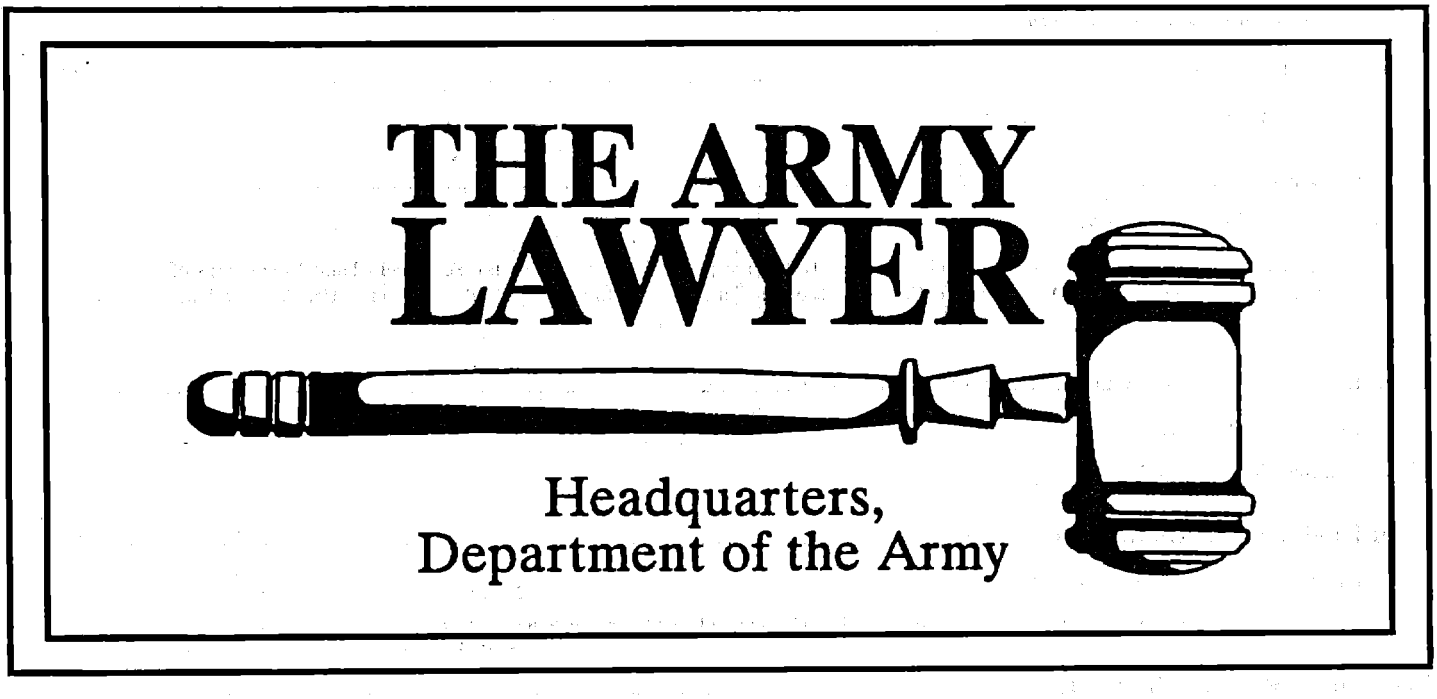

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Annual Review of Developments in Instructions (1995)

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Introduction

This article reviews the significant 1995 developments in the law pertaining to military judges' instructions to court members.[1] This article will discuss developments based on case law and the most recent change to the *Manual for Courts-Martial* (*Manual*).[2] It will also discuss developments contained in the updates to the *Military Judges' Benchbook* (*Benchbook*)[3] promulgated by the Office of the Chief Trial Judge, United States Army Trial Judiciary. During the past year, two of these updates were issued.[4] An updated checklist of *Benchbook* instructions, including new instructions contained in the updates, is included in Appendix A to this article.

Instructions on Offenses

The military judge is required to instruct on the elements of offenses.[5] Defining the terms used in the elements of the offenses is an important part of these instructions. *United States v. Sneed*[6] is an example of how important such definitions can be. In *Sneed*, the accused was an evidence custodian who stole items from the evidence room. He was charged with wrongful disposition of military property under Article 108 of the Uniform Code of Military Justice (UCMJ)[7] and with larceny of military property under Article 121 of the UCMJ.[8] The military judge was required to define the term "military property" because it was a statutory element of Article 108 and a sentence escalator under Article 121. The military judge instructed the members that "the maintenance of items of evidence is an indispensable part of the [military justice] system; thus, if you find that the items listed in this specification [were] properly surrendered to the hands of the military to permit its use in evidence, you can conclude that it is military property."[9]

In upholding this instruction, the Court of Appeals for the Armed Forces (CAAF) noted that it is "the function to which property is put as evidence in courts-martial, notwithstanding that it is privately owned, [which] qualifies that property as military property of the United States."[10] The CAAF found that, given the importance of the military justice system, the trial judge's definition was proper.

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[1] This article is one in a series of annual articles reviewing instructional issues. *See, e.g.*, Gary J. Holland & R. Peter Masterton, *Annual Review of Developments in Instructions*, ARMY LAW., Mar. 1995, at 3.

[2] Exec. Order No. 12,960, 60 Fed. Reg. 26,647 (1995), *reprinted in* MANUAL FOR COURTS-MARTIAL, United States, app. 25, at A25-26 (1995 ed.) [hereinafter MCM].

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

[4] Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 14 (21 Mar. 1995) [hereinafter Update Memo 14]; Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 15 (27 June 1995) [hereinafter Update Memo 15].

[5] MCM, *supra* note 2, R.C.M. 920(e).

[6] 43 M.J. 101 (1995).

[7] UCMJ art. 108 (1988).

[8] *Id.* art. 121.

[9] *Sneed*, 43 M.J. at 103.

[10] *Id.* at 104.

United States v. Murray[11] is another example of the importance of definitions. The accused in *Murray* was convicted of, among other things, communicating a threat. The victim, the accused's former girlfriend, testified that the accused attacked and raped her and then threatened to kill her if she told the police. The accused testified that his sexual act with his girlfriend was consensual, and when she threatened to harm his wife and child he told her he would kill her if she did so.

The defense requested an instruction that "contingent words will neutralize threat declarations . . . where there is no reasonable possibility that the uncertain or contingent events will occur." The military judge refused to give the requested instruction and instructed the members on the elements of the offense, including the requirement that the communication be "wrongful" without defining wrongful.

