA 310, *supra* note 10, at 1-18.

[32] MCELHANEY, *supra* note 12, at 12.

Supervisors should consider making practice sessions mandatory for the first couple of trials. Supervisors also should not hesitate to require rehearsals for counsel who are having problems in court. Trial attorneys only get better with practice. Unfortunately, with fewer courts-martial, many counsel are not getting that practice in actual trials. Consequently, counsel should try to improve their advocacy skills through rehearsals or practice sessions.

Supervisors can increase the benefit of the practice sessions through videotaping counsel's performance. Many civilian trial advocacy programs and TJAGSA, in its Criminal Law Advocacy Course (CLAC) and Advanced Trial Advocacy Graduate Course program, use videotape review with students to assist them in improving their advocacy skills. The videotape review should be used to identify nervous or annoying habits of counsel as well as problems with the substance of the presentation. The supervisor or the attorney critiquer can then review the videotape with the counsel. Many counsel will not accept that they are doing something wrong or even realize how badly they have performed until they see it on tape. For example, counsel may repeatedly say "and, uh" or sway back and forth during the examination of a witness. Counsel are frequently amazed when they see themselves on videotape and realize they need to correct or change something.[33]

Meaningful critiques of counsel's performance, either in an actual court-martial or in a rehearsal session, are essential to improving the counsel's performance. During advocacy training, TJAGSA instructors use the National Institute of Trial Advocacy (NITA) critique method to explain to students what they did wrong and how they can improve. This critiquing method, although very critical, tells the counsel exactly what they did and how to fix it. The vague, pat-on-the-back, general feedback type of critique simply does not identify for counsel what it is they need to improve on or how they need to go about improving.

The NITA critique focuses the counsel on the area the supervisor or critiquer wants to discuss—such as, cross-examination with a particular witness. This is called headnoting the problem area. After identifying the "headnote," the critiquer then gives counsel a "playback" of their performance. This requires the critiquer to take verbatim notes during the counsel's performance or presentation. The critiquer will read back to counsel precisely what was said. The playback is essential to the critique because most counsel do not believe that they are doing or saying something in a particular manner until they hear the playback. After the playback, the critiquer gives the counsel a "prescription" on how to fix the problem. The critiquer essentially gives a demonstration of how to do it. Although the NITA critique method may be difficult to master, the benefit to counsel is tremendous. At the conclusion of a NITA critique, counsel should be able to tell the supervisor exactly what they would do differently the next time.[34]

Finally, counsel can practice their advocacy skills in another arena that is similar to a trial and is as equally important. Many young counsel have improved their advocacy skills by doing administrative boards and magistrate court. Although defense counsel always have represented soldiers at administrative boards, many trial counsel—especially at the smaller installations—are not participating in administrative boards. If possible, trial counsel should serve as the recorder at all administrative boards. Administrative boards provide all counsel with the opportunity to examine and cross-examine witnesses, handle physical evidence, and make arguments to the board members. Another venue that may offer the opportunity to practice advocacy skills is the local United States Magistrate Court, which customarily deals with the installation's traffic violations and minor offenses involving civilians. Whether trial counsel are participating in the magistrate program on a part-time or full-time basis, they will receive a substantial benefit.

In-House Training

Regularly scheduled in-house training is another important tool that the supervisor can use to enhance the advocacy skills of assigned counsel. The supervisor should designate a specific time for the training and, absent special circumstances, should not deviate from it. The training can be held on a weekly, bi-weekly, monthly, or even bi-monthly basis. Regardless of how often the training is scheduled, all counsel should participate. The supervisor may have to "shut down" the office to ensure full participation in the instruction. In this regard, it may be beneficial to schedule the instruction to coincide with enlisted training.[35]

After setting a time for training, determine what topics or areas would most benefit counsel. The number of appropriate topics is unlimited and might include areas where counsel need special emphasis—such as, presenting opening arguments, using a diagram, or voir dire. The instruction could address issues that counsel are dealing with in particular cases—such as, using a handwriting expert in a forgery case or a drug expert in a urinalysis case. The instruction also might include topics that counsel should know—such as, the procedures used at the CID laboratory for analyzing different types of evidence, procedures used for processing a crime scene or evidence, or pretrial confinement procedures.[36]

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[33] Appendix *C* of this article contains a brief guide on how to conduct a video review.

[34] Appendix *D* further describes the NITA critique method.

[35] Both Fort Hood, Texas, and United States Army Europe (USAREUR), utilize a very effective training period called "Sergeant's Time." While the date and time apparently varies in USAREUR, at Fort Hood, Sergeant's Time occurs each Thursday morning from 0800 until 1200. During this time, all enlisted soldiers are required to participate in some form of training dealing with either their military occupational specialty or general soldier skills. A training time such as this would also be a perfect time to conduct in-house counsel training.

[36] For a detailed listing of additional in-house training topics see Appendix *E*.

After deciding what topics merit instruction, assign each counsel a topic to teach. The assigned "instructor" would be responsible for presenting a class on that topic for all other counsel. The length of the classes can be anywhere from fifteen to fifty minutes, depending on the topic. The instructor should prepare an outline for use by the attendees during the presentation as well as for their future reference. The outline can be very detailed or it can be as simple as a one-page handout with "bullets" highlighting key points and reference material.

The instructor may want to utilize outlines obtained from other sources, such as TJAGSA short courses, the basic course, or graduate course. Additionally, materials obtained from civilian CLE courses and publications make excellent teaching handouts. These handouts can be maintained by each attorney in a three-ring advocacy notebook for future reference.

Those counsel assigned as instructors should be made aware that they will be expected to perform in a professional manner. They should not be allowed to give this matter only cursory attention. Teaching a particular topic or area not only will provide valuable information to others, but also will enhance the instructor's knowledge of the area. One of the best ways to learn something is to teach it to someone else. Thus, both the instructor and the students will benefit.

Other possible instruction could come from "outsiders." For example, there may be reservists or national guardsman near the installation who are civilian trial attorneys. As reservists or guardsman, they may be interested in providing instruction on a relevant topic solely for "reserve points."[37] Another option would be to invite a local prosecutor or Assistant United States Attorney to present a class on advocacy. Trial Defense Service supervisors might want to consider inviting a local public defender or civilian criminal defense attorney to present a class to defense counsel. Many of them will be more than happy to do so and they even may be able to qualify for CLE credit with their state bar.

Your community may contain a number of individuals who probably have years of experience or training in a relevant area and who would be willing to share their expertise with young attorneys.[38] For example, many judge advocates have no previous experience dealing with law enforcement, either in or out of the military. Consider having your local CID or military police investigators present classes that relate to law enforcement. They can provide instruction on how they process a case, process evidence, describe various types of drugs or narcotics, or discuss different investigative techniques. Including law enforcement personnel in your in-house training not only will provide your counsel with important information that will enhance their performances as trial advocates, but it will foster a better working relationship between counsel and law enforcement personnel.

Another source of instructors and topics is the NCOs within the SJA or TDS office. In larger offices, legal NCOs handle a number of the pretrial and posttrial aspects of a case. Experienced legal NCOs probably are more familiar with processing a court-martial from the point of drafting specifications and charges to mailing the record of trial to the Court of Military Review than most judge advocates. Their expertise can educate counsel not only on the role of legal NCOs and their contribution to the court-martial process, but with all aspects of a court-martial.

JAG School Resources

The Judge Advocate General's School can play an important role in the training of both trial and defense counsel and should be used to complement any in-house criminal law training program. Advocacy training, videotape reproduction of advocacy and criminal law lectures, as well as deskbooks and handbooks on criminal law topics, are available from TJAGSA.

For the past several years, TJAGSA's Criminal Law Division has taught two one-week classes on trial advocacy per year, The Criminal Trial Advocacy Course (CTAC) provided lecture type instruction in various aspects of advocacy such as case preparation, direct and cross examination, voir dire, and trial procedure. In addition, the students participated in actual hands-on advocacy training in a mock trial. Attendance in this course was limited to forty-eight students per session.

Beginning in March 1994, the CTAC will be replaced by a two-week trial advocacy course, the CLAC. The CLAC also will be offered twice a year and will provide all of the instruction contained in the CTAC course, only in an expanded format. The CLAC will include lectures on case preparation, direct and cross examination, voir dire, evidence, arguments, and more hands-on advocacy training than was offered in the CTAC. In addition, this course will be expanded to allow up to fifty-six students to attend. Supervisors who desire to send counsel to a CLAC should contact their legal administrator or the TDS training officer to assess funding availability and to reserve a quota using the Army's Training Requirements and Resource System.

In addition to advocacy training, the Criminal Law Division publishes several deskbooks and handbooks that practitioners

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[37] *See* DEP'T OF ARMY, REG. 140-1, ARMY RESERVE: MISSION, ORGANIZATION, AND TRAINING, para. 3-30 (1 June 1990); DEP'T OF ARMY, REG. 140-185, ARMY RESERVE: TRAINING AND RETIREMENT POINT CREDIT AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS (15 Sept. 1979).

[38] If you are located near a law school, law professors may be interested in presenting classes to trial and defense counsel. Several law professors around the country were previously affiliated with the Judge Advocate General's Corps.

will find useful.[39] These books are updated annually so the material covered is based on the latest developments in criminal law. The division receives numerous requests for these materials each year and because distribution of these materials is not part of the division's mission, it lacks the resources to provide them. These TJAGSA publications are available, however, through the Defense Technical Information Center as well as the Legal Automation Army-Wide System electronic bulletin board.[40]

Finally, the supervisor may want to provide a change of pace by incorporating training films into the training process. In this regard, TJAGSA's Visual Information Management Office (VIMO) can be of service. The VIMO routinely videotapes many of the lectures presented by both TJAGSA faculty and guest speakers. These tapes are stored in the VIMO video library and are available on request to practitioners in the field.

The procedures for obtaining copies of these videotaped lectures are simple. Send the VIMO a request identifying the lecture or tape that you want, along with a blank videocassette tape. The VIMO will copy their original onto your blank tape and return it to you. To determine what videotapes are available, contact the Visual Information Branch for a copy of their annual *TJAGSA Videotape Bulletin*.[41] Use of videotape lectures is an inexpensive—but extremely effective—way to keep interest at a relatively high level and provide quality legal training for your counsel.

Conclusion

We hope that this article will aid supervisors in trying to improve the advocacy skills of their subordinates. We recognize, however, that advocacy skills only improve through practice and dedication. Our advice to supervisors is that any time you have the opportunity to get your subordinates in a situation where they are required to "think on their feet" and be articulate, you will elevate their advocacy skills.

Being a trial lawyer is not a talent one is born with, it is a skill that is developed as a result of organization, hard work, observing others in trial, reading records of trial, and plenty of practice. And while some attorneys seem to have more natural ability than others, even an average attorney can develop into a solid courtroom performer given adequate training and mentoring. As a chief of criminal law or senior defense counsel you have an obligation to your subordinates to train them to the best of their natural ability. In carrying out this responsibility you probably will find it to be one of the most rewarding aspects of your military career.

APPENDIX A

Criminal Law Division SOP

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[39] Currently the Criminal Law Division, TJAGSA, has the following publications available:

The Crimes and Defenses Deskbook—JA 337 (1993) (220 pages);
Unauthorized Absences Text—JA 301 (1993) (86 pages);
Criminal Law, Nonjudicial Punishment—JA 330 (1993) (40 pages);
Senior Officers Legal Orientation—JA 320 (1994) (249 pages);
Trial Counsel and Defense Counsel Handbook—JA 310 (1993) (452 pages); and
United States Attorney Prosecutions—JA 338 (1993) (343 pages).

[40] *See* Current Material of Interest, ARMY LAW., Mar. 1994, at 66.

[41] The current *TJAGSA Videotape Bulletin* is dated November 1993. A few of the videotape lectures listed therein include, "The Capabilities of the CID Lab," "Evidentiary Issues in Military Child Abuse Cases," and "DNA Fingerprinting," as well as lectures on advocacy by such noted criminal law practitioners as F. Lee Bailey, John Lowe, Waco Carter, and Vaughan Taylor. All procedures for requesting a videotape are thoroughly detailed in the bulletin.

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APPENDIX C

How to Conduct a Video Review

Purpose. A video review has the following four purposes:

(1) Let the counsel *see and hear how they really look.* (This is the primary purpose—counsel usually do not appear on tape as they do in their mind's eye);

(2) *Identify "distractors"* and change undesirable behavior—movements, speech, mannerisms, posture;

(3) Reinforce critique points; and

(4) Get a second opinion, or a different perspective.

Questions. To get the counsel involved and help the critiquer target areas for comment, ask the following questions:

(1) (If the video critiquer did not view the original performance) How did the original critiquer say you did?

(2) How do you think you did?

(3) Is there a particular part you want to look at in the video tape?

(4) *What will you do differently next time?*

Teaching points. Here are a few common areas to concentrate on during the video review:

Posture. Slouching, legs crossed, bending over to read, arms folded or on hips, hands in pocket. Use the freeze frame. If the counsel has distractive repetitive movements, such as pacing, use the fast forward to show the repetition.

Eye contact. None, inattentive looking, never looks at witness or members, looks surprised or startled, always reading. Use the freeze frame.

Words. "Legalese" versus simple conversational English, compound or confusing questions, nonleading questions. Stop tape and ask counsel for a better way to do it. Give a demonstration.

Methodology. Do not create an adversarial relationship during the critique session. The counsel will not learn under such circumstances. Avoid initially critiques that are personal in nature. For example, save for later that the counsel is a slob in uniform, needs a haircut, or does not appear to meet other personal appearance standards. These facts can be mentioned after you have had a few minutes of dialogue. Point out issues as they occur on the tape, and give a prescription at the same time. Give a summary at the end. Ask counsel what they would do differently next time. Go slow, do not be threatening. Watching oneself on tape is often discomforting. Give good constructive critiques. Give useful, long-term advice. Based on your critique, the counsel should be able to tell you what they would do differently next time and why they would do it differently.

APPENDIX D

NITA Critique Method

After the trial or the practice session is complete, the critiquer should assess the counsel's performance. The video critiquer should use the same method for critiquing the counsel on the videotape. The critiquer should pick one or two points (no more than three) that need to be worked on by counsel. The critiquer should use the following format for critiquing counsel:

Headnotes

Try to be specific and concise when identifying the headnote. What is the general nature of the point you are about to critique? This will allow the counsel to know where you are going with the critique. Is it the form or length of questions, the use of leading questions on cross-examination, is it style or presence, is it organization or sequence, or is it the use of objections? Other common critique points include use of "legalese," failure to listen to the witness, seeking conclusions from the witness rather than facts, and the organization of the presentation. Identify the priority problems and do not overload the counsel with more than two or three points at a time.

For example: "Captain Smith, I want to talk to you about the use of leading questions on cross-examination. You did not use leading questions during your cross-examination of Sergeant Jones."

Playback

The key to an effective playback is your ability to take notes of the counsel's performance. The goal is to give the counsel a verbatim playback of what they said. Use the *exact words* of counsel.

For example: During your cross-examination of Sergeant Jones you asked: "How long did the incident last?" and "What was the lighting like?"

Prescription

Give examples of how to do it better. Demonstrate the point being made. Show counsel what to do instead of just telling them. Give a series of questions or a portion of the opening or close to illustrate the point to be made. Be honest with the counsel but do not be cruel or unduly harsh.

For example: Let me suggest the following: "This incident that you describe took place in only ten to fifteen seconds, correct?" and "It was dark that night and the nearest street light is one block away?"

Ask Questions

If you are not sure why counsel did or did not do a particular thing ask counsel why they did what they did before you begin your critique. There may be an explanation for counsel's actions and you may not need to critique that point.

For example: Captain Smith, what were you trying to accomplish by asking the court members whether they drank alcohol?

APPENDIX E

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2. Obtaining Civilian Criminal Records
3. Obtaining Medical Records
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9. Chapter 10 Processing/Discharge of Officers
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13. Cross-Examination
14. Voir Dire
15. Court Member Questionnaires
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19. Posttrial Submissions
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21. Direct Examination of the Accused (Preparing the Accused for Testifying)
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    - child abuse syndrome
    - eyewitness identification/memory

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25. Drug Operations

26. Drugs and Narcotics

- types

- how used, held, sold, schemes

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29. Evaluating Your Military Judge

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- What does the judge expect from counsel

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The bulletin appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The contents of the latest issue (volume 1, number 3) are reproduced below:

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

CERCLA Reauthorization

The CERCLA is scheduled for reauthorization in 1994. The Environmental Protection Agency (EPA) has been coordinating with several work groups looking at liability, remedy selection, and Section 120 issues. Some of the federal agencies on the work group have made sweeping proposals for change (for example, repealing Section 120(h)). The Department of Defense's (DOD) view, generally, has been that the present system of liability, remedy selection, and cleanup responsibility, while not perfect, is working fairly well. It is likely that the Administration will favor some changes—the most important being to give states a bigger role in regulating cleanups and selecting remedies. Mr. Nixon.

Environmental Compliance Assessment System (ECAS)

Delay in Approving ECAS Reports

Recently, some installations have sought to prevent draft reports from becoming final to avoid having to release the reports under the Freedom of Information Act and risking possible enforcement actions. Delaying approval of ECAS reports is contrary to ECAS procedures and delays the funding and implementation of corrective measures. We are not aware of any cases where the EPA or a state has sought to obtain an ECAS report for enforcement purposes. Environmental compliance assessment system reports should be reviewed and approved promptly. Installations must begin to take corrective action based on the ECAS report as soon as possible; extensive delays in finalizing reports will not be allowed in the future. Mr. Nixon.

Fines and Penalties

Fine Reporting

In a 5 November 1993 memorandum, the Director of Environmental Programs announced a new Army policy for reporting environmental fines and penalties. Effective immediately, receipt of a written fine or penalty assessment triggers the policy. Installations must complete the fine tracking form found on the Army Compliance Tracking System (ACTS) and submit the form to their major Army Command (MACOM) within twenty-four hours after receiving the written notification of a fine or penalty assessment. Major Army Commands must

forward the fine tracking form to the Army Environmental Center within forty-eight hours. The information is added to a "living" information paper that is provided to the Army leadership. Additionally, installation and MACOM environmental law specialists (ELS) should ensure that they are notified of any fine or penalty assessments and that they fax a copy of the complaint or notice of violation to the ELD. Major Bell.

Clean Air Act (CAA)

The Conformity Rule

The EPA published the final Conformity Rule implementing CAA section 176(c).[1] The rule took effect on 31 January 1994. Additional information on this important new rule follows these notes.

The Enhanced Monitoring Rule

On 22 October 1993, the EPA published a proposed rule to establish an enhanced monitoring program.[2] The rule will implement CAA section 114. This complex rule would require greatly expanded monitoring, recordkeeping, and reporting requirements for significant emissions units within major sources of air pollutants. Significant emissions units generally would be units on the installation with the potential to emit thirty percent or more of the applicable major source definition. Monitoring records could be used as the basis for enforcement actions without the need for additional testing. On installations with large emissions units—such as incinerators—ELSs should alert installation engineers to this impending rule. The EPA estimates that 34,000 emissions units in the United States will be affected by this rule.

Perchloroethylene (PCE) Dry Cleaning National Emission Standards for Hazardous Pollutants (NESHAP)

The EPA promulgated the NESHAP for dry cleaning operations on 22 September 1993.[3] The NESHAP establishes many new reporting and compliance requirements for dry cleaning operations. Customer operated machines are exempt under the rule. Environmental law specialists should ensure that the initial reports are filed by the responsible operators. Major Teller.

Natural Resources

The Sikes Act

Congress is currently considering amending the Sikes Act.[4] The Sikes Act now gives the Secretary of Defense broad discretion to manage natural resources on DOD installations for multiple sustained uses. H.R. 3300 would amend the Act to require the following: require Integrated Natural Resources Management Plans (INRMP) for installations; provide oversight of natural resources management programs by the Department of the Interior (probably the Fish and Wildlife Service) and the states; require adequate staffing of installation natural resources programs; and establish a system of notices of violation for noncompliance with the Sikes Act. At a minimum, Congress is likely to amend the Sikes Act to require INRMPs and adequate staffing of natural resources programs. The DOD and the Services are currently working to develop internal measures to improve natural resources management on installations, to include an internal audit system, and to improve the RCS 1383 process. Major Teller.

Water Law Issues

Lessons Learned in Fiscal Year 1992

The ELD assisted seventeen installations on water law issues in Fiscal Year 1992. The issues often are state law specific and are not limited to installations in western states. Our experience shows that legal offices should know the status of their installation's water rights before—not after—a problem arises. Additionally, legal offices should take appropriate steps to protect the Army's water rights. We recommend that legal offices work closely with the Directorate of Engineering and Housing in developing a plan to document and protect the installation's water rights. Lieutenant Colonel Graham.

The EPA's New Conformity Rule

This note is designed to provide information on the EPA's new conformity rule, which implements section 176(c) of the CAA, as amended in 1990, 42 U.S.C. § 7506(c), and its impact on DOD activities.

Promulgation of the EPA's Final Conformity Rule

The EPA published the final conformity rule on 30 November 1993.[5] The rule at 40 C.F.R. part 93, subpart B, applies directly to federal agencies and takes effect on 31 January 1994. 40 C.F.R. part 51, subpart W, sets out the identical rule and requires states to incorporate it into state implementation plans (SIP) within twelve months.[6]

In revising SIPs in accordance with 40 C.F.R. part 51, subpart W, states cannot impose less stringent conformity requirements than in the EPA rule. States may impose, how-

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[1] 58 Fed. Reg. 63214-59 (1993).

[2] *Id.* at 54648.

[3] *Id.* at 49354.

[4] 16 U.S.C.A. §§ 670a-f (West 1993).

[5] 58 Fed. Reg. 63214-59 (1993) (amending 40 C.F.R. parts 51 and 93).

[6] This note will cite to the rule at 40 C.F.R. part 51, subpart W. The final rule differs substantially from the rule as proposed on 15 March 1993. 58 Fed. Reg. 13836 (1993).

ever, more stringent conformity criteria and procedures if applied equally to nonfederal, as well as federal, entities.[7] Because the CAA section 176 conformity requirement only applies to federal activities, states will not likely choose to subject nonfederal entities to conformity requirements to impose more stringent rules on federal agencies. Note that any existing SIP provisions relating to conformity remain in effect until the EPA approves a SIP revision in accordance with the new rule.[8]

The CAA Conformity Requirement

The CAA requires states to have EPA-approved SIPs to achieve national ambient air quality standards (NAAQS) by the attainment dates specified in the CAA. The EPA has established NAAQS for the following air pollutants (criteria pollutants): ozone (and the ozone precursors, nitrogen oxides and volatile organic compounds); carbon monoxide; sulfur dioxide; nitrogen dioxide; lead; and particulate matter (PM-10). In the absence of a required SIP, the CAA requires the EPA to promulgate a federal implementation plan (FIP).

A federal agency will not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform" to an applicable SIP or FIP.[9] Under section 176(c), "conformity to a SIP or FIP" means that federal actions must not cause or contribute to any new violation of air quality standards, increase the frequency or severity of any existing violation, or delay the timely attainment of any air quality standard or interim milestone.

To implement the broad substantive mandate that all federal actions conform to applicable SIPs and FIPs, CAA section 176(c)(4)(A) requires the EPA to promulgate procedures for conformity determinations. The EPA's position is that the new rule partially fulfills this requirement. As noted below, the EPA will promulgate additional rules addressing conformity determinations for procurements and for actions in nonattainment areas. Since 1990, in the absence of EPA conformity determination procedures, federal agencies generally have complied with CAA section 176 by making conformity determinations in the course of preparing documentation required by the National Environmental Policy Act (NEPA).[10] The new conformity rule changes this current federal agency practice by imposing stringent new procedural requirements for conformity determinations. Consequently, when the new conformity rule applies, conformity determinations will be much more difficult, time consuming, and expensive to complete than in the past. Moreover, the rule imposes procedural safeguards that will ensure that nonconforming actions do not proceed without a federally enforceable mitigation plan as part of the conformity determination.

The Grandfathering Provision

To allow for a smoother transition from current agency practice, the new conformity rule grandfathers federal actions under the following circumstances:

(1) the NEPA process for the action is completed by 31 January 1994; or

(2) the following three conditions are met:

(a) an environmental assessment is commenced or a contract is awarded to develop specific environmental analysis prior to 31 January 1994;

(b) sufficient environmental analysis is completed so that the agency can make a conformity determination; and

(c) the agency makes a written conformity determination under CAA section 176(c) by 15 March 1994 (although it need not be in compliance with the new rule).

For grandfathered actions or for actions prior to the effective date of the new rule, the CAA section 176(c) conformity requirement can be met, as in the past, by making a conformity determination as part of the NEPA process. In making such conformity determinations under the general CAA section 176(c) requirement, installations do not need to meet the requirements of the new rule.

Department of Defense installations should identify projects and activities currently in the planning stage that could qualify for grandfathering and take appropriate steps to ensure that the requirements are met. If an action does not meet the criteria for grandfathering and the new conformity rule is otherwise applicable, a conformity determination must be completed in accordance with the rule or the action cannot proceed. Major projects now in the planning stages that do not meet the grandfathering criteria may be delayed and require additional funding to meet the requirements of the new rule.

Federal Activities Subject to the EPA's Rule

The conformity rule requires federal agencies to conduct conformity determinations for federal actions in NAAQS nonattainment or maintenance areas (nonattainment areas that have reached attainment standards). Note, however, that the EPA proposes to promulgate a conformity rule in the near

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[7] 40 C.F.R. § 51.851(b) (1994).

[8] *Id.* § 51.851(b).

[9] The Clean Air Act § 176(c), 42 U.S.C. § 7506(c) (1990).

[10] 42 U.S.C.A. §§ 4321-70c (West 1993).

future for NAAQS attainment areas.[11] "Federal action" is defined broadly to include virtually all federal activities, including issuing licenses and permits, providing funds, and approving activities.[12]

Fortunately, the rule exempts certain classes of federal activities from its procedural requirements. A conformity determination is not required for actions that are exempt under the rule. Installations need to document decisions that the new conformity rule does not apply and the basis for making these decisions in NEPA documentation. The most significant exemptions applicable to DOD operations are as follows:

De Minimis Emissions

The rule does not apply to actions where the total direct and indirect emissions of criteria pollutants will be de minimis.[13] The de minimis levels specified in the rule are the same as the CAA's major stationary source thresholds for criteria pollutants, except for lead, which has a much lower threshold for conformity purposes.[14] The rule and preamble provide examples of federal actions that will fall within the de minimis exemption, including the following: continuing and recurring activities; routine movement of mobile assets; routine maintenance and repair; transfer of ownership of real and personal property; judicial and legislative proceedings; and administrative actions. Significantly, ongoing activities currently being conducted are exempt from the rule so long as emissions do not increase above the de minimis levels specified in the rule.

The transfer of federal real property falls within the rule's de minimis exemption. A federal agency is not required to consider the emissions resulting from subsequent reuse activities because it does not maintain control over such activities.[15] Thus, base realignment and closure (BRAC) disposal actions do not require a conformity determination under the rule.[16] This exemption expressly includes BRAC disposal actions involving an enforceable contract or a lease agreement where the delivery of a deed is required to occur after the CERCLA requirements are met.[17] For this exemption to apply, however, the federal agency must not retain continuing authority to control emissions associated with the land transferred.

Note that the de minimis rule does not apply to "regionally significant actions." As defined in the rule, such actions result in total emissions of a criteria pollutant that represent ten percent or more of a nonattainment or maintenance area's total emissions of that pollutant.[18] As a result, installations located in areas with relatively few emissions sources may have to conduct conformity determinations for actions with emissions below the de minimis levels specified in the rule.

CAA Preconstruction Permits

The rule exempts actions or portions of actions that require a permit under the CAA's new source review (NSR) or prevention of significant deterioration (PSD) programs.[19] Such permits are required for major new sources or modifications of existing major sources of criteria pollutants.

Emergency Actions

Federal actions in response to emergencies or natural disasters, such as hurricanes, earthquakes, civil unrest, and military mobilizations, are exempt from the rule.[20] For emergency actions continuing longer than six months, the federal agency must certify that it is impractical to complete a conformity determination and the emergency action cannot be delayed due to overriding concerns. The rule places no limit on the number of six-month extensions that can occur.

CERCLA Remedial and Removal Actions

The rule does not require a conformity determination for direct emissions from CERCLA remedial and removal actions "to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA."[21]

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[11] 58 Fed. Reg. 63,227-28 (1993).

[12] 40 C.F.R. § 51.852 (1994).

[13] *Id.* § 51.853(b), (c).

[14] 58 Fed. Reg. 63,228-29 (1993).

[15] *Id.* at 63,230-31.

[16] *Id.* at 63,224.

[17] 40 C.F.R. § 51.853(c)(xix) (1994).

[18] *Id.* § 51.853(i).

[19] *Id.* § 51.853(d)(1).

[20] *Id.* § 51.853(d)(2), (e).

[21] *Id.* § 51.853(d)(5).

Additionally, the rule allows federal agencies to establish through a formal rulemaking process a list of types of actions that are presumed to conform to applicable SIPs and FIPs.[22] The rule sets out criteria that these actions must meet to qualify for this presumption of conformity. In specific cases, the presumption of conformity is fully rebuttable by information showing the action is actually nonconforming.

The rule does not apply to procurement actions. In the preamble, however, the EPA announces its intent to promulgate a rule in the near future addressing conformity determinations for procurement actions.[23] The preamble notes that the "EPA is inclined to believe that Congress intended for certain procurement actions to be covered by the general conformity requirement." The preamble also indicates that the majority of procurement actions would be exempt from coverage.

The Conformity Analysis

If the new conformity rule applies to a federal action—that is, all actions not excluded by 40 C.F.R. section 51.853(b),(c),(d), and (f)—the action agency must make a written conformity determination in accordance with the rule prior to taking the action. Each agency is responsible for making its own conformity determination. Where multiple federal agencies are involved in an action, an agency may adopt the analysis of another agency.[24] An agency cannot proceed with an action without a positive conformity determination. In making a conformity determination, federal agencies must analyze the total direct and indirect emissions of criteria pollutants from both mobile and stationary sources caused by the action.

The term "indirect emissions" includes reasonably foreseeable emissions removed in time or distance from the action and that "[t]he federal agency can practicably control and will maintain control over due to a continuing program responsibility of the federal agency." For example, in constructing a federal building, an agency must consider the emissions resulting from the construction work; the emissions from operating the building after construction—such as from the building's boiler; and any increase in vehicle emissions as a result of the new building. The preamble contains a lengthy discussion, with examples, of what indirect emissions agencies must consider.[25] Agencies are not required to consider indirect emissions that they have no control over or that are not reasonably foreseeable. The rule defines "reasonably foreseeable emissions" as those emissions that at the time of the conformity determination are from a known location and quantifiable.[26]

If a conformity analysis indicates that an action will result in total direct and indirect emissions that do not conform to the SIP or FIP, the agency can develop measures to mitigate air quality impacts to make a positive conformity determination.[27] Agencies must fully develop mitigation measures prior to the conformity determination and they must be federally enforceable.

Notice and Comment Requirements

The rule requires federal agencies to give the EPA, state, local air quality agency, metropolitan planning organization, and interested federal agencies thirty days to review draft conformity determinations.[28] Additionally, federal agencies must notify all of these entities within thirty days after making the final conformity determination.

The rule also requires federal agencies to publish notice of the draft conformity determination by a "prominent advertisement in a daily newspaper of general circulation in the area affected by the action" and to allow thirty days for written public comment.[29] The agency must document its response to all comments and publish its final conformity determination within thirty days after making it. The agency may comply with these public notice and comment requirements concurrently with the NEPA process.

Frequency of Conformity Determinations

A conformity determination will lapse five years after it is completed unless the agency completes the action or has commenced a continuous program to implement the action within a reasonable time.[30] Ongoing activities making continuous

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[22] *Id.* § 51.853(f).

[23] 58 Fed. Reg. 63,215 (1993).

[24] 40 C.F.R. § 51.854 (1994).

[25] 58 Fed. Reg. 63,218-27 (1993).

[26] 40 C.F.R. § 51.852 (1994).

[27] *Id.* § 51.860.

[28] *Id.* § 51.855.

[29] *Id.* § 51.856.