The Air Force Court of Criminal Appeals (AFCCA) set aside the conviction of communicating a threat because the instructions were inadequate. The AFCCA found that the contingent nature of the accused's words were not important; it was their *wrongfulness* that was important. The AFCCA held that the judge erred by not defining the term "wrongful" and by not explaining that threats expressed for a legitimate purpose, such as defense of family, are not wrongful. Even though the defense did not object on these grounds, the AFCCA reversed because the judge had a *sua sponte* duty to instruct on the elements of the offense.[12]

Murray is also a good example of the relationship between instructions on the elements of the offense and instructions on affirmative defenses. Another way of looking at the trial judge's error in *Murray* is that the judge failed to instruct the members on the affirmative defense of legitimate purpose.[13] Under this theory, the judge should have told the jury that the accused had a complete defense if his threats were expressed for a legitimate purpose. Either way, the result is the same because the judge has a *sua sponte* duty to instruct on affirmative defenses.[14]

United States v. Cowan[15] is an example of the importance of precision in instructing on the elements of the offense. The accused in *Cowan* was charged with unpremeditated murder for stabbing and failing to render assistance to a drunken soldier. The accused had been drinking heavily with the victim, and the accused became upset when the victim returned to his barracks room and fell asleep. After spending some time alone with the victim, the accused rushed out of his room and called for an ambulance. The victim was found unconscious with several stab wounds, which caused him to bleed to death.

The military judge's instructions on the elements of the offense were inconsistent. He instructed the members several times that, to convict, it was necessary to find that the accused committed both the stabbing and the failure to render assistance. However, he also instructed that they only needed to find one or the other to convict. The CAAF found the instructions to be in error, pointing out that a failure to act is punishable only if the accused had a legal duty to act. However, the CAAF held that the instructional error was harmless beyond a reasonable doubt because the members convicted the accused of involuntary manslaughter based on both stabbing and failure to render assistance. Obviously, the better practice is to ensure that instructions on the elements of the offense are consistent and correct.

A valuable lesson from *Cowan* is the importance of instructing on every element. When a judge omits an element entirely, the error may not be tested for harmlessness; however, when a judge instructs erroneously on an element, this error may be tested for harmlessness, as the CAAF did in *Cowan*.[16]

During 1995, the Office of the Chief Trial Judge, United States Army Trial Judiciary, published two updates to the *Benchbook* dealing with instructions on offenses. These updates concerned the elements and definitions involved in wrongful disposition of military property under Article 108, UCMJ,[17] and obstruction of justice under Article 134, UCMJ.[18] These updates are designed to incorporate the latest changes in the law into the *Benchbook*. These updates demonstrate the importance of keeping abreast of changes in the law and the danger in blind adherence to the *Benchbook* instructions.

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[11] 43 M.J. 507 (A.F. Ct. Crim. App. 1995).

[12] *Id.* at 512. *See also* MCM, *supra* note 2, R.C.M. 920(e)(1); United States v. Mance, 26 M.J. 244, 256 (C.M.A. 1988).

[13] *Id.* at 512; MCM, *supra* note 2, R.C.M. 916(a).

[14] *Id.* at 513; MCM, *supra* note 2, R.C.M. 920(e)(3); United States v. Martinez, 40 M.J. 426, 431 (C.M.A. 1994). However, the result may be different if, as some courts have suggested, the accused can affirmatively waive instructions on an affirmative defense. *See* United States v. Barnes, 39 M.J. 230, 233 (C.M.A. 1994); United States v. Weinmann, 37 M.J. 724, 727 (A.F.C.M.R. 1993) (no authority for the accused to waive instructions on elements).

[15] 42 M.J. 475 (1995).

[16] *Id.* at 477-78. *See also* United States v. Mance, 26 M.J. 244, 255-56 (C.M.A. 1988).

[17] Update Memo 14, *supra* note 4.

[18] Update Memo 15, *supra* note 4.

Instructions on Lesser Included Offenses

The most significant recent case dealing with instructions on lesser included offenses is *United States v. Weymouth*.[19] Prior to *Weymouth*, the Court of Military Appeals (COMA)[20] held in *United States v. Foster*[21] that the *Blockburger*[22] statutory-elements test must be used to determine whether one offense is a lesser included offense of another. In *Weymouth*, the CAAF held that both the statutory-elements and the elements alleged in the language of the specifications must be considered when applying the military elements test.

The accused in *Weymouth* was charged with attempted murder, assault with intent to commit murder, aggravated assault with a dangerous weapon, and aggravated assault by intentional infliction of grievous bodily harm. All of these charges were based on a single incident in which the accused stabbed the victim with a knife, wounding him seriously. At trial, the military judge dismissed all three of the assault offenses, finding them to be lesser included offenses of attempted murder and, therefore, multiplicious for findings purposes. The government filed an interlocutory appeal to this ruling.[23] The Air Force Court of Military Review upheld the military judge's decision.[24]

The CAAF held that the military judge did not abuse his discretion and analyzed the *Blockburger* statutory-elements test used by federal courts,[25] which the military has now adopted.[26] The *Blockburger* statutory-elements test is met if all the elements of the lesser offense are included within the elements of the greater offense.[27] The CAAF found that, because of the differences between military and federal practice, the military elements test must encompass the statutory-elements as well as the elements contained in the language of the specifications.

The CAAF noted that the language of the attempted murder specification in *Weymouth* included the language "by means of stabbing [the victim] in the abdomen with a knife." Because this language alleged an assault, the CAAF found that the assault with intent to commit murder and aggravated assault with a dangerous weapon specifications were included within the attempted murder specification. This would not have been the case if only the elements in the *Manual* were considered because attempted murder does not require any assault.[28]

The CAAF also found that, although the aggravated assault by intentional infliction of grievous bodily harm specification was not necessarily included within the attempted murder specification, the judge did not abuse his discretion by dismissing this charge. Military judges may exercise their discretion in dismissing specifications to prevent prosecutors from needlessly piling on charges even though the dismissed specifications may not be lesser included offenses.[29]

The CAAF pointed out in *Weymouth* that it had not retreated to the old "fairly embraced" standard, which it discarded in *United States v. Teters*.[30] However, by looking to the language of the specification to determine lesser included offenses and, therefore, multiplicity issues, the CAAF has come quite close. The closeness is seen in the CAAF's statement: "*As alleged*, proof of the greater offense must invariably prove the lesser offense; otherwise the lesser offense is not included."[31]

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[19] 43 M.J. 329 (1995).

[20] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act also changed the name of the various Courts of Military Review to the Courts of Criminal Appeals. In this article, the title of the court that was in place at the time the decision was published will be used.

[21] 40 M.J. 140 (C.M.A. 1994).

[22] Blockburger v. United States, 284 U.S. 299 (1932).

[23] UCMJ art. 62 (1988).

[24] United States v. Weymouth, 40 M.J. 798 (A.F.C.M.R. 1994).

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

[26] This test was initially adopted in United States v. Teters, 37 M.J. 370 (C.M.A. 1993). In *Teters*, the COMA applied the elements test to determine multiplicity for findings. In *Foster*, the COMA recognized that the elements test also applied to the related issue of lesser included offenses. *Foster*, 43 M.J. at 142.

[27] *Blockburger*, 284 U.S. 299 (1932); *Schmuck*, 489 U.S. 705 (1989); *Teters*, 37 M.J. 370 (C.M.A. 1993).

[28] The elements of both of the assault specifications include an assault, which is not necessarily an element of attempted murder. MCM, *supra* note 2, pt. IV, ¶¶ 4b, 54b(4)(a), and 64b.

[29] United States v. Morrison, 41 M.J. 482 (1995).

[30] 37 M.J. 370 (1993).

[31] United States v. Weymouth, 43 M.J. 329, 335 (1995).

In *Weymouth*, the CAAF tried to clarify the application of the elements test in determining lesser included offenses. The CAAF's attempt, however, has resulted in further confusion. Although the CAAF indicated it need not decide in *Weymouth* whether the government could create lesser offenses by creative drafting of specifications,[32] its opinion undoubtedly will result in trial counsel attempting to do so. This will certainly make the military judge's task more difficult because he or she must now carefully scrutinize the language of each specification to determine on which lesser included offenses to instruct. This is particularly important because military judges have a *sua sponte* duty to instruct on lesser included offenses raised by the evidence.[33]

Instructions on Defenses

Self-help

In 1994, the United States Army Trial Judiciary published an update to the *Benchbook* concerning the defense of self-help under a claim of right.[34] In *United States v. Gunter*,[35] the CAAF addressed the self-help defense. Although *Gunter* was a guilty plea case, the court's reasoning is important when considering whether the evidence in a case raises the defense of self-help.

Private First Class Gunter pled guilty to larceny of blank checks, forgery of the checks, larceny of money by cashing the checks, and wrongful appropriation of a car stereo. He alleged on appeal that his pleas were improvident because the military judge failed to adequately resolve the defense of self-help. Gunter alleged that his victims owed him money, which approximated the value of the thefts.[36] The CAAF affirmed his conviction.

The initial importance of the court's holding in *Gunter* is the outright rejection by the CAAF of self-help as a defense to forgery offenses.[37] This rejection should eliminate the use of self-help instructions in forgery cases. Of equal importance to practitioners is the CAAF's holding regarding self-help as a defense to larceny and wrongful appropriation offenses. The CAAF indicated that the self-help defense is a limited one. The right of self-help "must be based on an agreement between the parties providing for the satisfaction or the security of the debt in this fashion."[38] The CAAF also limited any claim-of-right defense by stressing that the taking under such a right must be done openly, not surreptitiously.[39]

The restrictions placed by the CAAF on the defense of self-help under a claim of right will result in this defense being even less frequently raised by the evidence. However, the holding of the case necessitates a change in the wording of the current *Benchbook* instruction. A revised instruction based on the CAAF's holding in *Gunter* is at Appendix B.

Duress

The AFCCA decided one reported case in 1995 addressing the defense of duress. In *United States v. Vasquez*,[40] the accused alleged that he was coerced into committing bigamy because the Turkish police had threatened to place him and others in jail if he did not marry a Turkish woman whom he had been dating. The woman and her friends were taken to the police station for questioning and, upon returning, told the accused that "they had to get married or everyone would be thrown in jail."[41] The accused testified "that he had seen a movie years ago that showed the torture of an American in a Turkish prison" and he believed that they would be imprisoned and subjected to "terrible conditions" if he did not marry the woman.[42]

The military judge gave the defense of duress instruction as it applied to the fear that the accused had for his safety, but declined to give the instruction as it related to his fear for the safety of his friends who would also be confined in a Turkish prison.[43] The military judge instructed that the accused had to be under the rea-

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[32] *Id.* at 337, n.5.

[33] United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985).

[34] Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 13 (23 Nov. 1994). *See* Holland & Masterton, *supra* note 1, at 6.

[35] 42 M.J. 292 (1995).

[36] *Id.* at 294.

[37] *Id.* at n.3. *See also* United States v. Birdsong, 40 M.J. 606, n. 2 (A.C.M.R. 1994).

[38] United States v. Gunter, 42 M.J. 292, 295 (1995).

[39] *Id.* at 297.

[40] 42 M.J. 544 (A.F. Ct. Crim. App. 1995).

[41] *Id.* at 545.

[42] *Id.*

[43] *Id.*

sonable apprehension that he would be immediately killed or immediately suffer serious bodily injury if the accused did not marry the Turkish woman.

On appeal, the accused contended that the judge erred by using the word "immediately" in the duress instruction. The AFCCA rejected this argument by stating that "[b]oth the *Manual for Courts-Martial*, and case law clearly require that the threat be immediate."[44] The AFCCA also indicated that the accused received a windfall. The AFCCA indicated that duress did not apply to the facts because "[a] threat to send someone to jail does not establish the potential harm necessary to raise the duress defense" and "[u]nsubstantiated fear of injury or harm is not sufficient to establish duress."[45] Because duress did not apply, the court held that the judge did nor err in refusing to give any instructions regarding the threatened harm, confinement in a Turkish jail, involving the accused's friends.

Based on the wording in the *Manual*[46] regarding the defense of duress, the current *Benchbook* instruction[47] appears erroneous in two respects. First, the instruction does not require the threat of harm to be immediate. Second, the instruction indicates that the harm must be directed either to the accused or to a member of the accused's immediate family. More accurately, the instruction should require the threatened harm to be immediate and the harm be directed to the accused or to "another innocent person." This person does not necessarily have to be a member of the accused's immediate family. A revised duress instruction is at Appendix C.