[30] *Id.* § 51.857.

progress towards completing an action and that fall within the scope of the final conformity determination for the action are not considered new actions. The rule requires, however, a new conformity determination if an action is changed so as to result in increased emissions above the de minimis level.

Impact on DOD Operations

As a result of the new conformity rule, DOD installations will have to conduct detailed conformity determinations for major actions in nonattainment and maintenance areas. Types of actions covered include major construction projects, base or mission expansions, large training exercises that are not being conducted currently on a continuing and recurring basis, construction or expansion of waste water treatment plants, and prescribed burning.[31] If required by the rule, DOD installations can expect conformity determinations to be time consuming and expensive to complete. The calculation of total direct and indirect emissions resulting from an action and an analysis of the applicable SIP or FIP requirements are complex and highly technical tasks. In most cases, installations will need contractor support to complete conformity determinations.

Effective Installation Compliance

For installations in NAAQS nonattainment and maintenance areas, legal offices should work with their environmental staff to develop an effective system for early identification of projects and activities subject to the new conformity rule. This can be accomplished in conjunction with the planning, preparation, and review of NEPA documentation. Moreover, legal offices should ensure that in cases when installations determine the conformity rule to be inapplicable, such decisions and the bases for making them are documented in the NEPA process—such as documentation of a finding that emissions will be de minimis.

In cases where the new rule applies, installations must properly plan for compliance to avoid unnecessary delay and expense in completing actions. Conformity determinations under the rule will be expensive and should be properly budgeted along with other environmental documentation. Additionally, installations should carefully plan to meet the conformity rule's notice, review, and comment requirements concurrently with parallel NEPA requirements. Effective integration of conformity and NEPA requirements will take planning and close coordination between legal and environmental staffs.

Finally, during 1994, states will be preparing and submitting SIP revisions to incorporate the new conformity requirements.[32] Installations should monitor this process to ensure that the rules adopted are not more stringent than the rule promulgated by the EPA, unless equally applicable to nonfederal entities. Given the complex and subtle nature of the conformity rule, seemingly minor wording changes could result in a significant expansion of the requirements as intended in the EPA's rule. Major Teller.

[31] *See* 58 Fed. Reg. 63,223 (1993) for additional examples.

[32] 40 C.F.R. pt. 51, subpt. W (1994).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

United States v. Jackson: Erroneous Instruction Concerning Learned Treatise Is Not Plain Error

The learned treatise exception to the hearsay rule, Military Rule of Evidence (MRE) 803(18),[1] United States, provides courts-martial practitioners with a valuable tool in the direct or cross-examination of expert witnesses. The main requirement for using the exception, whether on direct or cross-examination, is establishing the treatise, periodical, or pamphlet as reliable authority.[2] The proponent of the evidence accomplishes this task either by obtaining an admission from an expert witness on the reliability or authority of the

[1] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 803 (18) (1984) [hereinafter MCM] provides that even if the declarant is available as a witness, the hearsay rule does not exclude statements contained in learned treatises:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

[2] *See generally* DAVID F. BINDER, HEARSAY HANDBOOK ch. 7 §19.01, at 337 (3d ed. 1991).

statement,[3] or through judicial notice.[4] As is the case with the hearsay exception for recorded recollections,[5] MRE 803(18) provides that statements from the learned treatise are read into evidence; the learned treatise itself does not become an exhibit.

Unlike the rule it replaced,[6] which provided for the use of statements from learned treatises only for impeachment, MRE 803(18) "allows substantive use on the merits of statements within treatises if relied upon in direct testimony or called to the expert's attention on cross-examination."[7] In other words, the statements introduced under this exception come in for the truth of the asserted proposition, and not simply to explain or impeach an expert's opinion.[8] Court-martial practitioners must appreciate the evidentiary significance of statements admitted pursuant to MRE 803(18). Without such an understanding, the major benefits available from use of the exception may be unknowingly and unnecessarily lost, as demonstrated by *United States v. Jackson*,[9] a recent United States Court of Military Appeals (COMA) decision.

Jackson involved prosecution for wrongful use of marijuana. The prosecution case rested on a positive urinalysis. The government's expert witness identified and explained the laboratory report on the urinalysis at length.[10] The defense consisted of the accused's sworn denial of marijuana use, good character evidence,[11] and extensive cross-examination of the government expert.

During the cross-examination of the government's expert witness, the defense counsel used statements from learned treatises that discussed the pitfalls of urinalysis. In certain particular details, the government expert agreed with those writings. The COMA concluded that, concerning those statements, the defense had satisfied the foundational requirements of MRE 803(18).[12] Defense counsel also cross-examined using quality control reports from the expert's laboratory.[13] The COMA concluded that while the government expert had explained some of the terminology in the quality control reports, and some discrepancies those reports discussed, he had not adopted the facts asserted in the reports.[14] Moreover, the expert did not waver at any point on the accuracy of urinalyses performed in his laboratory.[15] Finally, the government's expert testified from his own knowledge on several matters addressed in the quality control reports.[16]

Immediately after the cross-examination, the military judge instructed the members that the statements read by counsel from the learned treatises and the quality control reports had been admitted solely for the purpose of testing the testimony

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[3] The provision on calling the treatise to the attention of the expert in cross-examination, or having the expert rely on the treatise on direct examination, "is designed to ensure that the materials are used only under the sponsorship of an expert who can assist the fact finder and explain how to apply the materials." 2 C. MCCORMICK, MCCORMICK ON EVIDENCE ch. 34 § 321, at 352 (4th ed. 1992).

[4] *See* MCM, *supra* note 1, MIL. R. EVID. 201. "Given the requirements for judicial notice, Rule 201, and the nature and importance of the item to be authenticated, the likelihood of judicial notice being taken that a particular published authority other than the most commonly used treatises is reliable is not great." MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE-EVIDENCE § 6769, at 714 n.4 (interim ed. 1992).

[5] MCM, *supra* note 1, MIL. R. EVID. 803(5).

[6] MANUAL FOR COURTS-MARTIAL, ¶ 138f (rev. ed. 1969) provided that

> An expert witness who to some extent has based an opinion upon his study of books or papers dealing with his specialty may be cross-examined as to that opinion by reference to any reputable works in his field, including works not relied upon by the expert witness in his testimony.

[7] MCM, *supra* note 1, MIL. R. EVID. 803(18) analysis, app. 22, at A22-45.

[8] 2 STEPHEN A. SALTZBURG AND MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL at 279 (5th ed. 1990).

[9] 38 M.J. 106 (C.M.A. 1993).

[10] *Id.* at 107.

[11] *See* MCM, *supra* note 1, MIL. R. EVID. 404(a).

[12] The learned treatises were written by a Dr. Dubowski and a Dr. Fredricks. *Jackson*, 38 M.J. at 110. Although the opinion did not indicate that the government expert established the writings as "reliable authority" within the meaning of MRE 803(18), trial counsel waived any foundational deficiencies by his failure to object. *Id.* at n.*.

[13] *Id.* at 107.

[14] *Id.* at 111. The government expert "did not testify to or adopt the statistics or conclusions in the reports, and defense counsel did not offer the reports in evidence." *Id.* at 110.

[15] *Id.* at 111.

[16] The government expert discussed software problems, that some urine samples cannot be tested by chromatography, and that a radio immunoassay screen had failed in April 1990, and was reanalyzed. *Id.* at 110.

of the government expert. The military judge instructed the panel not to consider those statements for their truth.[17] The defense did not object to the instruction.

The COMA held that the judge's instructions "fell short" because the military judge did not differentiate between three different types of evidence: factual assertions in the quality control documents which the expert explained without adopting; factual assertions in the reports about which the expert testified from his own knowledge; and opinions of other experts which the expert adopted as his own.[18] The COMA concluded that the writings in the learned treatises were not excludable as hearsay, but were admissible as part of the expert's testimony.[19] The testimony based on the expert's own knowledge also should have been considered for its truth.

To the extent that the military judge's instructions precluded consideration of those factual assertions, the instructions were erroneous.[20] Although the limiting instruction was incorrect to a large degree, the absence of any defense objection meant that waiver would apply. No appellate remedy would be available unless the instruction amounted to "plain error."[21] Under the facts of the *Jackson* case, the instructional error did not rise to that level.[22]

For the defense, it is particularly frustrating to exert the effort to obtain learned treatises, become familiar with their contents, and use them satisfactorily in court only to have the greatest potential benefit—that is, the substantive use of the evidence—evaporate following an erroneous instruction. Failure to object to that error magnifies the disappointment, and suggests that counsel did not fully appreciate the evidentiary significance of his or her cross-examination with learned treatises. Major O'Hare.

United States v. Andrews: The ACMR Upholds the Government's Right to Require Trial Before Military Judge Alone

Introduction

In *United States v. Andrews*,[23] the Army Court of Military Review (ACMR) recently held that Rule for Courts-Martial (R.C.M.) 705(c), as amended by Change 5, *Manual for Courts-Martial (Manual)*,[24] "permits the government to propose as a term of the pretrial agreement, that the [accused] elect trial by military judge alone."[25] The ACMR also held that the government may condition the sentence limitation on whether the accused elects trial by military judge alone.[26]

In *Andrews*, the ACMR noted that prior to Change 5,[27] an accused was permitted to bargain away his or her right to be sentenced by members "so long as the government did not require (or was perceived as requiring) waiver of members as a condition precedent to acceptance of a pretrial agreement."[28] However, by upholding the plain language of Change 5 to R.C.M. 705, the ACMR recognized legitimate "time-and-manpower considerations" in the government's use of court members,[29] and procedures implemented to achieve that legitimate goal are not contrary to military law or public policy.[30]

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[17] *Id.* at 109.

[18] *Id.* at 111.

[19] *Id.* at 110.

[20] *Id.* at 110-111.

[21] *Id.* at 111 (citations omitted). *See* MCM, *supra* note 1, MIL. R. EVID. 103. Plain error is error that is not only obvious and substantial, but which has an unfair prejudicial impact on the jury's deliberations. *Jackson*, 38 M.J. at 111 (citations omitted).

[22] Regarding the quality control reports, the COMA observed, in the vernacular, that the defense "never laid a glove on him." *Jackson*, 38 M.J. at 111.

[23] 38 M.J. 650 (A.C.M.R. 1993).

[24] MCM, *supra* note 1, R.C.M. 705(c)(2), (C5, 6 July 1991). *Permissible terms or conditions*, provides that "this rule does not prohibit either party from proposing the following additional conditions," including, the waiver of "the right to trial by court-martial composed of members," under R.C.M. 705(c)(2)(E). Rule for Courts-Martial 705(c) permits pretrial negotiations to be initiated "by the accused, defense counsel, the staff judge advocate, the convening authority, or their duly authorized representatives." Change 5 applies to all cases in which charges are preferred on or after 6 July 1991. Exec. Order No. 12767, § 4(c) (1991).

[25] *Andrews*, 38 M.J. at 653.

[26] *Id.*

[27] MCM, *supra* note 1, R.C.M. 705(c)(2).

[28] *Andrews*, 38 M.J. at 652.

[29] *Id.* at 653.

[30] *Id.*

In *United States v. McClure*,[31] a follow-up to *Andrews*, the ACMR reviewed a claim of error in which a convening authority, in a handwritten notation on appellant's proposed pretrial agreement, indicated that "[t]he foregoing is accepted only if the accused elects to be tried by military judge alone."[32] Reaffirming *Andrews*, the ACMR found no error, holding that the accused voluntarily accepted the convening authority's counter-offer and understood all the terms of the pretrial agreement.[33]

Background

Prior to the effective date of Change 5, the rule articulated in *United States v. Young*[34] controlled this aspect of pretrial agreement negotiations. In *Young*, the ACMR set aside the sentence because the government, in exchange for the withdrawal of additional charges, required as a term of a pretrial agreement that the accused be tried by military judge alone.[35] The ACMR noted that the "origin of the pretrial agreement is important because Article 16(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 816(1)(B), resulted from a decision by Congress to provide a viable option for an accused to be tried by members or the military judge alone."[36] Waivers of the right to trial by members in pretrial agreements that were not "the exclusive product of [an accused's] own voluntary effort"[37] were deemed to be derived from "undue prosecution pressure for an accused to 'cop a plea,'"[38] "or else."[39]

In a footnote to *Young*, the ACMR questioned whether Change 5 to the *Manual* could "change public policy expressed in a statutory provision" protecting an accused's right to select a sentencing forum.[40] Addressing this public policy consideration and acknowledging the dicta in *Young*, the ACMR in *Andrews* observed that, although raised by litigants on several occasions, "neither the Court of Military Appeals nor the courts of military review have ever held that a waiver of the right to trial with members is void as against public policy."[41] The ACMR also noted the general acceptance of waivers of the Sixth Amendment right to jury trial in federal district courts[42] and reasoned that "[i]f constitutional rights may be waived in a plea bargain, we believe that statutory rights may also be waived."[43]

In another case that preceded Change 5 to R.C.M. 705, *United States v. Blevins*,[44] the Navy-Marine Corps Court of Military Review (NMCMR) held that once an accused initiated pretrial agreement negotiations, the government was free to propose and insist different terms and conditions, including the waiver of members.[45] The NMCMR noted that "[i]t is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision as long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain."[46]

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[31] No. 9300748 (A.C.M.R. Nov. 23 1993).

[32] *Id.* at 2.

[33] *Id.*

[34] 35 M.J. 541 (A.C.M.R. 1992).

[35] *Id.* at 542. The accused in *Young* initially elected to be tried by members and entered mixed pleas. After completion of the providence inquiry, the government indicated that it would be willing to dismiss the additional charges on the condition that the accused be tried by military judge alone. The ACMR indicated that "[d]espite its unusual form, the arrangement . . . is properly characterized as a 'pretrial agreement.'" *Id.* n.2.

[36] *Id.* at 543. *See* United States v. Zelenski 24 M.J. 1 (C.M.A. 1987). Uniform Code of Military Justice Article 16 classifies the three kinds of courts-martial. Articles 16(1)(B) and (2)(C) provide for the right of an accused to request military judge alone courts-martial in general and special courts-martial. UCMJ art. 16 (1988).

[37] *Young*, 35 M.J. at 542 (quoting United States v. Lallande, 46 C.M.R. 170 (C.M.A. 1973)).

[38] *Id.* at 543.

[39] *Id.* at 542.

[40] *Id.* at 543 n.3.

[41] United States v. Andrews, 38 M.J. 650, 652 (A.C.M.R. 1993).

[42] *Id.*

[43] *Id.* at 653.

[44] 22 M.J. 817 (N.M.C.M.R. 1986).

[45] *Id.* at 818.

[46] *Id.* at 818-19.

The COMA has yet to address how Change 5 affects government-initiated pretrial agreement terms. In *United States v. Zelenski*,[47] the COMA required assurances from "concerned parties" that the accused's waiver of his right to trial before members originated with the defense.[48] Basing its decision on Article 16(2)(C) of the UCMJ, the COMA noted that "[o]ur reluctance to fully accept this provision in all guilty plea cases without regard to its point of origin is not chimerical. It is grounded instead on Congress' decision to provide the military accused a viable option to be tried by members or by military judge alone."[49]

The majority in *Zelenski* also warned that "service or command polic[ies] which might undermine this legislative intent through the medium of standardized plea agreements will be closely scrutinized."[50] Judge Cox, concurred, however, only in the result and referred to his prior concurring opinion in *United States v. Jones*,[51] where he observed:

> I write to distance myself from any implication in the majority opinion that the point of origin or sponsorship of any particular term of a pretrial agreement is outcome determinative. . . . Moreover, with a few exceptions (including, but not limited to, the rights to counsel, allocution, appeal, and the right to contest jurisdiction), I see no problem with the Government's sponsorship, originating, dictating, demanding, etc., specific terms of pretrial agreements.[52]

In *United States v. Huber*,[53] The Coast Guard Court of Military Review (CGCMR) specifically referenced Judge Cox's concurrence in *Jones*, and held that although the pretrial agreement provision requiring trial by military judge alone originated with the convening authority, "we believe that aspect of the negotiated plea should be subordinate to the question of whether the accused's right to trial was a viable option that was not undermined."[54]

In *United States v. Sanchez*,[55] a case succeeding *Huber*, the CGCMR similarly upheld the terms of a pretrial agreement initially suggested by a government representative. The agreement required the accused to waive all pretrial motions and proceed to trial before judge alone.[56] The CGCMR noted that the terms of the agreement were "viable options freely negotiated away by the accused in return for the desired sentence limitation."[57]

In *United States v. Bray*,[58] the NMCMR held that despite being denied the "viable option" of trial before members, the accused had "not demonstrated that he ha[d] been prejudiced by the inclusion of a trial by judge alone clause in the pretrial agreement."[59] The NMCMR in *Bray* also noted that the accused did "not contend and there [was] no indication that he would have chosen trial by members in the absence" of such a provision.[60]

While not specifically addressing waiver of trial before members, prior to Change 5, the COMA did address the issue of aggravation evidence—including evidence of uncharged misconduct—in a stipulation of fact made part of a pretrial agreement.[61] In *United States v. Glazier*, the COMA held that it perceived "no reason why evidence, even though otherwise inadmissible under the Military Rules of Evidence, cannot come into trial by way of stipulation."[62] Under *Glazier*, if the

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[47] 24 M.J. 1 (C.M.A. 1987).