Divestiture

In *United States v. Sanders*,[48] the CAAF used a divestiture case to state the important principle that "[u]nlike the military judge's responsibility to instruct on every defense reasonably raised by the evidence . . ., he does not have an obligation *sua sponte* to instruct on every fact that may support that defense."[49] In *Sanders*, the judge instructed on the defense of divestiture involving an assault on a noncommissioned officer (NCO) where the evidence indicated that the NCO victim used profanity, pushed the accused, and invited the accused to hit him. When giving the divestiture instruction, the judge stated that the members "must consider all the relevant facts and circumstances including, but not limited to, the testimony of the accused that . . . [the victim] approached him in a menacing manner and that . . . [the victim] addressed him with profane language."[50] Nowhere in the instructions did the military judge say anything about the evidence that the NCO victim invited the accused to strike him. Elsewhere in his instructions, the judge did refer to the victim's "language and conduct" when referring to the divestiture defense.[51]

On appeal, the issue was whether the judge committed plain error in failing to include the NCO's invitation for the accused to strike the NCO in the judge's explanation of the divestiture defense. The court held there was no plain error and correctly couched the issue in terms of plain error because the failure of the defense counsel to object at trial waives this type of instructional error.[52] While not adding anything new to the law of divestiture, the *Sanders* case should remind counsel of "the responsibility . . . to object or request additional instructions if there is dissatisfaction with the instructions on the facts."[53]

Sanders should also serve to remind judges to accurately and impartially tailor instructions in the case to the evidence presented at trial. A practical tip for judges who are tailoring the instructions is to incorporate the facts in a general way and leave it to counsel to argue the specific facts to the members. In *Sanders*, the judge made the mistake of going too far by incorporating specific facts into his instructions that were contested at trial. When the judge gets too specific in reciting the evidence, the judge runs the risk of suggesting to the members that the recited evidence is true. Judges must remember that the members are the triers of fact.

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[44] *Id.* at 546.

[45] *Id.* at 547.

[46] MCM, *supra* note 2, R.C.M. 916(h), provides:

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or *another innocent person* would be *immediately* killed or would *immediately* suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply [Emphasis added].

[47] BENCHBOOK, *supra* note 3, para. 5-5.

[48] 41 M.J. 485 (1995).

[49] *Id.* at 486.

[50] *Id.*

[51] *Id.*

[52] MCM, *supra* note 2, R.C.M. 920(f).

[53] United States v. Sanders, 41 M.J. 485, 486-87 (1995).

The judge in *Sanders* could have easily avoided any issue in the divestiture instruction by *only* stating that the members had to consider all relevant facts and circumstances, to include the language and conduct of the NCO. The members would then be left to determine what language and conduct the NCO used and whether his actions removed his protected status. Before closing arguments, the judge is advised to hold an instructions Article 39(a) session[54] to inform counsel of the general language that the judge proposes to use in tailoring the instructions to the evidence and that the judge expects counsel to argue the specific facts as they see them during closing arguments.

Mistake of Fact

The disproportionate number of reported instructional cases in 1995 involving the defense of mistake of fact[55] suggests that appellate courts, trial judges, and counsel have a difficult time determining the applicability of the mistake-of-fact defense. Based on its decision in *United States v. Brown*,[56] the CAAF is apparently seeking to avoid further appellate issues concerning the mistake-of-fact defense in rape cases. The court indicated that in every rape where the defense theory is that the alleged victim consented to the sexual intercourse, "the military judge would be well-advised to either give the [mistake-of-fact] instruction *or* discuss on the record with counsel applicability of the defense."[57]

Any suggestion that the mistake-of-fact instruction should always be given may seem to be practical judgemanship, but it is not in complete accord with the law. Judges are only to instruct on a defense if it is reasonably raised by the evidence. A defense is reasonably raised if some evidence exists to which the court members may attach credit if they so desire.[58] If a rape victim testifies that the accused asked her if she would be willing to have sex and she said "no," and the accused testifies she said "yes," there would be no mistaken belief that the victim consented. In this case, the mistake-of-fact instruction should not be given.

The CAAF's suggestion that the military judge should instruct on mistake of fact, *unless* the defense counsel agrees it is not raised,[59] makes little sense. The judge has the *sua sponte* duty to instruct on all defenses raised by the evidence.[60] Whether the defense counsel believes the defense has been raised would not avoid appellate issues because the judge has the sole responsibility to decide if the instruction is applicable.[61]

The court's frustration over the mistake-of-fact defense in rape cases stems from cases such as *United States v. Willis*.[62] In *Willis*, the victim testified that she was asleep when the accused raped her. Sergeant Willis testified that the victim was fully awake and willingly participated in foreplay and consensual sexual intercourse. He immediately stopped the intercourse when the victim stated, "no this is wrong."[63] On appeal, the accused contended that the judge erred in not giving the mistake-of-fact instruction based on the accused's testimony that the victim was awake and responsive and the testimony of other witnesses that the victim was amicable toward the accused earlier in the evening.[64]

The majority opinion states that the testimony at trial did not hint of any possibility of a mistaken belief by the accused.[65] In essence, the majority opinion viewed the evidence at trial as being at two diverse ends of the spectrum—no consent versus actual consent. Viewing the evidence in the light most favorable to

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[54] Prior to giving instructions, the military judge should call the court into session without the presence of members to discuss instructions (UCMJ art. 39(a) (1988)).

[55] The authors found nine reported cases in military appellate courts concerning instructional issues about affirmative defenses in 1995. Seven of these cases concerned mistake of fact. One case concerned divestiture and the other concerned self-help.

[56] 43 M.J. 187 (1995).

[57] *Id.* at 190, n.3.

[58] United States v. Simmelkjaer, 40 C.M.R. 118, 122 (C.M.A. 1969); MCM, *supra* note 2, R.C.M. 920(e)(3).

[59] In *Brown*, the CAAF recommended that the *Benchbook* instruction should contain a note, written in two-inch high letters, stating "INSTRUCT ON REASONABLE AND HONEST MISTAKE IN ALL RAPE CASES INVOLVING CONSENT UNLESS THE DEFENSE COUNSEL AGREES THAT THE DEFENSE IS NOT RAISED." *Brown*, 43 M.J. at 190, n.3.

[60] United States v. Martinez, 40 M.J. 426, 431 (C.M.A. 1994).

[61] The only exception may be if the accused affirmatively waives instruction on the defense. Some courts have suggested that an accused can affirmatively waive instruction on an affirmative defense. United States v. Barnes, 39 M.J. 230, 233 (C.M.A. 1994); United States v. Weinmann, 37 M.J. 724, 727 (A.F.C.M.R. 1993). *Compare* United States v. Strachan, 35 M.J. 362 (C.M.A. 1992) (accused can affirmatively waive instructions on lesser included offenses).

[62] 41 M.J. 435 (1995).

[63] *Id.* at 437.