[48] *Id.* at 2. The court in *Zelenski*, quoting from United States v. Schmeltz, 1 M.J. 8, 12 (C.M.A. 1982), indicated that it would not invalidate a guilty plea on this basis alone provided it was "a freely conceived defense product."

[49] *Id.*

[50] *Id. See* United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987).

[51] 23 M.J. 305 (C.M.A. 1993).

[52] *Id.* at 308.

[53] 24 M.J. 697 (C.G.C.M.R. 1987), *pet. denied*, 25 M.J. 435 (C.M.A. 1987).

[54] *Id.* at 700.

[55] 26 M.J. 564 (C.G.C.M.R. 1988).

[56] *Id.* at 566.

[57] *Id.* at 567.

[58] 26 M.J. 661 (N.M.C.M.R. 1988).

[59] *Id.* at 663.

[60] *Id.*

[61] United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

[62] *Id.* at 270.

accused and counsel unequivocally admit to both the truth and admissibility of the stipulation, the accused may be foreclosed, at the risk of losing the benefits of his or her pretrial agreement,[63] from contesting the admissibility of the stipulation.[64]

Conclusion

In *Andrews*, the ACMR has distanced itself from its previous concerns about protecting the "viability" of an accused's forum selection and the "perils of prosecutorial overreaching"[65] in the pretrial negotiation phase. Waivers of the right to trial before members also may expedite case disposition; "an outcome which generally is in the interest's of justice."[66] Ultimately, *Andrews* recognizes the government's legitimate interests—time, expense, military mission—in requiring an accused to forego his or her right to trial before members to benefit from a negotiated pretrial agreement.

Andrews did not specifically address whether a local command may institute a policy that all pretrial agreements include waivers of the right to trial before members. The court, however, did indicate that Article 16, UCMJ, and the Sixth Amendment protect the right of the accused to a "viable choice regarding forum selection."[67] *Andrews* also notes the COMA's prior condemnation of "systemized government interference with the appellant's right to forum selection."[68]

Staff judge advocates should carefully advise their convening authorities to avoid the perception that a waiver of trial before members is a condition precedent to favorable consideration of a pretrial agreement in every case. Trial counsel also should scrupulously avoid this impulse when negotiating the terms of an agreement with defense counsel. At the trial level, military judges must continue to "police terms of pretrial agreements to insure compliance with statutory and decisional law as well as to basic notions of fundamental fairness."[69] In each negotiation, an equitable balance must be struck between convenience of forum, the statutory and constitutional rights of the accused, and public confidence in the military justice system as a whole. Major Winn.

The COMA Addresses the Constitutional Requirements for Pretrial Confinement Determinations and Reviews in Light of *Gerstein v. Pugh* and *County of Riverside v. McLaughlin*

In *United States v. Rexroat*,[70] the COMA, reversing the ACMR,[71] clarified the constitutional requirements that apply to pretrial confinement orders in light of the United States Supreme Court's decisions in *Gerstein v. Pugh*[72] and *County of Riverside v. McLaughlin*.[73] In an opinion written by Judge Gierke, the COMA held that the commander's pretrial confinement probable-cause determinations required by R.C.M. 305(d) or (h)[74] satisfy *Gerstein v. Pugh* when pretrial confinement is reviewed by a neutral and detached commander, provided the review is accomplished within the forty-eight-hour time limit established by *County of Riverside v. McLaughlin*. The COMA further held that the procedures for pretrial con-

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[63] *Id.* at 271. Chief Judge Everett, concurring, disagreed with the majority that a successful defense objection to matters within the stipulation entitles the government to withdraw from the pretrial agreement.

[64] *Id. See* United States v. DeYoung, 29 M.J. 78 (C.M.A. 1989); United States v. Ross, 34 M.J. 183 (C.M.A. 1992).

[65] United States v. Schaffer, 12 M.J. 425, 430 (C.M.A. 1982).

[66] *Id.*

[67] *See* United States v. Andrews, 38 M.J. 650, 653 (A.C.M.R. 1993) (referring specifically to United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975); *see also* United States v. Zelenski, 24 M.J. 1, 2 (C.M.A. 1987); United States v. Ralston, 24 M.J. 709, 710, n.1 (A.C.M.R. 1987) ("[t]he unexplained inclusion of this type of waiver in a majority of the negotiated guilty pleas in a given jurisdiction over a significant time period may give rise to an inference that local command policy requires such a provision").

[68] *Id.* at 652, (referring specifically to *Zelenski*, 24 M.J. at 2 (C.M.A. 1987)).

[69] *See* United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976); *see also* United States v. Cassity, 36 M.J. 759, 761 (N.M.C.M.R. 1992).

[70] 38 M.J. 292 (C.M.A. 1993), *petition for cert. filed*, 62 U.S.L.W. 3454 (U.S. Dec. 27, 1993).

[71] United States v. Rexroat, 36 M.J. 708 (A.C.M.R. 1992) (en banc). The COMA's decision also effectively overruled United States v. Holloway, 36 M.J. 1078 (N.M.C.M.R. 1993), in which the NMCMR, citing the decision of the ACMR in *Rexroat*, held that the seven-day time limit for review of pretrial confinement probable cause required by R.C.M. 305(i)(1) was unconstitutional.

[72] 420 U.S. 103 (1975). *Gerstein* held that the Fourth Amendment required that a neutral and detached person—independent of the police or prosecutor—make a prompt judicial determination of probable cause as a prerequisite to pretrial detention subsequent to a warrantless arrest. The military applied *Gerstein* in Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

[73] 111 S. Ct. 1661 (1991). Defining what is "prompt" under *Gerstein*, the Supreme Court in *McLaughlin* set out a bright-line rule that probable cause determinations made after 48 hours are presumptively untimely. To rebut the presumption of untimeliness in such cases, the government must demonstrate the existence of a bona fide emergency or other extraordinary circumstance. *Id.* at 1670.

[74] MCM, *supra* note 1, R.C.M. 305.

finement review by a military magistrate in R.C.M. 305(i) and by a military judge in R.C.M. 305(j) also satisfy *Gerstein* and *McLaughlin* if conducted within forty-eight hours of the initiation of pretrial confinement.

The facts in *Rexroat* were straightforward. Following the accused's apprehension by Navy security personnel in Hawaii, the accused's commander ordered him into pretrial confinement pursuant to R.C.M. 305(d).[75] The next day, LTC *R*, a unit commander not in the accused's chain of command, conducted a probable-cause review of the commander's decision and determined that probable cause existed for the accused's pretrial confinement.[76] Five days later, a judge advocate military magistrate conducted a second review of the accused's pretrial confinement pursuant to R.C.M. 305(i)[77] and *Army Regulation (AR) 27-10*.[78]

At trial, the accused requested five days additional pretrial confinement credit on the grounds that his pretrial confinement from the date of LTC *R*'s review to the date of the military magistrate's review was illegal. Specifically, the accused argued that LTC *R*'s review of the commander's decision to confine him was defective in two respects: (1) LTC *R* was not a neutral and detached magistrate as defined by *AR 27-10* and as required by *Gerstein v. Pugh*;[79] and (2) the military magistrate's review was not conducted within forty-eight hours as required by *County of Riverside v. McLaughlin*.[80] The military judge denied the motion after determining that LTC *R* qualified as a neutral and detached magistrate and that his review met the requisite constitutional standards.

The ACMR reversed the military judge's ruling and granted the accused five days credit towards his sentence to confinement.[81] The ACMR held that LTC *R*'s review of the accused's pretrial confinement was deficient because he was not authorized under R.C.M. 305(i) and *AR 27-10* to act as a magistrate for the review of pretrial confinement, stating that authority rested solely with a military judge or military magistrate.[82] Moreover, the ACMR held that the seven-day time requirement for the review of probable cause for pretrial confinement, as required by R.C.M. 305(i)(1), was unconstitutional because the review must be performed within the forty-eight hours mandated by *McLaughlin*.[83] In reaching its decision, the ACMR ruled that R.C.M. 305(i) was the exclusive means of compliance with the constitutional requirements mandated by *Gerstein* and *McLaughlin*.[84]

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[75] MCM, *supra* note 1, R.C.M. 305(d). Rule for Court-Martial 305(d) provides:

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

[76] Lieutenant Colonel *R*'s review of the pretrial confinement order was an effort to follow guidance contained in an electronic message promulgated to the field by the Office of The Judge Advocate General following the Supreme Court's decision in *McLaughlin*. United States v. Rexroat, 36 M.J. 708, 712-13 n.5 (A.C.M.R. 1992). Among other things, the message suggested that to comply with the 48-hour rule articulated in *McLaughlin*, "A neutral and detached commander (not an accuser) should review the probable cause determination. If an immediate commander is an accuser, the next superior commander may be called upon to determine the basis for pretrial confinement, including a neutral review of probable cause." *Id.* The message also indicated that a military magistrate's review pursuant to RCM 305(i) made within 48 hours of the pretrial confinement order also would satisfy *McLaughlin*. *Id.*

[77] MCM, *supra* note 1, R.C.M. 305(i). Rule for Court-Martial 305(i) provides, in pertinent part:

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

(1) *In general.* A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement.

(2) *By whom made.* The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

[78] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 9 (22 Dec. 1989) [hereinafter AR 27-10]. *Army Regulation 27-10*, paragraph 9-1 requires that a military magistrate be a judge advocate appointed by The Judge Advocate General. Paragraph 9-5b(1) directs that a military magistrate will review pretrial confinement under R.C.M. 305(i).

[79] 420 U.S. 103 (1975).

[80] 111 S. Ct. 1661 (1991).

[81] United States v. Rexroat, 36 M.J. 708, 715 (A.C.M.R. 1992).

[82] *Id.* at 711. The ACMR pointed out that although LTC *R* was capable of conducting the probable cause review, he was not authorized by regulation to do so. The ACMR explained that in *AR 27-10*, chapter 9—the Army's regulation implementing R.C.M. 305(i)—the Secretary of the Army had elected to grant that review authority only to judge advocates appointed by The Judge Advocate General.

[83] *Id.* at 712. The military magistrate's review of the accused's pretrial confinement did not meet *McLaughlin*'s 48-hour rule because it occurred seven days after the accused's incarceration.

[84] *Id.* at 714.

The COMA initially decided that the forty-eight-hour time limit established in *McLaughlin* applies to the military services.[85] Next, noting that *Rexroat* was the first case in which the COMA was required to "squarely decide who is constitutionally qualified to make and review the initial probable-cause determination," the COMA held that a commander is *not* per se disqualified to make the initial probable cause review required by *Gerstein*.[86] In support of its holding, the COMA pointed out that previous opinions had held that a nonlawyer may be constitutionally qualified to determine whether probable cause to search exists,[87] and that a commander is not per se disqualified to determine whether probable cause to search exists.[88] Accordingly, the COMA held:

> We perceive no reason to treat the determination of probable cause for pretrial confinement differently from probable cause to search. Accordingly, we hold that either of the commander's probable-cause determinations required by RCM 305(d) or (h) can satisfy *Gerstein* if the commander is neutral and detached, and can satisfy *McLaughlin* if conducted within 48 hours.[89]

Applying this standard to *Rexroat*'s facts, the COMA could not determine from the record whether the commander was neutral and detached. Although the charge sheet reflected that the commander was not the accused's formal accuser, the COMA was unable to ascertain whether the commander "was otherwise involved in the case against" the accused.[90] The COMA was satisfied, however, that LTC *R* was neutral and detached as "[t]he record reflects that LTC *R* had no prosecutorial or law enforcement role in this case."[91] Additionally, the COMA reasoned that no legal impediment existed for LTC *R* to conduct the probable-cause review required by *Gerstein*. First, as a commissioned officer, LTC *R* was empowered to order the accused into confinement.[92] Second, consistent with *United States v. Lynch*,[93] LTC *R* was constitutionally qualified to conduct the pretrial confinement review as he was not "directly or particularly involved in the command's law enforcement function."[94] In further analyzing LTC *R*'s pretrial confinement review authority, the COMA agreed with the ACMR that LTC *R* was not a military magistrate within the meaning of *AR 27-10*, chapter 9, and was not authorized to perform the R.C.M. 305(i) review.[95] Furthermore, because LTC *R* was not the accused's commander, he was not authorized to perform the R.C.M. 305(h) review.[96] Nevertheless, in deciding that LTC *R*'s independent review of the probable cause for pretrial confinement complied with *Gerstein* and *McLaughlin*, the COMA concluded that the procedures specified in R.C.M. 305 are not the only means by which the constitutional requirements identified by those decisions may be met:

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[85] United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993). The COMA commented, however, that because *McLaughlin* merely creates a presumption of untimely review when the 48-hour limit is exceeded, if military exigencies prevent completion of probable-cause review within 48 hours, those exigencies may be used to rebut the presumption.

[86] *Id.* at 297.

[87] United States v. Lopez, 35 M.J. 35 (C.M.A. 1992).

[88] United States v. Ezell, 6 M.J. 307 (C.M.A. 1979). The COMA also cited *Lopez* for this proposition.

[89] *Rexroat*, 38 M.J. at 298.

[90] *Id.*

[91] *Id.* In *Ezell*, 6 M.J. at 307, 318-19, the COMA discussed the factors to be considered in determining whether a commander is neutral and detached:

> We have recognized that the military commander is capable of neutrality when he is not actively involved in the investigative or prosecutorial functions which are otherwise clearly within the perimeters of command authority . . . . We have also held that, when the military commander becomes personally involved as an active participant in the gathering of evidence or otherwise demonstrates personal bias or involvement in the investigative or prosecutorial process against the accused, that commander is devoid of neutrality . . . .

Id.

[92] UCMJ art. 9(b) (1988); MCM, *supra* note 1, R.C.M. 304(b)(2).

[93] 13 M.J. 394 (C.M.A. 1982).

[94] *Id.* at 397.

[95] *Rexroat*, 38 M.J. at 298.

[96] *Id.* MCM, *supra* note 1, R.C.M. 305(h)(2)(A) provides as follows:

> (2) *Action by commander.*
>
> (A) *Decision.* Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

> While RCM 305 establishes specific procedures for reviewing pretrial confinement, it does not prohibit additional procedures not specifically required by RCM 305, such as LTC [*R*]'s independent review . . . . PFC Rexroat argues that the RCM 305(i) review is the only "authorized" probable-cause review and that, because it did not comply with *McLaughlin* in this case, he is entitled to relief. We disagree. RCM 305(d), (h), (i), and (j) all provide for a probable-cause review, any one of which, if conducted by a neutral and detached official within 48 hours, would satisfy *Gerstein* and *McLaughlin*.[97]

Although *Rexroat* left intact the procedures for pretrial confinement determinations and review established by R.C.M. 305, the decision establishes that a neutral and detached official must make, or review within forty-eight hours, the pretrial confinement probable cause decision. As a practical matter, steps must be taken to ensure that a review by a neutral and detached official will be available within forty-eight hours when commanders make the initial decision to place a soldier in pretrial confinement. While *Rexroat* makes clear that this official may be another commander—provided that he or she is neutral and detached—the more efficient solution is to take steps to ensure that the military magistrate conducts the R.C.M. 305(i) review within forty-eight hours of the pretrial confinement decision. This meets both constitutional standards and R.C.M. 305 requirements and avoids encumbering the pretrial confinement procedure with an additional layer of review. Major MacKay, Individual Mobilization Augmentee.

Surreptitious Peeks into an On-Post BOQ Are Not Plain-View Observations and May Taint Subsequent Witness Testimony at Trial

In *United States v. Kaliski*,[98] the COMA made several important refinements in military search and seizure law. The COMA clarified the plain-view exception by ruling that it did not apply to a police officer's peek through a rear patio window of on-post quarters. The COMA also limited the inevitable discovery doctrine's scope when applied to live witness testimony.

In an opinion written by Judge Gierke, the COMA held that Air Force security police engaged in an illegal search when they stood on the rear patio of the accused's Bachelor Officers' Quarters (BOQ), looked through a patio door, and observed the accused engaged in sodomy with Mrs. *S*, the wife of an enlisted airman. The COMA declined to apply the plain-view exception because the security police had no right to be on the accused's patio.

The COMA also refused to apply the inevitable discovery rule to the fruits of the illegal search. Reversing the Air Force Court of Military Review (AFCMR),[99] the COMA held that the subsequent testimony of Mrs. *S* at trial should have been excluded because it was tainted by the illegal search and would not inevitably have been discovered.

The accused, a second lieutenant, was a public affairs officer at Vandenberg Air Force Base, California. Mrs. *S* was married to a staff sergeant assigned to the same base. A coworker and neighbor of the accused observed Mrs. *S*'s automobile outside the accused's BOQ on numerous occasions. He suspected that they were having an affair and reported his suspicions to the security police. Several days after his initial report, the accused's neighbor called the security police to advise them that Mrs. *S*'s car was once again parked outside the accused's BOQ. Two investigators went to the accused's BOQ, advanced onto a private rear patio, and looked in the sliding glass patio door through an eight-to-ten inch gap in the curtains. They observed the accused and Mrs. *S* engaging in oral sodomy. The investigators fled the patio when they thought that Mrs. *S* had seen them.

Two days later, the security police called Mrs. *S* to the police station and interviewed her. One of the investigators told Mrs. *S* that they "were investigating an allegation with Lieutenant Kaliski and herself."[100] He did not tell her that he had personally "observed the activity," but told her that he and the other investigator "knew some things and that [they] wanted to interview her to confirm or deny it."[101] Mrs. *S* stated that she provided the investigators with a statement incriminating the accused only after the investigators described to her in detail what they had observed. Approximately four months later, Mrs. *S* testified at trial and described her adulterous relationship with the accused.

The COMA began its analysis by emphasizing that military law recognizes a privacy right in government quarters that

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[97] *Rexroat*, 38 M.J. at 298.

[98] 37 M.J. 105 (C.M.A. 1993).

[99] In an unpublished opinion, the AFCMR held that the security police search of the accused's BOQ was illegal, but that Mrs. *S*'s statement and subsequent trial testimony inevitably would have been discovered.

[100] *Kaliski*, 37 M.J. at 107.

[101] *Id.*

extends to the land "immediately adjacent" to them.[102] Noting that looking into the window of a private residence is a search, the COMA stated that a plain view observation does not constitute an unreasonable search if made from a place where the observer has a right to be.[103] However, as the investigators "had no right to be on [the accused's] patio, peeking through his patio door . . . [because] . . . [t]hey were not in a public area, but on a private patio on which [the accused] had a reasonable expectation of privacy," the COMA held that the investigators conducted an unlawful search of the accused's quarters.[104]

The COMA next examined the degree to which Mrs. *S*'s testimony was fruit of the illegal search. The COMA identified three methods by which live witness testimony obtained through exploitation of police illegality may be admitted as exceptions to the exclusionary rule: (1) if the link to the underlying illegality is sufficiently attenuated; (2) if it is derived from a source independent of police illegality; or (3) if it would inevitably have been discovered absent police illegality.[105] In addressing the attenuation and inevitable discovery exceptions, the COMA fashioned a two-step test which combined these exceptions. The COMA did not address the independent source exception.

First, the COMA noted that the inevitable discovery rule will apply only if the prosecution shows that there was "a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of the police misconduct, and . . . that the government was actively pursuing a 'substantial alternate line of investigation at the time of the constitutional violation.'"[106] Next, the COMA explained that because of the unique nature of derivative live witness testimony, an attenuation analysis must be applied even if the prosecution shows inevitable discovery. The COMA noted that live witness testimony is unlike real or documentary evidence because it is the product of the witness' free will. To admit such testimony, notwithstanding any police illegality, the prosecution must establish that the witness' "independent act of free will" broke the chain of causation and caused the witness to testify.[107]

Turning to Mrs. *S*'s testimony, the COMA found that the inevitable discovery prong of the two-part test was not satisfied.[108] While acknowledging that the security police had identified Mrs. *S* as a witness through sources independent of the illegal search,[109] the COMA concluded that the security police would not have interviewed her in the absence of the concrete evidence of misconduct gained from their illegal search.[110] The COMA determined that absent the illegal

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[102] *Id.* at 108. In her dissent, Judge Crawford noted with approval that the majority, in effect, was indicating that a BOQ duplex is more like a multidwelling unit than a barracks, the latter being subject to a lesser expectation of privacy, particularly where officers or noncommissioned officers observe activity in barracks while performing their duties at or near the barracks. *Id.* at 112 (Crawford, J., dissenting), citing United States v. Lewis, 11 M.J. 188 (C.M.A. 1981) (COMA upheld noncommissioned officer's looking into barracks room after he could not get an answer at the door); United States v. Wisniewski, 21 M.J. 370 (C.M.A. 1986), *cert. denied,* 476 U.S. 1160 (1986) (noncommissioned officer could look through blinds in the barracks without violating the occupant's expectation of privacy).

[103] *Kaliski,* 37 M.J. at 108 (citing *Wisniewski,* 21 M.J. at 370, *cert. denied,* 476 U.S. 1160 (1986)).

[104] *Id.*

[105] *Id.* The military adopted the inevitable discovery rule in United States v. Kozak, 12 M.J. 389, 394 (C.M.A. 1982). *See* United States v. Allen, 34 M.J. 228 (C.M.A. 1992) (palm print of suspect obtained after illegal seizure inevitably would have been discovered during the course of the investigation as accused was otherwise a legitimate target of the investigation). In Nix v. Williams, 467 U.S. 431 (1984), the Supreme Court upheld the constitutionality of the inevitable discovery exception to the exclusionary rule stating "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received." As a result of *Nix,* Military Rule of Evidence 311(b)(2) was added in 1986. MCM, *supra* note 1, MIL. R. EVID. 311(b)(2) (1986 Drafter's Analysis). Military Rule of Evidence 311(b)(2) states that "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made."

[106] *Kaliski,* 37 M.J. at 109, (citing United States v. Lamas, 930 F.2d 1099, 1102 (5th Cir. 1991)). *See* MCM, *supra* note 1, MIL. R. EVID. 311(e)(2), which states, "Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence . . . that the evidence would have been obtained even if the unlawful search or seizure had not been made . . . ."

[107] *Kaliski,* 37 M.J. at 109. The COMA cited United States v. Ceccolini, 435 U.S. 268, 276 (1978) as authority for its attenuation test. However, the COMA did not separately articulate the factors to be considered in making the determination whether the taint of the illegal search is sufficiently attenuated to admit the independent witness testimony. *Ceccolini* examined the following factors in determining whether the exclusionary rule should be invoked when a relationship exists between an illegal search and the discovery of a live witness: (1) whether the witness' testimony was an act of his or her own free will or whether it was coerced or induced by official authority as a result of the illegal search; (2) whether fruits of the illegality were used in questioning the witness; (3) the amount of time that passed between the illegal search and contact with the witness and between contact and testimony; (4) prior to the illegal search, whether the police knew the witness and his or her relationship to the defendant; and (5) whether the police conducted the search intending to find a willing and knowledgeable witness to testify against the defendant. *Id.*

[108] *Kaliski,* 37 M.J. at 109.

[109] These sources included the neighbor who reported the repeated presence of Mrs. *S*'s car outside the accused's BOQ and a number of other witnesses who could testify about the relationship between Mrs. *S* and the accused. *Id.* at 113 (Crawford, J., dissenting).

[110] *Id.* at 109.

search, the security police would not have inevitably discovered either Mrs. *S*'s statement or her testimony.

The COMA also concluded that the attenuation prong of the test was not met. Pointing to several factors, the COMA determined that Mrs. *S*'s statement and testimony were not the result of an independent act of free will on her part. Mrs. *S* gave her statement only because the security police called her and confronted her with the sexual acts that they had observed at the accused's BOQ. There was no significant passage of time between the illegal search and the interrogation of Mrs. *S*. Mrs. *S* felt compelled to give her statement and testify as a result of a chain of events set in motion by the illegal search.[111] Accordingly, the COMA reversed the AFCMR, set aside the findings of guilty and the sentence, and dismissed the charge and specification.

Judges Sullivan, Cox, and Wiss concurred with Judge Gierke's opinion. Judge Crawford dissented. While she agreed with the majority that the search was illegal, Judge Crawford relied on the independent source doctrine to conclude that the security police obtained both Mrs. *S*'s statement and her trial testimony from sources untainted by the illegal search of the accused's BOQ. The independent source doctrine differs from the inevitable discovery rule in that the question is not whether evidence found in violation of the Fourth Amendment inevitably would have been discovered lawfully, but whether the police did acquire the evidence at issue by relying on an untainted source.[112]

In Judge Crawford's view, any taint of the illegal search was severed because much of what was known about Mrs. *S* and her relationship with the accused was gained two months prior to the illegal search.[113] Judge Crawford contended that because Mrs. *S* knew that a number of witnesses could have testified about her relationship with the accused, her statement and subsequent trial testimony were neither obtained as a result of, nor tainted by, the illegal search.[114]

Although the majority and the dissent appear to have reached their conclusions based on dissimilar analytical approaches, their differences are more readily attributable to their strikingly divergent views of the facts. The majority concluded that, but for the illegal search, the security police never would have interviewed Mrs. *S* and the prosecution never would have called Mrs. *S* as a witness. The dissent concluded that evidence independent of the illegal search led the investigators to Mrs. *S* and resulted in her statement and trial testimony.

Practitioners may glean two lessons from *Kaliski*. First, the COMA has clarified the extent to which soldiers have an expectation of privacy in on-post quarters.[115] The observations of law enforcement agents made from areas within the curtilage of on-post quarters, such as the rear patio in this case, are not in plain view. Second, when litigating whether a witness' testimony was derived from an illegal search, the prosecution bears a heavy burden of showing not only that the testimony would inevitably have been discovered by lawful means, but also that the testimony was not tainted by the illegal search. The prosecution must show that the testimony was the result of an independent act of free will on the witness' part. Major MacKay, Individual Mobilization Augmentee.

United States v. McCarthy: Warrantless Apprehensions in Barracks Upheld

In *United States v. McCarthy*,[116] the COMA held that warrantless[117] apprehensions in barracks rooms do not violate the Fourth Amendment. However, the COMA's holding also implies that warrantless searches of barracks rooms are proper. *McCarthy* may have completely eliminated Fourth Amendment protections in the barracks.

The charges against the accused, Private Barry McCarthy, arose from three reported assaults on female service members living in military dormitories[118] at Little Rock Air Base,

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[111] *Id.*

[112] 4 W. LAFAVE, SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) (2d ed. 1987). *See* Murray v. United States, 487 U.S. 533 (1988). In *Murray*, the Supreme Court reaffirmed that the independent source doctrine applies not only to evidence obtained for the first time during an independent lawful search, but also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities tainted by the initial illegality.

[113] *Kaliski*, 37 M.J. at 114.

[114] *Id.* at 113-14. Citing Brown v. Illinois, 422 U.S. 590 (1975) and United States v. Ceccolini, 435 U.S. 268 (1978), the dissent discussed several factors supporting the conclusion that Mrs. *S*'s statement and testimony were not tainted by the illegal search: (1) there was a gap of nearly four months between the illegal search and Mrs. *S*'s testimony; (2) Mrs. *S*'s identity was not discovered as a result of the illegal search but was known to the investigators months in advance; and (3) there was no indication that the investigators conducted the illegal search to obtain the identity of the already known witness, Mrs. *S*. *See supra* note 107.

[115] *But cf.* United States v. McCarthy, 38 M.J. 398, 401-03 (C.M.A. 1993) (soldier in *barracks* has limited expectation of privacy in apprehension context).

[116] *Id.*

[117] A "warrant" is express permission to search, seize, or apprehend issued by competent civilian authority. An "authorization" is express permission to search, seize, or apprehend issued by competent military authority. MCM, *supra* note 1, MIL. R. EVID. 315(b). For purposes of this note, these terms will be used interchangeably.

[118] In the Air Force, living quarters for single junior enlisted service members are called "dormitories." In the Army, these quarters are called "barracks." This note uses "dormitory" and "barracks" synonymously.

Arkansas. The victims told the security police that their assailant identified himself as "Barry," was dark complected, approximately six feet tall, had a tatoo on his top right forearm, and wore a ski mask, blue jeans, tennis shoes, a black T-shirt with a large design.

One of the security policemen investigating the case noticed a note on a dormitory room door signed by "Barry McCarthy." The policeman interviewed the occupant of the room, who described Barry McCarthy as being six feet tall, with dark hair and a dark complexion. The occupant also told the policeman that McCarthy lived in room 305 in another dormitory.

The security policeman went to McCarthy's room and knocked on the door, but received no answer. The policeman then contacted the Charge of Quarters (CQ) for McCarthy's dormitory, who described McCarthy as being six feet tall with dark hair, a dark complexion, and a tatoo. At approximately 0400 hours, the policeman returned to McCarthy's room with the CQ, who had a key and authority to enter the room. The policeman pounded on McCarthy's door and, when he again received no answer, the CQ opened the door with the key. The policeman found McCarthy sleeping in a bunk inside the room and noticed that he matched the victims' description of their assailant. When McCarthy subsequently was apprehended, a ski mask was found in his waistband and an unauthorized grenade simulator was found in his pocket.

At trial the defense objected to the evidence seized during McCarthy's warrantless apprehension. The military judge admitted this evidence and convicted the accused of burglary, assault consummated by a battery, and violation of a regulation by unlawfully possessing a grenade simulator. The ACMR affirmed the accused's conviction.[119]

The COMA affirmed, ruling that McCarthy's warrantless apprehension was proper. Judge Gierke, writing the opinion of the court, upheld R.C.M. 302(d)(2),[120] which permits warrantless apprehensions in the barracks. He was joined by Judges Cox and Crawford.

The COMA determined that *Payton v. New York*,[121] the Supreme Court case requiring warrants for apprehensions in the home, did not apply to apprehensions in barracks or dormitory rooms.[122] The COMA noted that under *Payton*, intrusions into the home to arrest are indistinguishable from intrusions into the home to search. However, the COMA determined that under prior Supreme Court case law,[123] arrests and searches outside the "home" are constitutionally different. The COMA ruled that a warrant is not required for an arrest unless the arrest occurs in the home.

The COMA then distinguished a military barracks or dormitory room from a "home." The COMA noted that a lesser expectation of privacy is present in a barracks room than in a civilian home.[124] The COMA also noted that R.C.M. 302(e)(2) provides that "private dwellings" do not include barracks rooms.[125] The COMA pointed out that it often had upheld warrantless intrusions into barracks rooms.[126] Finally, the COMA listed several differences between barracks rooms and civilian homes. The COMA stated that the critical difference is the need for military discipline in the barracks.

The COMA did not determine the "outer limits" of McCarthy's reasonable expectation of privacy in his dormitory room. The COMA held, however, that this expectation was not infringed by the warrantless entry into McCarthy's room and his subsequent apprehension.

Judge Wiss and Judge Sullivan concurred in the result. However, they based their opinions on the defense's waiver of the warrant issue by failing to properly raise it at trial.[127] Judge Sullivan felt that McCarthy's warrantless apprehension

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[119] United States v. McCarthy, 34 M.J. 768 (A.C.M.R. 1992).

[120] MCM, *supra* note 1, R.C.M. 302(d)(2). Rule for Court-Martial 302(d)(2) states that neither warrants nor any other authorizations are required for apprehensions, except as provided in R.C.M. 302(e)(2). Rule for Court-Martial 302(e)(2) requires a warrant or authorization to apprehend a person in a "private dwelling." However, R.C.M. 302(e)(2) states that a "private dwelling" does not include "living areas in military barracks" "whether or not subdivided into individual units." *Id.* R.C.M. 302(e)(2).