[64] *Id.*

[65] *Id.* at 438.

the accused, however, two possibilities exist. First, the victim consented, or secondly, the accused was mistaken about her lack of consent. Although the accused did not indicate at trial that he had any mistaken belief, this is not the standard to apply when deciding to instruct on a defense. As stressed by Judge Wiss in his dissent, the defense theory at trial is not dispositive regarding instructions on affirmative defenses.[66] Because the court members could attach credence to the evidence of mistaken belief by the accused, albeit not the defense theory of the case, the members "should have been provided the opportunity to consider such a scenario."[67] If the CAAF is concerned with practical judgemanship and avoiding appellate issues, then the mistake-of-fact instruction should be given in situations like that in *Willis*. This approach would place the responsibility on the court members to decide the case based on the facts and complete law, not solely the law sought by counsel.[68]

While the above cases concerned the mistake-of-fact instruction, the defense contended in *United States v. True*[69] that a portion of the standard *Benchbook* mistake-of-fact instruction[70] was in error. After having been asleep in the same room with the victim, Airman True indicated that he walked over to the couch where the victim was sleeping and, when he saw her eyes open, he immediately began to kiss, fondle, and undress her. Only when he had sexual intercourse with her did the victim awaken and jump up.[71] Based on these facts, the judge gave the mistake-of-fact instruction, to include instructing the members that, "[a]dditionally, the mistake cannot be based on a negligent failure to discover the true facts."

On appeal, the defense contended that this portion of the instruction permitted conviction based only on a negligence standard.[72] In rape cases, mistake-of-fact is a defense only if the mistake is both honest and reasonable.[73] The court in *True* had no difficulty finding that a person is not being reasonable if that person is negligent. The *Benchbook* mistake-of-fact instruction, therefore, constitutes a correct statement of the law.[74]

The mistake-of-fact instruction also posed problems in cases other than rape. Again, the primary issue in these cases was whether the evidence raised the defense. In *United States v. McDivitt*,[75] the accused separated from his wife after living with her and supporting her for only about six weeks. Five years later, not knowing his wife's whereabouts, he recertified his entitlement to his quarters allowances, falsely indicating that he had provided support to his wife for the preceding two years. His recertification gave rise to a charge of signing a false official record as well as larceny of the resulting higher allowances he received based on the false document.

The accused testified that a finance clerk had told him that he was entitled to the "with dependent rate" for quarters allowances until he was divorced.[76] The CAAF indicated that the statement by the finance clerk had nothing to do with the accused having made an honest mistake about the falsity of the record. Because the accused admitted that he had not provided any support for his wife during the preceding two years, he had made no mistake. He knew the true facts, yet falsified them. As the CAAF stated, because the accused knowingly signed a false record, "he cannot thereafter complain that he had made an honest mistake as to his intent for, in that instance, his falsity defeats the honesty of his purpose."[77] The trial judge, therefore, was correct in limiting the mistake-of-fact instruction only to the larceny offense.

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[66] *Id.* at 440 (Wiss, J., dissenting) (citing United States v. Taylor, 26 M.J. 127, 131 (C.M.A. 1988) and United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981)).

[67] United States v. Willis, 41 M.J. 435, 440 (1995) (Wiss, J., dissenting).

[68] Compare this case with *United States v. Barrick*, 41 M.J. 696 (A.F. Ct. Crim. App. 1995), where the court held that the military judge did not err in refusing to give a mistake-of-fact instruction in a rape case where the evidence reflected that the victim went to bed alone and awoke with the accused penetrating her, telling her to "come alive." The accused did not testify about the incident. No evidence existed as to the accused's state of mind or belief that he had received the consent of the victim.

[69] 41 M.J. 424 (1995).

[70] BENCHBOOK, *supra* note 3, para 5-11(II).

[71] *True*, 41 M.J. at 425.

[72] *Id.*

[73] MCM, *supra* note 2, R.C.M. 916(j); United States v. Taylor, 26 M.J. 127, 128 (C.M.A. 1988).

[74] *True*, 41 M.J. at 426.

[75] 41 M.J. 442 (1995).

[76] *Id.* at 443.

[77] *Id.* at 444.

In *United States v. Gillenwater*,[78] the CAAF agreed with the defense counsel that the trial judge erred in not giving a requested mistake-of-fact instruction concerning larceny of government property. The accused worked in a self-help shop whose mission was to repair and renovate broken items of government property. Searches of his living quarters resulted in charges of larceny of items from the accused's workplace. Evidence was admitted at trial that the accused's former supervisor had given him permission to take items home for both personal and government use and that the accused had worked on several government projects at home.[79] The trial judge refused to give the requested instruction because he felt that such evidence only negated the element of the accused's intent and did not raise a mistake on his part.

This reasoning may be why the CAAF appears so upset with mistake-of-fact issues because trial judges appear not to be giving instructions when the evidence clearly raises the issue. Nearly all defenses attack an element of an offense. In *Gillenwater*, the accused's honest, but mistaken, belief that he had permission to take, store, and use the items at his quarters certainly would negate the element of intent; it does so because his belief is at the heart of the mistake-of-fact defense.

Judges need to remember that the function of the members is to decide if mistake-of-fact *applies* to the facts of the case. The function of the judge is to decide if the evidence *raises* the defense. To better protect the record on appeal, trial counsel should not be insistent in opposing requested instructions on affirmative defenses. All parties need to understand that the standard is relatively low for raising them.[80]

Lack of Causation

The final new development in the area of instructions on defenses in 1995 was the United States Army Trial Judiciary's publication of an instruction as an update to the *Benchbook*[81] regarding lack of causation, intervening cause, and contributory negligence. Some offenses require that the accused's actions actually cause the alleged harmful result; for example, suffering military property to be lost.[82] The *Benchbook's* new paragraph 5-19, contained in the update, has a series of suggested instructions to cover situations where the evidence raises the issue of causation. These instructions serve to ensure that court members understand how far an accused must go before being criminally liable for his or her actions.

Evidentiary Instructions

The military judge ordinarily has no *sua sponte* duty to give evidentiary instructions.[83] Trial and defense counsel must request these instructions or, absent plain error, they are generally waived.[84] An example of this is the accomplice instruction, which the military judge need only give on request.[85] However, when a request is made, the instruction should be given.[86] In *United States v. Hecker*,[87] the AFCCA held that the military judge erred in refusing to give a requested cautionary instruction on the credibility of accomplice testimony.

The accused in *Hecker* was convicted of, among other offenses, larceny by false pretense. The charge was based on the true value of repair services rendered by the accused and his busi-

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[78] 43 M.J. 10 (1995) (although charged with larceny, the members convicted the accused of wrongful appropriation).

[79] *Id.* at 11-12.

[80] MCM, *supra* note 2, R.C.M. 920(e) discussion: "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."

[81] Update Memo 14, *supra* note 4.

[82] UCMJ art. 108 (1988).

[83] An example where the military judge may have a *sua sponte* duty to instruct is in the area of an accused's right to remain silent. Even if not requested or affirmatively waived by the defense, if the court members raise an issue about an accused's silence, the military judge should give the failure to testify instruction. *See* BENCHBOOK, *supra* note 3, para. 7-12. *See also* United States v. Jackson, 6 M.J. 116 (C.M.A. 1979).