[121] 445 U.S. 573 (1980).

[122] The COMA previously had declined to answer this question. United States v. Mitchell, 12 M.J. 265, 269 n.1 (C.M.A. 1982).

[123] The COMA relied on United States v. Watson, 423 U.S. 411 (1976), which held that a warrantless arrest in a public place does not violate the Fourth Amendment. United States v. McCarthy, 38 M.J. 398, 400 (C.M.A. 1993).

[124] To support this proposition the court cited several cases, including Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975), which upheld warrantless drug inspections in the military.

[125] MCM, *supra* note 1, R.C.M. 302(e)(2).

[126] The COMA cited United States v. Middleton, 10 M.J. 123 (C.M.A. 1981), which upheld an inspection of a barracks room, and United States v. Lewis, 11 M.J. 188 (C.M.A. 1981), which upheld a peek through a barracks room window from a public area.

[127] Judge Wiss pointed out that McCarthy's objection at trial was that the search of his room was conducted without probable cause. Although this objection assumed that the accused had a reasonable expectation of privacy in his room, it did not, in Judge Wiss' view, place this issue squarely in contention. Judge Sullivan joined Judge Wiss' concurring opinion. *McCarthy*, 38 M.J. at 404.

violated his Fourth Amendment rights. Judge Wiss also had reservations about the majority's resolution of the warrant issue.

In his concurring opinion, Judge Wiss stated that the majority holding rests on the premise that "*no* Fourth Amendment reasonable expectation of privacy" exists and, therefore, no Fourth Amendment protection in a barracks room.[128] In Judge Wiss' view, any intrusion into an area protected by a reasonable expectation of privacy—whether to apprehend or search—requires a warrant. Under this view, if no warrant is required to enter a barracks room, the room is not protected by any reasonable expectation of privacy.

The majority justified its holding by reasoning that arrests and searches outside the home are constitutionally different. The majority implied that warrantless apprehensions are permissible in areas outside the home, such as a barracks room, regardless of whether a reasonable expectation of privacy exists. Judge Wiss, on the other hand, does not draw the distinction between barracks rooms and homes; he believes that an arrest warrant is required whenever a reasonable expectation of privacy exists.

Judge Wiss' view is consistent with *Payton v. New York.*[129] Although *Payton* involved a warrantless arrest in a civilian home, the Supreme Court ruled that the differences between intrusions to search and to arrest are "merely ones of degree rather than kind" because both breach an individual's privacy.[130] In *Minnesota v. Olson,*[131] the Supreme Court made it clear that the legality of a warrantless arrest depends on the suspect's reasonable expectation of privacy in the area where the arrest is made, not whether the area constitutes a "home."[132]

As Judge Wiss indicates, the majority's implication that no reasonable expectation of privacy exists in barracks rooms is at odds with case law. The COMA previously has ruled that unreasonable "shakedown" inspections in the barracks violate the Fourth Amendment.[133] The COMA also has held that the search of a barracks room without probable cause violates the Fourth Amendment.[134] Both decisions rest on the proposition that the soldiers involved had reasonable expectations of privacy in their barracks rooms. Because of these decisions, soldiers arguably have acquired more of an expectation of privacy in their barracks rooms with the transition from open bays to semiprivate rooms.[135]

In *McCarthy*, the COMA has upheld warrantless apprehensions in the barracks. In so doing, it also may have blessed warrantless searches in the barracks. However, until the COMA clarifies its ruling, defense counsel should continue to argue that warrants or authorizations are required for searches in the barracks. Prosecutors, on the other hand, should not rely on *McCarthy* as authority to conduct warrantless barracks searches. Prosecutors also should be cautious when dealing with warrantless apprehensions; if soldiers are given significant expectations of privacy in the barracks, the courts may require warrants to apprehend there, despite the ruling in *McCarthy*.[136] Major Masterton.

Health Care Professionals and Article 31(b), UCMJ[137]

The COMA recently took a seemingly broad-brush approach to rights warnings when applied to medical person-

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[128] *Id.* at 405. Judge Wiss used the term "two-person barracks room," because McCarthy shared his room with another soldier. *Id.*

[129] 445 U.S. 573 (1980).

[130] *Id.* at 589.

[131] 495 U.S. 91 (1990).

[132] The Supreme Court ruled that the warrantless arrest of a visitor in a private home violated the Fourth Amendment. The Court stated that the government's attempt to justify the search rested on "the mistaken premise that a place must be one's 'home' in order for one to have a legitimate expectation of privacy there . . . ." *Id.* at 96.

[133] United States v. Roberts, 2 M.J. 31 (C.M.A. 1976).

[134] United States v. Moore, 23 M.J. 295 (C.M.A. 1987). In his concurrence, Judge Cox questioned whether service members had any expectation of privacy in barracks rooms. He noted that "since the lead opinion in United States v. Roberts, 2 M.J. 31, 36 n.16 (C.M.A. 1976) unilaterally declared that service members have 'reasonable expectation[s] of privacy' in their barracks rooms, discussion and factual development of this issue have effectively ceased . . . ." He urged reassessment of the issue.

[135] *See* United States v. Thatcher, 28 M.J. 20, 24 n.3 (C.M.A. 1989).

[136] In upholding McCarthy's warrantless apprehension, the COMA relied, in part, on *Little Rock Air Force Base Regulation 90-2, Housing and Dormitory Standards and Policies* (28 June 1988). This regulation prohibits certain weapons in dormitory rooms, limits cooking to certain areas, requires posting of name plates, requires that shoes be lined up under the bed, authorizes room inspections, prohibits overnight guests, and limits underage visitors. If McCarthy had been given more expectations of privacy in his room, the result might have been different.

[137] UCMJ art. 31 (1988). Article 31(b) provides in full:

> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

nel treating suspects in the military. In *United States v. Raymond*, ostensibly creating a bright line rule, the COMA held that Article 31 did not apply to "health care professionals when engaged in patient treatment."[138] However, *Raymond* does not signify a new bright line rule, but simply is a restatement of current law couched in broad terms that could mislead the unwary counsel. Counsel should *not*, based on *Raymond*, dismiss defense arguments that the Army's family advocacy program regulation, *AR 608-18*, creates an agency relationship between social workers and law enforcement investigators.[139] Moreover, counsel should be prepared to address the due process issue raised in Judge Wiss' concurring opinion.[140]

Under current law, interrogators subject to the UCMJ, who are acting in an official law enforcement or disciplinary capacity, are required to provide Article 31(b) warnings to suspects prior to any questioning.[141] Civilians normally are excluded from the requirements of Article 31, but may be required to warn a suspect if acting as an agent for military investigators.[142] The degree of control that the government exercises over the civilian questioner is a critical factor in determining whether an agency relationship exists.[143] For example, if the government uses the civilian as a subterfuge to avoid the requirements of Article 31, or the civilian interviewer serves as a mere conduit of information for military law enforcement authorities, then Article 31 would apply.[144]

In *Raymond*, a CID agent interviewed a soldier suspected of sexually abusing the eleven-year-old daughter of friends.[145] Following a rights warning, the soldier invoked his Article 31 rights, thereby terminating the interview.[146] The soldier, distraught and withdrawn over the allegations, went to an Army hospital seeking mental health counseling on a "walk-in" basis.[147]

A civilian psychiatric social worker employed by the Army, Mr. *W*, interviewed the soldier without providing any rights warning. Mr. *W* never spoke with anyone in the soldier's command before or after the meeting and was unaware of the previous CID interview.[148] Moreover, Mr. *W* never intended to call the CID. He only spoke with the CID after being approached by an agent after first obtaining authorization from his supervisor.[149]

Following acceptance of the accused's guilty plea, the government offered in evidence the statements made to Mr. *W* to show the accused's lack of remorse for the crimes.[150] Mr. *W* testified that during his interview with Raymond, the accused admitted to the allegations against him but asserted he "didn't feel that society had a right to judge him."[151] The military judge admitted the evidence, notwithstanding strenuous defense objection that the social worker was essentially a gov-

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[138] 38 M.J. 136, 137 (C.M.A. 1993).

[139] *See* DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM (18 Sept. 1987) [hereinafter AR 608-18]; United States v. Moore, 32 M.J. 56 (C.M.A. 1991) (*AR 608-18* was not in effect on date challenged interview occurred); United States v. Kline, 35 M.J. 329 (C.M.A. 1992) (COMA sidestepped the *AR 608-18* agency issue, ruling that Article 31 requirements were complied with); *see also* United States v. Moreno, 36 M.J. 107 (C.M.A. 1992) (defense argued unsuccessfully that agency relationship was created between Texas Department of Human Services investigator-social worker and military law enforcement personnel based on "protocols"); *Cf.* United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992) (court rejected defense claims that an Executive Order authorizing cooperation between United States intelligence agents and military law enforcement agents converted the intelligence agents into [agents] of the military).

[140] *Raymond*, 38 M.J. at 144 ("I believe it is entirely logical to argue under certain circumstances that the Government—through interaction of two provisions of law that are entirely within its power to effect [the reporting requirements of *AR 608-18* and the absence of an evidentiary privilege]—has improperly undermined Article 31.").

[141] MCM, *supra* note 1, MIL. R. EVID. 305(d)(1)(B).

[142] *Moreno*, 36 M.J. at 113 states, "Article 31, UCMJ, extends to a civilian investigator in two instances: (1) where the civilian and military investigations merge into an indivisible entity, and (2) when the civilian investigator acts in furtherance of any military investigation, or as an instrument of the military." (quoting United States v. Penn, 39 C.M.R. 194, 199 (C.M.A. 1969)).

[143] *Id.* at 117. ("[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.") *Id.* Affiliation with the military through employment does not automatically convert a civilian into an agent of the military, but is a factor in determining if an agency relationship exists. United States v. Quillen, 27 M.J. 312, 314 (C.M.A. 1988).

[144] *Moreno*, 36 M.J. at 117.

[145] United States v. Raymond, 38 M.J. 136, 137 (C.M.A. 1993).

[146] *Id.*

[147] *Id.* at 138.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 137.

[151] *Id.*

ernment agent, and that Article 31 rights were required prior to the interview.[152]

No question exists whether the civilian social worker in *Raymond* was subject to the Army's family advocacy program regulation, *AR 608-18*.[153] The issue before the COMA was whether the psychiatric social worker was required to provide Article 31 rights warnings before interviewing the accused. Any statements obtained in the unwarned interview would have been inadmissible at trial if rights warnings were required.[154]

The COMA initially answered the specifically framed issue of *Raymond*, and held that the social worker was not acting as an investigative agent of law enforcement agencies, despite being subject to *AR 608-18*.[155] Not content to answer only the framed issue, the COMA went further and held that as a matter of law Article 31 does not apply to health care professionals engaged in patient treatment.[156]

The COMA's rulings merit discussion on two points: (1) whether *AR 608-18* no longer creates an agency relationship; and (2) whether health professionals engaged in patient treatment are per se excluded from the Article 31 coverage.

Army Regulation 608-18 contains significant reporting requirements and other cooperative responsibilities between law enforcement agencies and other program participants, to include the civilian social workers at military hospitals.[157] The COMA classified the family advocacy program as solely a community services program and not a law enforcement program.[158] This categorization ignores the explicit language of *AR 608-18*.[159] The family advocacy program regulation does not automatically create an agency relationship, but the reporting and cooperation responsibilities with law enforcement personnel cannot be dismissed. This responsibility is a factor in determining whether an "agency" relationship exists.[160]

This factor would have been significant if Mr. *W* had pursued and reported patient information to law enforcement agencies with the zeal and degree of cooperation suggested by the *AR 608-18*.[161] A more accurate analysis would be to determine why Mr. *W* was questioning the soldier. If the purpose was to diagnose and treat the soldier or otherwise engage in patient treatment then agency is not an issue. In that situation, Article 31 does not apply because the inquiry is not a law enforcement or disciplinary inquiry.[162]

This brings us to the second issue raised in *Raymond;* whether the COMA has per se excluded health care professionals engaged in patient treatment from the coverage of Article 31? A per se exclusion of Article 31's coverage extends current law (medical personnel engaged in patient treatment historically have not been viewed as conducting law enforcement or disciplinary inquiries).[163] However, Judge

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[152] *Id.* at 141 (Wiss, J., concurring).

[153] *Id.* at 138.

[154] This assumes that no other exception to Article 31 applied—such as questioning for other than law enforcement or disciplinary purposes. *See* United States v. Loukas, 29 M.J. 385 (C.M.A. 1990).

[155] *Raymond*, 38 M.J. at 137.

[156] *Id.*

[157] *Id.* at 138-147.

[158] *Id.* at 138. "[T]he Army regulation (AR 608-18) establishes a comprehensive program accommodating the competing needs of the military community. It is not a law enforcement program; it is a community services program." *Id.*

[159] *Army Regulation 608-18* includes numerous provisions detailing joint responsibilities of social workers and law enforcement personnel to: collect information about known and suspected cases of child abuse; gather evidence of criminal activity; fully investigate such allegations when discovered, and share information and records. *Id.* at 142-143.

[160] *See* United States v. Quillen, 27 M.J. 312 (C.M.A. 1988) (regulations required the exchange to file reports on crime with military officers—store detectives were found to be "instruments of the military"); *see also* Falvey, *Health Care Professionals and Rights Warning Requirements,* ARMY LAW., Oct. 1991, at 25-26 (author compared the difference in the approaches by the Army and Marine Corps to family advocacy); Caddell, *Article 31(b) Warnings Revisited: The COMA Does a Double Take,* ARMY LAW., Sept. 1993, at 22 (author, analyzing United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992) and United States v. Moreno, 36 M.J. 107 (C.M.A. 1992) concluded that "Agreements or executive orders to cooperate or assist military authorities are not enough, by themselves, to convert civilian investigators into instrumentalities of the military.").

[161] AR 608-18, *supra* note 139, para. 3-15, 3-16. *Moreno*, 36 M.J. at 117; *E.g.*, United States v. Miller, 36 M.J. 124, 128 n.5 (C.M.A. 1992).

[162] *Raymond*, 38 M.J. at 140.

[163] *See* United States v. Fisher, 44 C.M.R. 277 (C.M.A. 1977); *see also* Falvey, *supra* note 160, at 23-25 (author reviewed the historical applicability of Article 31 to health care professionals).

Wiss, in his concurring opinion, considered this ruling unnecessarily "broad and gratuitous."[164] A health care professional engaged in patient treatment could be equally motivated to collect and report incriminating information to law enforcement agencies, pursuant to *AR 608-18*. A per se exclusion from Article 31's coverage under those circumstances would invite abuse. The COMA may have struck a nerve with the apparent bright line rule, but the underlying principle is well established in case precedent. The danger lies, however, in reading the holding too broadly.

Judge Wiss raised an important point: the government can use the reporting requirement of *AR 608-18* and the absence of any evidentiary psychotherapist-patient privilege as an "end run around Article 31."[165] Judge Wiss agreed with the final result of the majority opinion because the social worker did not follow the reporting and cooperation requirements of *AR 608-18*.[166] If the counselor in *Raymond* had collected and reported evidence of the accused's criminal activity to law enforcement agents pursuant to the family advocacy regulation, he may not have violated Article 31 under the broad language of the majority opinion, but may have violated the accused's due process rights.[167]

Conclusion

Previous analysis of Article 31's applicability to civilians focused on the "agency" issue.[168] *Raymond*, unfortunately, does not discuss this issue in depth. It did lower, however, concerns about the impact of *AR 608-18* on the agency analysis, particularly following the dicta of *United States v. Moore*.[169] Government counsel should not rely excessively on *Raymond* to support the admissibility of statements obtained by health care professionals through the family advocacy program, but should continue to pursue evidence gathered from this source. Defense counsel should continue to argue—when health care professionals provide evidence to law enforcement agencies pursuant to *AR 608-18*—that social workers and other medical professionals, motivated to collect information in addition to diagnosing and treating patients, still fall under Article 31. Moreover, Judge Wiss' comments raise an important due process attack that probably will be the next battleground in this area; defense counsel may want to argue that the government has effectively undermined Article 31 through absence of a psychotherapist-patient privilege, and the reporting and investigation requirements of *AR 608-18*. As a practical step in trial preparation, counsel should determine the extent to which any health care professional/witness has collected and reported information to law enforcement agencies in compliance with *AR 608-18*. Defense counsel should continue raising the agency issue as well as the due process argument if they find such activity has occurred. Major Hayden.