[84] MCM, *supra* note 2, R.C.M. 920(e), (f).

[85] The COMA recently affirmed this rule in *United States v. Gittens*, 39 M.J. 328 (C.M.A. 1994) (failure to request accomplice instruction constitutes waiver).

[86] *See, e.g.*, United States v. Gillette, 35 M.J. 468 (C.M.A. 1992).

[87] 42 M.J. 640 (A.F. Ct. Crim. App. 1995).

ness associate, Mr. Norris, who testified for the prosecution regarding the specific details of the contractual arrangement with the victim.[88] Although unclear from the opinion, Norris apparently tried to minimize his own degree of culpability. As the defense counsel believed Norris had a motive to falsify his testimony in whole or in part, the defense counsel specifically requested that the military judge instruct the members regarding accomplice testimony.[89] The judge refused.[90] The AFCCA held that, when evidence raises a reasonable inference that a witness may have been an accomplice, the military judge, on request, shall give a cautionary instruction on whether the witness is an accomplice and the inherent suspect nature of accomplice testimony.[91]

A military judge is only required to give requested evidentiary instructions that are correct statements of law.[92] While the military judge in *Hecker* erred in not giving a defense requested instruction, *United States v. Taylor*[93] is an example where the military judge properly refused to give a defense requested instruction on the use of a prior inconsistent statement.

The accused in *Taylor* was convicted of premeditated murder, burglary, and larceny. At trial, the defense requested an instruction that the members could consider prior inconsistent statements of two government witnesses for the truth of the matters contained therein. The military judge did not grant this request.[94] The AFCCA upheld the trial judge's ruling,[95] finding no support for the defense's contention that prior inconsistent statements can be used as substantive evidence when the statements are made during a police interrogation.[96]

When uncharged misconduct is introduced, the military judge must, on request, instruct on the limited use of such evidence.[97] As the AFCCA recently stated, however, even absent such a request, the better practice is to give such an instruction.

In *United States v. Barrow*,[98] the accused was charged with sexually abusing his adopted stepdaughter and having an adulterous affair with a married subordinate. Over defense objection,[99] the military judge allowed the trial counsel to link the evidence

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[88] The accused and Mr. Norris were partners in an off-duty business called "Bare Walls," which performed minor repair projects on Beale Air Force Base, California. The larceny involved the charging of an inflated price to repair a hole punched in a dormitory wall. The accused told Airman First Class (A1C) F, the person responsible for the damage, to get the hole fixed to avoid getting in trouble with the squadron's first sergeant. However, the accused lied when he informed A1C F that the first sergeant was already aware of the damage. As he was unfamiliar with the local business community, A1C F asked for assistance in finding a repairman. The accused recommended contacting his associate, Mr. Norris. Although Norris gave a $25 estimate, the accused subsequently charged $75, telling A1C F he "needed to be taught a lesson." The resulting larceny charge was based on the accused's false representation that the repair price was $75 after initially giving a price of $25.

[89] A standard accomplice testimony instruction is located in the *Benchbook*. *Supra* note 3, para. 7-10.

[90] The military judge did not give the requested instruction because he determined Norris was not the accused's accomplice. The appropriate test is whether the witness could have been convicted of the same crime for which the accused was prosecuted. United States v. McKinnie, 32 M.J. 141 (C.M.A. 1991). In finding he could have been prosecuted for the larceny, albeit by the civilian criminal justice system, the AFCCA determined that Norris was aware of what the accused proposed to do, aided him in the execution of the larceny by providing him with a false invoice overstating the charge with the accused's name excised, split the profits from the repair work, and otherwise shared criminal intent. *Hecker*, 42 M.J. at 644.

[91] As the error in this case went only to witness credibility, which was already covered by an existing instruction to the members, and the accomplice's testimony was partly corroborated by the victim, the AFCCA was convinced Hecker suffered no prejudice from the failure to give the requested instruction. *Hecker*, 42 M.J. at 645.

[92] MCM, *supra* note 2, R.C.M. 920(c).

[93] 41 M.J. 701 (A.F. Ct. Crim. App. 1995).

[94] Instead, the relevant part of the instruction eventually given was as follows: "If you believe that inconsistent statements were made, you may consider the inconsistencies in evaluating the believability of the testimony of those witnesses. *You may not, however, consider the prior statements as evidence of the truth of the matters contained in those portions of the prior statements.* *Id.* at 702 (emphasis in original).

[95] The military judge has substantial discretion in deciding what instructions to give. The standard of review of a refusal to give a defense requested instruction is for an abuse of discretion. United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993).

[96] *Taylor*, 41 M.J. at 703. The Military Rules of Evidence provide that a prior inconsistent statement may be considered for the truth of the matters asserted therein if the declarant testifies and is subject to cross examination and the statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ." *See* MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)(A). In this case, however, the statements were made during a police interrogation and not at a formal proceeding.

[97] *See, e.g.*, United States v. Mundell, 40 M.J. 704 (A.C.M.R. 1994).

[98] 42 M.J. 655 (A.F. Ct. Crim. App. 1995).

[99] At trial, the accused testified concerning the allegations made by his stepdaughter and denied committing any sexual acts with her. The thrust of his defense was that his stepdaughter gained her sexual knowledge, including the use of sexual instruments, from Master Sergeant (MSG) M, a co-worker who had also engaged in a sexual relationship with her. The accused argued the stepdaughter falsely accused him to curry favor with MSG M when their relationship cooled and the details of the allegations made against him actually came from sexual techniques which MSG M had taught her. *Id.* at 662.

concerning the two victims because both involved use of vibrators and pornographic magazines.[100] On appeal, the AFCCA found no error in allowing the prosecutor to make such an argument. The AFCCA first found that the accused placed the identity of his stepdaughter's "sexual teacher" at issue by claiming she gained her knowledge from a previous sexual relationship with Master Sergeant M. The AFCCA then determined evidence that the accused used identical sexual aids with both the married subordinate and his stepdaughter would show a "distinctive technique" in his sexual repertory and would have a tendency to make the identity of her "teacher" more probable. As such, the AFCCA ruled the military judge did not err in allowing the trial counsel to link the two victims.[101]

Of special interest to the trial judiciary is the use of cautionary instructions in this area. In *Barrow*, the AFCCA noted that, because the defense did not request a specific limiting instruction on the use of the *modus operandi*[102] evidence, none was required.[103] However, in a trial with members, the judge should consider giving a limiting instruction on how the members can consider that evidence,[104] even absent a defense request.[105] To do so "may judicially salvage an otherwise sinking appellate case."[106]