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.

Congress Passes Increase in VA Home Loan Fees

Congress has authorized an increase in the fees service members and veterans must pay when using the Veterans' Affairs (VA) Home Loan Program. In 1988, Congress created the VA Guaranty and Indemnity Fund (Fund) and required that individuals using the VA Home Loan Program pay a fee to the Fund. This fee was intended to defray some of the losses to the VA Home Loan Program caused by the high default rate. By 1991, the fee ranged from .5% to 1.25% of the total loan amount for house purchases, depending on the user's downpayment. In 1992, certain members of the Reserves became eligible for the VA Home Loan Program with fees generally .5% higher than for those who gained their eligibility through active service. In that year Congress raised the indemnity fee by an additional .65% for most house loans.

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[164] *Raymond*, 38 M.J. at 140.

[165] *Id.* at 143-144.

[166] *Id.* at 144 (Wiss, J., concurring).

[167] *Id.* Judge Wiss pointed out that *AR 608-18*'s reporting requirement leads law enforcement agents to evidence, which is then admissible in a court-martial in the absence of any medical privilege in the Military Rules of Evidence. The interaction of the regulatory provision and the evidentiary rules, both within the power of the government to effect, arguably undermined the warning requirement of Article 31. This argument is stronger when law enforcement authorities have received evidence of abuse through the reporting requirement of *AR 608-18*.

[168] United States v. Moreno, 36 M.J. 107, 113 (C.M.A. 1992).

[169] *See* United States v. Moore, 32 M.J. 65, 61 (C.M.A. 1991) ("[T]he particular regulation . . . proffered by appellant . . . to show an agency relationship between this government nurse and the military police does not undermine our conclusion. . . . It was not in effect on April 8, 1987, the day the challenged interview in this case occurred."); *see also* United States v. Quillen 27 M.J. 312, 314-315 (C.M.A. 1988) (court, finding an agency relationship, cited extensively from an exchange service manual that tasked store detectives with developing information for reports on crime, including shoplifting, that were provided to appropriate military officers).

As part of the Omnibus Budget Reconciliation Act of 1993[170] Congress raised the indemnity fee by .75% over the 1991 fee for most house loans closed after September 30, 1993 and before October 1, 1998. In addition, a different fee applies for most second and subsequent uses of a VA entitlement for house purchases. This fee is 3% of the total loan amount if the eligible individual pays less than 5% down.[171] The new fee structure for active duty service members and veterans is:

Down payment	*Fee*
Less than 5%	2% (3% if a second use)
More than 5%, Less than 10%	1.5%
Over 10%	1.25%

Individuals who gained their eligibility through reserve service who are purchasing a house must pay the higher fees applicable to them, plus the new .75% fee, or the 3% fee for second and subsequent use. These changes do not affect the uniform 1% indemnity fee for the purchase of a manufactured home. Major Gsteiger, Individual Mobilization Augmentee.

Tax Note

Tax Tips for the Newly Divorced

Army lawyers counseling a client contemplating divorce or legal separation may find the following tax information useful. As all attorneys know, divorce causes changes in the client's tax situation. Here are a few general guidelines and tax tips counsel should share with the client.[172] Lieutenant Colonel Hancock.

Choose the Correct Filing Status

Your marital status is important in determining your income tax filing status. You may file as "single" if you are unmarried and obtained your divorce, legal separation (determined under state law), or annulment by the end of your tax year (usually 31 December). You generally file as "head of household" if you are unmarried at the end of the tax year or are married and lived apart from your spouse the last six months of the tax year, and you kept up a home for your child (listing the child's name on the return) or, if you are unmarried, for the person for whom you can claim as a dependent. Couples not divorced by year end may be able to file "jointly" (married filing joint status), or separate returns (married filing separately). You should figure your tax both ways to ensure that you are using the method that will result in the lower tax.

Exemption Amount Increased for 1993

You are allowed to deduct $2,350 for yourself and each person you can claim as your dependent for the 1993 tax year. An exemption for your spouse is allowed only if you are married and file a joint return with your spouse, or you file a separate return and the spouse had no gross income and was not a dependent on another person's return. You must list the social security number of all dependents who turned one year old by the end of the tax year.

Who Claims the Children?

A parent must meet several tests to claim an exemption for a child. A child's exemption usually may be claimed by one of the parents (not both) if the child had gross income of less than $2,350 for 1993, or that child is under nineteen years old, or is a student under age twenty-four. Generally, the custodial parent gets to claim the exemption for the child. If neither a divorce decree nor agreement establishes custody, then the parent who had physical custody for the greater part of the year is considered to have custody of the child. The custodial parent can release the exemption to the noncustodial parent by signing a written declaration, *Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents*, or similar statement.

Alimony Is Income for One—Deductible by the Other

Alimony or separate maintenance payments you make to your ex-spouse or spouse under a divorce or separation agreement are tax deductible (they are an adjustment to your gross income reported on the *Form 1040*). You do not have to itemize deductions to claim alimony payments. The recipient of alimony payments reports them on the *Form 1040* as part of the recipient's gross income. You do not deduct child support payments that you make. You do not include, in income, child support payments that you receive.

Legal Fees You Pay May Include Deductible and Nondeductible Charges

If you incur legal expenses in obtaining a divorce or separation, you should have your civilian attorney itemize the charges for his or her services. Legal fees and court costs for getting a divorce are *not* deductible. You may, however, deduct legal fees paid for tax advice in connection with the divorce, and legal fees to get alimony that you must include in your gross income. You also may include fees you pay to other professionals—such as appraisers or accountants—for

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[170] Pub. L. No. 103-66 (1993).

[171] This subsequent use fee does not apply to interest rate reduction refinancing.

[172] This update is 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. The 1994 edition of *JA 269* has been uploaded on the Legal Automation Army-Wide System Bulletin Board.

services in determining the correct amount of your tax or in helping to obtain alimony. If you itemize deductions, you may claim the deductible charges, subject to the two percent of adjusted gross income floor.

Remember to Change Your Tax Withholding

You usually will have to file a new *Form W-4, Employee's Withholding Allowance Certificate*, with your employer when you become divorced or separated. Changes in income, deductions, exemptions, or filing status during the year may require you to change the amount of tax withheld or begin to make estimated tax payments. For instance, if you are single, divorced, or legally separated, you must claim single status on your *Form W-4*. If you receive alimony or other payments that are not subject to withholding, you may have to ask for additional withholding from your wages or make estimated tax payments.

See *IRS Publication 504, Divorced or Separated Individuals,* for more information. It contains specific details on the tax rules on property settlements, Individual Retirement Accounts, and other topics of interest to divorced persons.

No Automatic Deferment for Federally Insured Student Loans

In the past, persons with outstanding federally insured student loans[173] got automatic deferment of payments during their initial term of military service.[174] The Higher Education Amendments Act of 1992[175] has significantly changed eligibility for deferments. The categories of eligibility for deferments have been reduced from eleven to three: school, unemployment, and economic hardship. Military service no longer qualifies for automatic deferment. Those entering the military must demonstrate economic hardship, as defined by the Higher Education Amendments Act.[176] The new criteria apply to loans for which the first disbursement is made on or after July 1, 1993 to an individual who is a "new borrower" on the date the individual applies for the loan.[177] Major Hostetter.

Survivor Benefits

Congress has made special provision in the recent National Defense Appropriations Act[178] for the survivors of soldiers who died between 28 October 1992 and 1 December 1992. Servicemen's Group Life Insurance (SGLI) beneficiaries of soldiers who died "in the performance of duty" between these dates may apply to the Defense Finance and Accounting Service for an additional death gratuity.[179] The amount of the gratuity will be equal to the SGLI proceeds paid or payable to each SGLI beneficiary.

Why the special gratuity? The Veterans' Benefits Act of 1992[180] was enacted on 29 October 1992. One provision of that act doubled the maximum available SGLI coverage from $100,000 to $200,000.[181] The increase, however, did not take

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[173] These government insured student loans are now collectively referred to as Federal Family Education Loan (FFEL) programs, which are divided into the Stafford Loans Program, the Federal Supplemental Loans for Students (SLS) Program, the Federal PLUS Program and the Federal Consolidation Loan Program. 34 C.F.R. § 682.100 (1993).

[174] 20 U.S.C. § 1078 (b)(1)(M) (1992) provided that periodic installments of principal need not be paid during any period "not in excess of 3 years during which the borrower is a member of the Armed Forces of the United States. . . ."

[175] Pub. L. No. 102-325, 106 Stat. 519, § 416(e)(1) (to be codified as amended at 20 U.S.C. § 1078 (b)(1)(M)) reduced from 11 to 3 the number of clauses enumerating the periods during which periodic installment payments of principal need not be paid. Note that Pub. L. 103-203, 107 Stat. 2457 (1993) made technical amendments to the Higher Education Amendments Act of 1992. These changes did not affect deferment eligibility for military persons.

[176] "A borrower shall be considered to have an economic hardship if such borrower is working full-time and is earning an amount which does not exceed the greater of the minimum wage rate . . . or an amount equal to 100% of the poverty line for a family of 2 . . . or such borrower meets such other criteria as are established by the Secretary by regulation. . . . In establishing criteria . . ., the Secretary shall consider the borrower's income and debt-to-income ratio as primary factors."

Pub. L. 102-325, § 416 (e)(2).

[177] *Id.* § 432(a)(3). The Department of Education anticipates publishing its notice of proposed rulemaking in the *Federal Register* during Spring 1994. Telephone interview with the Department of Education (Jan. 3, 1994). *See* 58 Fed. Reg. 56,253 (1993) (to be codified at 34 C.F.R. § 682). When rules are published, legal assistance attorneys should look for the definition of "new borrower" and ask whether clients with "old" and "new" loans are able to defer automatically the entire amount or just the "old" portion. Questions may be addressed to Chief, Loans Branch, Division of Policy Development, Department of Education, Office of Postsecondary Education, 400 Maryland Avenue, SW, Room 4310, ROB-3, Washington, D.C. 20202-5449.

[178] H.R. Res. 3116, 103d Cong., 1st Sess., 139 CONG. REC. S13,298-02 (1993) (enacted).

[179] *Id.* § 8136.

[180] The Veterans' Benefits Act, Pub. L. No. 102-568, § 201, 106 Stat. 4324 (1992).

[181] *Id.* § 201.

effect until 1 December 1992. Apparently, the new National Defense Appropriations Act provision was intended to assuage the complaints of those SGLI beneficiaries whose deceased insureds never had the opportunity to take advantage of the increase in SGLI coverage.[182]

Application for the gratuity must be in writing and be received by the Department of Defense no later than 30 September 1994.[183] Major Peterson.

Administrative and Civil Law Notes

Digest of Opinion of The Judge Advocate General: Revocation of Pass and Confiscation of Civilian Clothes

What can a commander do to ensure a soldier's presence for disciplinary proceedings when the commander determines that pretrial confinement is not necessary? A commander in United States Army Europe (USAREUR) revoked the pass privilege of such a soldier and confiscated and stored the soldier's civilian clothing. In response, the soldier submitted an Article 138 complaint. The General Courts-Martial Convening Authority (GCMCA) denied the complaint and The Assistant Judge Advocate General for Military Law and Operations determined that the denial was proper.[184]

The soldier was being administratively discharged for commission of a serious offense—disobeying a noncommissioned officer—and for repeated failures to repair. After approval of the discharge, but prior to actual discharge, the soldier committed additional misconduct when he withdrew $400 from his closed account. His commander stopped the administrative discharge and started an investigation. While the investigation was pending, the soldier allegedly drove after his driving privileges had been revoked, committed adultery, transferred tax exempt goods to a German national, and failed to repair. In view of this and prior failures to repair, his commander considered him to be a flight risk, revoked his pass privilege, and confiscated his civilian clothing.

The analysis supporting The Assistant Judge Advocate General's decision concluded that "[t]he need to ensure the [soldier's] presence at . . . disciplinary proceedings, the [soldier's] overall poor conduct, and his refusal to operate within the parameters set for him (driving with suspended privileges) clearly underscore the reasonableness of the . . . decision to revoke [his] pass privileges." The analysis noted that the revocation of pass privileges did not rise to the level of a restriction.

In their review of the complaint, The Office of the Judge Advocate General, United States Army (OTJAG) considered provisions of *Army Regulation 630-5*,[185] *(AR 630-5)* and *Army Regulation 670-1*[186] *(AR 670-1).*

The Office of The Judge Advocate General first considered whether it was permissible to revoke the soldier's pass privilege. *Army Regulation 630-5* provides that "passes are not a right to which one is entitled, but [are] a privilege to be awarded to deserving soldiers."[187] In deciding whether a particular soldier is deserving, a commander may consider the soldier's conduct.[188] A commander also may revoke a soldier's pass privilege "to ensure the presence and availability of [the soldier]. . . ."[189] Revocation of this soldier's pass privilege was appropriate because of the soldier's misconduct and because of the need to ensure his presence for disciplinary action.

The Office of The Judge Advocate General then considered whether it was permissible to confiscate and store the soldier's civilian clothing. *Army Regulation 670-1* provides that "[c]ommanders . . . may restrict the wear of civilian clothes by those soldiers who have had their pass privileges revoked under the provisions of AR 630-5."[190] *United States Army Europe Pamphlet 27-5*[191] contains a similar provision and goes one step further. *United States Army Europe Pamphlet 27-5* allows commanders to confiscate and store civilian clothing when a soldier violates an order not to wear civilian

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[182] Eligibility for the gratuity is affected if the insured, prior to death, made a written SGLI election in anticipation of the 1 December change in the law. If the insured affirmatively elected to take no SGLI increase, then no gratuity will be paid to the SGLI beneficiary. If the insured elected an increase to something less than the $100,000 allowable, the gratuity will be paid in the amount of the increase so elected. National Defense Appropriations Act, *supra* note 178 § 8136.

[183] *Id.* Potential applicants should contact the local finance and accounting office for information on how to file a claim. If time is of the essence, and filing information is not immediately available from the local finance and accounting office, applicants should probably make their application by certified letter to Commander, DFAS-IN, Indianapolis, Indiana 46249.

[184] Article 138 Complaint, Op. Admin. L. Div., Off. JAG, Army, DAJA-AL/1127 (20 July 1993).

[185] DEP'T OF ARMY, REG. 630-5, PERSONNEL ABSENCES: LEAVES AND PASSES (1 July 1984) [hereinafter AR 630-5].

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

[187] AR 630-5, *supra* note 185, para. 11-1a.

[188] *Id.* para. 11-1c.

[189] *Id.* para. 11-1d.

[190] AR 670-1, *supra* note 186, para. 1-13a.

[191] U.S. ARMY, EUROPE, PAM. 27-5, LEGAL SERVICES: LEADERS CORRECTIVE AND ADMINISTRATIVE ACTION, para. 20 (27 Sept. 1984).

clothing or when a soldier demonstrates an intent to violate such an order. In this case "[t]he degree of the [soldier's] misconduct, his demonstrated disregard for authority (disobeying an NCO, driving with suspended driving privileges), and the strong possibility of court-martial charges [demonstrated] the [soldier] would not comply with any such order."

Consequently, OTJAG concluded that the GCMCA properly determined that the unit commander complied with regulation and properly exercised discretion in revoking the soldier's pass privilege and in confiscating and storing the soldier's civilian clothing. Major Emswiler.

Claims Report

United States Army Claims Service

Tort Claims Note

Special Tort Database Entries for AAFES and NAFI Claims

In the Claims Report of the November 1993 issue of *The Army Lawyer*, we reviewed the special steps that Army claims offices need to take in investigating and processing claims that arise from acts or omissions of employees of the Army and Air Force Exchange Service (AAFES) or other nonappropriated fund instrumentalities (NAFI). As claims office personnel, you should be aware that the Tort & Special Claims Management Program (Tort Database) contains special entries for these claims. Like the special steps for investigating and processing claims, you should be using these entries for AAFES and other NAFI claims. They will help you and the Claims Service in monitoring AAFES and other NAFI claims to ensure that we are handling them properly.