Procedural Instructions

The military is somewhat unique in permitting court members to ask questions of witnesses.[107] In *United States v. Hill*,[108] the accused contended that the members lost their impartiality by the nature and number of questions they asked of the witnesses. The court members used 125 question forms, some having multiple questions on them. In the opinion, the Coast Guard Court of Criminal Appeals (CGCCA) indicated that "every judge should instruct the members at the outset concerning the questioning of witnesses and, in doing so, should advise that it is the basic responsibility of counsel, not the court, to develop the relevant evidence."[109]

The judge in *Hill* initially gave the standard *Benchbook* instruction, but the CGCCA felt that it may have been appropriate for the judge to have repeated the instruction during the trial to impress on the members the need to avoid becoming an advocate for either side.[110] In this case, however, the court found any error to have been waived by the defense counsel's failure to object to the number of questions being asked or to object to a loss of the members' collective impartiality.[111]

While questions by members may at times rise to the level of indicating a loss of impartiality, counsel and judges also need to recognize that the members have equal opportunity with counsel to obtain evidence.[112] Judges and counsel must ensure that the members, in their fact-finding role, are not limited in eliciting admissible testimony that may help them in making their findings. For example, a counsel's objection to a member's question as beyond the scope of direct or cross-examination makes little sense if the member has the same right to elicit testimony as does counsel.

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[100] Evidence relating to one charge may be used to prove an unrelated charge when the evidence meets the criteria of Military Rule of Evidence 404(b). *See* MCM, *supra* note 2, MIL. R. EVID. 404(b). In this case, the military judge had ruled that use of the vibrator was *res gestae* evidence but specifically reserved ruling on the trial counsel's alternative theory of admissibility that the evidence was relevant to prove the accused's modus operandi in seducing females. Unfortunately, the military judge never did affirmatively rule on this alternative theory. Instead, the AFCCA concluded the military judge had "implicitly ruled the evidence concerning . . . use of vibrators and 'pornography' met the criteria for Rule 404(b)." *Barrow*, 42 M.J. at 663. The better practice is to keep track of motions raised and ensure each is ruled upon at some point in the trial.

[101] During closing argument, trial counsel argued there was "similarity" and "consistency" between the accused's sexual acts with his stepdaughter and with the married subordinate because he used a vibrator and magazines to stimulate both of them. *Id.*

[102] When the trial judge permits argument that evidence offered to prove one charge proves another, he or she should insure the record contains specific findings on just how the evidence fits the 404(b) criteria. MCM, *supra* note 2, MIL. R. EVID. 404(b).

[103] United States v. Borland, 12 M.J. 855 (A.F.C.M.R. 1981).

[104] An "other acts" instruction is located in the *Benchbook*. *Supra* note 3, para. 7-13. A standard "spillover" instruction is located in Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 8, para. 7-17 (10 December 1993) [hereinafter Update Memo 8].

[105] United States v. Diaz, 39 M.J. 1114, 1118 (A.F.C.M.R. 1994).

[106] United States v. Barrow, 42 M.J. 655, 664 (A.F. Ct. Crim. App. 1995).

[107] *See* MCM, *supra* note 2, MIL. R. EVID. 614(b).

[108] 42 M.J. 725 (C.G. Ct. Crim. App. 1995).

[109] *Id.* at 727.

[110] *Id.*

[111] *Id.* at 728. The defense counsel did object to one member's questions and did challenge that member for cause based on the member's apparent bias. The court found that the judge did not abuse her discretion in denying the challenge for cause and that the questions, which formed the basis for the objection, did not indicate any bias on the part of the member.

[112] UCMJ art. 46 (1988); MCM, *supra* note 2, MIL. R. EVID. 614(a).

In 1995, the CAAF again reminded judges that they must be careful when giving the reasonable doubt instruction. In *United States v. Czekala*,[113] the CAAF indicated that an instruction defining reasonable doubt as "a doubt which would cause a reasonably prudent person to hesitate to act in the more important and weighty of his own personal affairs" is ambiguous and not helpful.[114] Based on this statement, military judges should eliminate the hesitation to act sentence from their reasonable doubt instruction.

The judge in *Czekala* also mistakenly told the members that "you must be satisfied that the evidence is such as to exclude *not* every fair and rational hypothesis or theory of innocence." The CAAF indicated that the erroneous placement of the word "not" within the instruction effectively reversed the burden. However, when considered in context of the entire instructions regarding reasonable doubt, the error did not affect the accused's substantial rights.[115]

In 1995, the *Manual* was amended to change the rules on reconsideration of findings.[116] Rule for Courts-Martial 924[117] was amended by removing the provision allowing the members to reconsider their findings of guilty any time before sentence is announced. The rule for all findings by members is now the same: The findings can be reconsidered only before they are announced in open court.[118] The procedural instructions on findings should be amended to reflect this change.[119]

After the case is over and before the members are excused, many judges now give a final word of caution to the court members. In 1995, the Army's Chief Trial Judge recommended that Army judges use the following adjournment instruction for excusing the members:

> Court members, before I excuse you, let me advise you of one matter. In the event you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your service. You are excused.[120]

This cautionary instruction not only reminds the court members of their oath not to disclose the vote or opinion of any member, but it also represents an implied reminder to counsel not to seek disclosure of the members' deliberative process. If counsel seek post-trial affidavits from court members, counsel need to understand the matters contained therein should only address matters of extraneous influence or unlawful command influence exerted on the members.[121]

Sentencing Instructions

Sentencing instructions are an essential part of the trial process. Either party may propose specific sentencing instructions.[122] However, the military judge need not give the instruction unless the issue is reasonably raised, it is not adequately covered elsewhere in the instructions, and the proposed instruction accurately states the law.[123] *United States v. Briggs*[124] is an example where a military judge properly denied such a proposed instruction.

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[113] 42 M.J. 168 (1995).

[114] *Id.* at 170; Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: Reasonable Doubt Instruction (12 Sept. 1995).

[115] *Id.* at 170-71. It appears that the trial judge did not erroneously place the word "not" in the instruction, but transposed portions of the *Benchbook* instruction. The instruction should read: "The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt."

[116] Exec. Order No. 12,960, 60 Fed. Reg. 26,647 (1995), *reprinted in* MCM, *supra* note 2, app. 25, at A25-26.

[117] MCM, *supra* note 2, R.C.M. 924.

[118] *Id.*

[119] The procedural instructions on findings in the *Benchbook* should be amended by deleting the following language in the first full paragraph on page 2-74: "You may also reconsider any finding of guilty on your own motion at any time before you have first announced a sentence in the case." *See* Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 11 (19 July 1994).

[120] Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: Adjournment Instructions to Members (24 Jan. 1995).

[121] *See* Tanner v. United States, 483 U.S. 107 (1987); United States v. Loving, 41 M.J. 213, 234-39 (1994); MCM, *supra* note 2, MIL. R. EVID. 509; 606.