When entering data in the Tort Database for AAFES or other NAFI claims, the first "screen label" or "data field" that needs your special attention is the "Chap" field. You always should enter "2" representing chapter 12 of *Army Regulation 27-20 (AR 27-20).*[1] You should use the "2" entry for AAFES and other NAFI claims even though *AR 27-20*, paragraph 12-3a, directs that you should process the claims using the procedures of other chapters of *AR 27-20.*

The second data field that needs particular attention is the "Damage Synopsis" field. When a claim arises from AAFES activities, enter "AAFES" as the first five characters in this field. When the claim arises from the activities of other NAFIs, and is in excess of $100, enter "ACIF" as the first four characters in this field, to denote that the payment will come from the Army Central Insurance Fund.

We recently reviewed the Tort Database and it was apparent that widespread problems exist in correctly identifying NAFI claims. Common errors include: erroneously identifying Defense Commissary Agency claims as NAFI claims; confusing AAFES auto repair facilities with automotive craft shops; entering a number other than "2" in the "Chap" field for AAFES and other NAFI claims; and failing to enter "AAFES" or "ACIF" in the "Damage Synopsis" field. Claims supervisors should periodically review the basic categories of NAFIs with subordinates who make Tort Database entries and encourage them to seek guidance if they are unsure of the correct Tort Database entry.

You may wish to review pages twenty-one, twenty-two, and twenty-six of the *Users Manual for Revised Tort & Special Claims Management Program.* Contact the Chief, Operations & Records Branch, Tort Claims Division, DSN 923-3472, if you have questions concerning these entries. Lieutenant Colonel Kirk.

Personnel Claims Notes

Theft from Vehicles

Army Regulation 27-20, paragraph 11-4e and *Department of the Army Pamphlet 27-162,*[2] paragraph 2-29, specify circumstances under which vehicle losses are cognizable. One of these circumstances is theft from a secured vehicle at quarters or other authorized places.

On several claims, a question has arisen as to what qualifies as a secured vehicle when the theft is from a jeep or other similar vehicle that has a soft top and nonmetal doors with nonglass windows that cannot be locked or that is easily opened by removing the doors from their hinges or unsnapping the

[1] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

[2] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989).

top from the sides of the vehicle. Normally, thefts from these types of vehicles are not considered compensable because these vehicles offer no deterrence to any would-be thief.

Owners of such vehicles, who purchase factory installed stereo or radio equipment or who install stereo or radio equipment, should be warned that thefts from these vehicles normally will not be payable barring extraordinary circumstances. Advise these individuals of the risks involved and of the need to consider purchasing insurance to cover the contents of the vehicle.

Claims offices should publish this information in their local newspaper or bulletin. Lieutenant Colonel Kennerly and Ms. Zink.

Carton Capacity of Compact Discs

Do you know how many compact discs or record albums or a combination of the two will fit into a 1.5 cubic foot carton? In several claims, this question has arisen when the claimant indicated on his or her *DD Form 1840R*[3] or *DD Form 1844*[4] that he or she owned in excess of 100 compact discs, but had no proof of ownership other than one inventory line number that listed "compact discs—1.5 ctn." This question also bothered the carrier industry, and industry personnel provided the Claims Service with some interesting information.

Industry personnel determined that 165 compact discs fit in a 1.5 cubic foot carton. If the carton contains record albums, as well as compact discs, a maximum of sixty-five compact discs and sixty record albums fit when the record albums are placed flat in the bottom of the carton. If the record albums are standing on end, thirty record albums and a maximum of sixty-five compact discs will fit in a 1.5 cubic foot carton. This information is provided as guidance to assist in the adjudication of claims and in the recovery process. Ms. Schultz.

[3] Dep't of Defense, DD Form 1840R, Notice of Loss or Damage (Jan. 1988).

[4] Dep't of Defense, DD Form 1844, List of Property and Claims Analysis Chart (Feb. 1989).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

1994 National Guard Judge Advocate Training Workshop

The 1994 National Guard Judge Advocate Training Workshop will be held at the Army Professional Training Center, Camp Robinson, Little Rock, Arkansas from 26 to 31 March 1994. The Workshop is open to all National Guard judge advocates. The Workshop will focus on "traditional" Guard issues 26 through 28 March, and on AGR issues 29 through 31 March. You may attend all or part of the Workshop. There is no cost for housing and meals may be taken at the dining facility. Individuals are responsible for arranging travel expenses and personal pay with their respective organizations. Registration fee is $30.00 for traditional Guard judge advocates and $40.00 for AGR participants. The point of contact for the Workshop is Major Doug House at (501) 791-5030, and the point of contact at National Guard Bureau, Judge Advocate, is Lieutenant Colonel James Thompson at (703) 693-3814. Lieutenant Colonel Menk.

The Reserve Component Library

The following publications are of special interest to the Reserve Component. Judge advocates should add these publications to their staff judge advocate office libraries. Captain Parker.

The Guard and Reserve in the Total Force (Library of Congress number 84-601118). This book addresses historical philosophy, specific events, and individuals that influenced the "Total Force" structure of today's military.

The National Guard; A Compact History (Library of Congress number 70-130739). This book addresses the development of the National Guard from 1887-1975.

The Militia and the National Guard (Library of Congress number 93-14047). Written as a research guide, this book discusses the historical evolution of the citizen soldier from colonial times to the 1990s.

The Miracle Man in Peace and War (Library of Congress number 63-22141). A historical account of the development of the National Guard from the late 19th Century to the mid-1960s.

Economic Impact Study of the Idaho National Guard (Library of Congress number 90-622789). A publication by the Business College of Boise State University which explains the contributions of the "Guard" to local communities and the state. Addresses benefits directly related to the National Guard on employment, education, taxes, community stability, and area growth and development.

The National Guard in Politics (Library of Congress number 65-11588). A civilian's perspective on politics and the development of the National Guard.

The Judge Advocate Officer Advance Course (JAOAC) Phase I Deadline

Reserve Component judge advocates enrolled in Phase I of JAOAC, the correspondence phase, must fully complete and mail in this phase by 15 May 1994 to be eligible to attend Phase II of JAOAC, the resident phase, this summer. I highly recommend that students complete and mail in *JA 151, Fundamentals of Military Writing*, by 1 April 1994. This early completion will allow time for any corrections to be made before the 15 May 1994 deadline mentioned above. Students should mail all courses to The Judge Advocate General's School, United States Army, ATTN: Correspondence Course Office, Charlottesville, Virginia 22903-1781.

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
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 COL Cullen 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 32 Ayer Avenue San Jose, CA 95110 (408) 297-9172 X204
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 601 N. Carrollton Ave. New Orleans, LA 70119 (504) 282-6439
9 Apr 94	Indianapolis, IN INARNG IN War Memorial Auditorium 431 N Meridian St. Indianapolis, IN 46241	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 (317) 247-3449 FAX (317) 247-3198
23-24 Apr 94	Atlanta, GA 81st ARCOM Atlanta Airport Hilton 1030 Virginia Avenue Atlanta, GA 30354	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden MAJ Warner 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 Hudson 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 Columbus Marriott North Hotel 6500 Doubletree Avenue Columbus, OH 43229	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane COL Schempf	LTC Thomas G. Schumacher 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: ARPC-ZJA-P, 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

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).

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

June 1994

1-3, GWU: Patents, Technical Data, and Computer Software, Washington, D.C.

1-3, ESI: Just-in-Time and Systems Contracting, Washington, D.C.

6-10, GWU: Administration of Government Contracts, Anchorage, AK.

6-10, ESI: Federal Contracting Basics, San Diego, CA.

6-10, ESI: Accounting for Costs on Government Contracts, Washington, D.C.

10-11, PBI: 11th Annual Criminal Law Symposium, Harrisburg, PA.

10-11, LRP: Consumer Bankruptcy Law, Chicago, IL.

12-24, NCDA: Career Prosecutor Course, Houston, TX.

13-14, GWU: A Practical Introduction to Government Contracting, Washington, D.C.

13-17, ESI: Defense Program Management, Washington, D.C.

13-17, GWU: Cost-Reimbursement Contracting, Seattle, WA.

14-17, ESI: Competitive Proposals Contracting: Negotiated Procurement Using Best-Value Techniques, Denver, CO.

20-24, ESI: Operating Practices in Contract Administration, Washington, D.C.

20-24, ESI: Managing Projects in Organizations, Washington, D.C.

21-24, ESI: Contracting for Services, Denver, CO.

27-29, ESI: Strategic Purchasing, Washington, D.C.

27-29, ESI: International Project Management, Washington, D.C.

28-29, ESI: Export Controls and Licensing, Washington, D.C.

30-July 3, NIBL: Western Mountains Bankruptcy Law Institute, Jackson Hole, WY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.

AAJE: American Academy of Judicial Education, 1613 15th Street - Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104-3099. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (510) 642-3973.

CLA: Computer Law Association, Inc., 8303 Arlington Boulevard., Suite 210, Fairfax, VA 22031. (703) 560-7747.

CLEI: CLE International, 999 18th Street, Suite 2260, Denver, CO 80202. (303) 297-1223.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FBA: Federal Bar Association, 1815 H Street, NW., Suite 408, Washington, D.C. 20006-3697. (202) 638-0252.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (706) 369-5664.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

JMLS: John Marshall Law School, 315 South Plymouth Court, Chicago, IL 60604. (312) 427-2737, ext. 573.

LRP: LRP Publications, 1555 King Street, Suite 200, Alexandria, VA 22314. (703) 684-0510, (800) 727-1227.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NCJFC: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NIBL: Norton Institutes on Bankruptcy Law, P.O. Box 2999, 380 Green Street, Gainesville, GA 30503. (404) 535-7722.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

SUCLE: Stetson University CLE, 1401 61st Street South, St. Petersburg, FL 33707. (813) 345-1121

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

TLS: Tulane Law School, Tulane University CLE, 8200 Hampson Avenue, Suite 300, New Orleans, LA 70118. (504) 865-5900.

TPI: The Philadelphia Institute, 2133 Arch Street, Philadelphia, PA 19103. (215) 567-4000.

UCSD: University of California at San Diego School of Law, Alcala Park, San Diego, CA 92110.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually

Jurisdiction	Reporting Month
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1994 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

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 A274370 Tax Information Series/JA 269(94) (129 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 A273376 The Law of Federal Employment/JA-210(93) (262 pgs).

*AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

*AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

*AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

*AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

*AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

*AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

*AD A274413 United States Attorney Prosecutions/JA-338(93) (194 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 U.S.C. 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 Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicat-

ed to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed fulltime by the federal government;

(d) Army Reserve and Army NG judge advocates not on active duty (access to OPEN and the pending RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

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

(h) Individuals with approved, written exceptions to the access policy.

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

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing 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 new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight 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 BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, 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. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) 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 onto the LAAWS BBS, take the following steps:

(a) When asked 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 asked 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 up the exploded file "XXXXX.DOC", by following instructions 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.
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.
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.

FILE NAME	UPLOADED	DESCRIPTION
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.ZIPAugust 1993Defensive Federal Litigation—Part A, June 1993. JA200B.ZIPAugust 1993Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	November 1993	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235.ZIP	August 1993	Government Information Practices.
NA241.ZIP	August 1993	Federal Tort Claims Act.
JA260.ZIP	September 1993	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1993	Legal Assistance Real Property Guide.
JA262.ZIP	June 1993	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA265A.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part A, September 1993.
JA265B.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part B, September 1993
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notarial Guide.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	June 1993	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	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
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.

FILE NAME	UPLOADED	DESCRIPTION
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.
JA506.ZIP	November 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.
V1YIR91.ZIP	January 1992	Volume 1 of TJAGSA's 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.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for CY 1991.

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 Doctrine, Developments, 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, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

4. 1994 Contract Law Video Teleconferences (VTC)

March VTC Topic (to be determined)

23 Mar, 1400-1600: FORSCOM installations, HSC, AMCCOM, ATCOM, TACOM, White Sands Missile Range, Picatinny Arsenal

24 Mar, 1530-1730: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

April VTC Topic: Procurement Management Reviews (SARDA)

19 Apr, 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

22 Apr, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

May VTC Topic (to be determined)

16 May, 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

17 May, 1500-1700: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

June VTC Topic (to be determined)

15 June, 1400-1600: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

17 June, 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

July VTC Topic (to be determined)

18 July, 1530-1730: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

19 July, 1530-1730: TRADOC installations, ISC, DESCOM, ARL, MICOM

October VTC Topic (to be determined)

5 Oct, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Oct, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined)

8 Nov, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

9 Nov, 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined)

5 Dec, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Dec, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

NOTE: Mr. Moreau, Contract Law Division, OTJAG, is the VTC coordinator. If you have any questions on the VTCs or scheduling, contact Mr. Moreau at commercial: (703) 695-6209 or DSN: 225-6209. Topics for 1994 VTCs will appear in future issues of *The Army Lawyer.*

5. Articles

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

William D. Meyer, *Remnants of Eastern Europe's Totalitarian Past: The Example of Legal Education in Bulgaria,* 43 J. OF LEGAL EDUC. (1993).

Philippe Lieberman, *Expropriation, Torture, and* Jus Cogens *Under the Foreign Sovereign Immunities Act:* Siderman de Blake v. Republic of Argentina, 24 U. MIAMI INTER-AM. L. REV. (1993).

A. Louis DiPietro, *Lies, Promises, or Threats; The Voluntariness of Confessions,* 22 POLYGRAPH 258 (1993).

Brian C. Jayne, *The Use of Alternative Opinions in the Polygraph Technique,* 22 POLYGRAPH 313 (1993).

Thomas W. Miller & Lane J. Velkamp, *Family Violence: Clinical Indicators among Military and Post-Military Personnel,* 158 MIL. MED. 766 (1993).

Casenote, *The "Plain Feel" Exception—A Fourth Amendment Rendition of the Princess and the Pea:* State v. Dickerson, 62 U. CIN. L. REV. 321 (1993).

Grayson M.P. McCouch, *Timely Disclaimers and Taxable Transfers, in* 47 U. MIAMI L. REV. 1043 (1993).

Jeannette DeVaris, *Child Testimony: A Developmental and Contextual Perspective,* 30 CT. REV. 5 (1993).

Pamela Carpenter, *Lives of Misery: Battered Women and Expert Evidence,* 30 CT. REV. 8 (1993).

Leonard Haber, *Recognizing the Battered Woman Syndrome,* 30 CT. REV. 19 (1993).

6. 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.

7. New or Changed Publications.

PUBLICATION NUMBER	*TITLE*	*DATE*
AR 600-8-3	The Total Army Sponsorship Program	1 July 93
CIR 380-93-1	Department of the Army Implementing Instructions for the Classified Information Nondisclosure Agreement (NDA)	30 Sept 93
AR 190-13	The Army Physical Security Program	30 Sept 93
AR 190-40	Serious Incident Report	30 Nov 93
AR 190-51	Security of Army Property at Unit and Installation Level	30 Sept 93
AR 600-100	Army Leadership	17 Sept 93
AR 621-5	Army Continuing Education System (ACES)	17 Nov 93
PAM 350-20	Unit Equal Opportunity Training Guide	30 Aug 93
PAM 600-5	Handbook for Retiring Soldiers and Their Families	30 Aug 93
PAM 600-75	Accommodating Religious Practices	22 Sept 93

8. 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:

Office of the Staff Judge Advocate, Attn: CE3 J. Michael Perdue, HQS, USA Garrison, Fort Ord, CA 93941. Commercial: (408) 242-2424, DSN: 929-2424.

- CMR, Vol 31
- MJR Volumes

1-7	3 copies
8	4 copies
9-11	3 copies
12	2 copies
13	3 copies
14	4 copies
15	3 copies
16-19	5 copies
20	4 copies
21	6 copies
22-29	5 copies
30	4 copies
31-34	5 copies

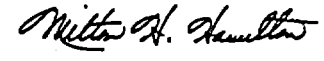
Office of the Staff Judge Advocate, Attn: MAJ Natalie Grifin, HQ US Army Communications-Electronics Command & Fort Monmouth, Fort Monmouth, NJ 7703-5010. Commercial: (908) 389-4442 DSN: 992-4442.

- Government Contract Reports
- U.S. Law Week
- U.S. Supreme Court Digest (West)
- U.S. Supreme Court Digest (Lawyers Coop.)
- U.S. Supreme Court Reports (Lawyers Coop.)

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
06382

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