[122] MCM, *supra* note 2, R.C.M. 1005(c).

[123] United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985).

[124] 42 M.J. 367 (1995).

The accused in *Briggs* plead guilty to three specifications of wrongful use of cocaine and several unrelated offenses. At sentencing, when asked by his counsel where he had gotten the money to buy the drugs he used, the accused stated he sold large amounts of cocaine to support his habit. This was apparently an unscripted response as defense counsel requested the military judge instruct the panel to disregard the testimony about prior distributions. The military judge denied this request.[125] Without surprise, a panel member subsequently asked how long the accused had been distributing drugs to support his habit. Although the military judge did not permit the question, the defense once again asked for a specific instruction. The military judge again declined but subsequently instructed the members to sentence the accused only for the crimes he was convicted.[126]

On appeal, the defense asserted that the military judge should have given the requested instruction. In affirming the trial judge's decision, the CAAF held that a "military judge is not required to give the specific instruction requested by counsel if the matter is adequately covered in [other] instructions."[127] The CAAF found that the general *Benchbook* instruction used in this case was sufficient.

The Rules for Courts-Martial prohibit the *prosecution* from introducing testimony during sentencing regarding the appropriateness of a punitive discharge.[128] Logically, it should also be inappropriate for the *defense* to offer testimony that a punitive discharge is not appropriate.[129] This issue was addressed in *United States v. Ramos*.[130]

During sentencing, the defense counsel asked his witness whether he believed the accused could continue to serve and contribute in the United States Army, and the witness gave a positive response. Without defense objection, the military judge thereafter instructed the panel that "the testimony by the witness that he thinks [the accused] can still be a soldier in the Army should really be disregarded . . . because of the danger that you would perceive a punitive discharge as being an elimination type proceedings."[131]

On appeal, the defense claimed this instruction proved the military judge abandoned his impartial role and became a government advocate. Concluding that the military judge is not "a mere referee, but rather may properly participate actively in the proceedings," the CAAF affirmed the lower court and found that any error did not prejudice the accused.

The military judge must instruct on the maximum authorized punishment that the court members can impose.[132] However, the members should not be informed as to how that amount was reached. In *United States v. Purdy*,[133] the Army Court of Criminal Appeals (ACCA) held that the military judge erred when he inadvertently informed the panel members that the maximum confinement was reduced from fifty-two to twenty-five years.[134] The ACCA held that the members need only be told the maximum period of confinement they can impose and not the basis for any limitation.[135] This case serves as a reminder that the determination of the maximum punishment that can be imposed should be made in an Article 39(a) session out of the court members' presence.[136]

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[125] As the trial counsel indicated he would not include evidence of the prior distributions in his argument, the military judge did not want to make a bad situation worse by highlighting the issue for the panel. *Id.* at 369.

[126] The pertinent part of the instruction, a slight variation of the one found in the *Benchbook*, was as follows: "Although you must give due consideration to all matters in extenuation, mitigation, and aggravation, keep in mind that the accused is to be only sentenced for the crimes that he's been found guilty of committing." BENCHBOOK, *supra* note 3, para. 2-37.

[127] MCM, *supra* note 2, R.C.M. 1005 discussion.

[128] *Id.* R.C.M. 1001(b)(5)(D).

[129] *See* United States v. Ohrt, 28 M.J. 301, 305-6 (C.M.A. 1989) (prosecution or defense witness should not be allowed to express opinion whether accused should be punitively discharged). *But see* United States v. Aurich, 31 M.J. 95, 96 (C.M.A. 1990) (Cox, J., and Everett, C.J., concurring) (commander should be able to testify that he or she wants accused back in unit, but generally should not be permitted to testify that he or she does not want accused back).

[130] 42 M.J. 392 (1995). Ramos' first line supervisor, a Staff Sergeant Knight, testified that he thought Ramos could "rehabilitate himself and continue to serve and contribute to the United States." *Id.* at 395. The military judge viewed this testimony as simply a euphemism for the panel not to adjudge a discharge.

[131] *Id.*

[132] MCM, *supra* note 2, R.C.M. 1005(e); Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 11, para. 2-87 (19 July 1994) [hereinafter Update Memo 11].

[133] 42 M.J. 666 (Army Ct. Crim. App. 1995).

[134] In ruling on a sentence multiplicity motion, the military judge held that three of the offenses involving one victim merged for sentencing purposes, reduced the maximum period of confinement from 52 to 25 years. This ruling was made in open court with the members present.

[135] *See also* United States v. Frye, 33 M.J. 1075, 1079 (A.C.M.R. 1992).

[136] In reassessing the sentence in this case, the ACCA was convinced the error did not prejudice the accused and affirmed the sentence as appropriate.

One of the more significant, albeit bizarre, CAAF rulings last year dealt with the maximum period of confinement for bad check cases. In *United States v. Mincey*,[137] the accused was charged with, among other offenses, one specification of uttering ten worthless checks.[138] None of these checks was for a value greater than $100.[139] The military judge, with the consent of both counsel, advised the accused that the maximum period of confinement for this specification was five years.[140]

On appeal, the accused argued the maximum period of confinement should have been six months based on the value of the amount of the largest single check in the specification.[141] The CAAF affirmed the findings and sentence by concluding that the maximum punishment for bad-check cases is now calculated by the number and amount of the checks as if they had been charged separately, regardless of whether the government joined several offenses in one specification.[142]

While this rule is certainly an important substantive change to prior courts-martial practice, of greater significance to the trial judiciary is the potentially broader precedential value of the analysis in the *Mincey* decision. Although the CAAF putatively attempted to limit its opinion to bad check-offenses, there appears to be no legal prohibition on the military judge expanding the ruling to any duplicitous specification.

In *United States v. Teters*,[143] the COMA adopted the *Blockburger*[144] statutory-elements test in determining multiplicity for findings.[145] In *United States v. Morrison*,[146] the CAAF clarified the unresolved issue of sentence multiplicity. Staff Sergeant Morrison was charged with missing movement through design and two specifications of willful disobedience of lawful orders. The charges were based on the accused's refusal to obey orders issued by his squadron commander to prepare for overseas deployment and the subsequent failure to deploy. At trial, the defense moved to dismiss the willful disobedience offenses on the grounds that they were multiplicious for both findings and sentencing with the missing movement specification. The military judge denied the motion and eventually treated the willful disobedience and missing movement as separately punishable offenses.

The CAAF affirmed the findings, holding that the offenses were not multiplicious because both required proof of an element the other did not.[147] The CAAF also affirmed the sentence concluding that Congress did not intend to prohibit imposing separate punishments for offenses warranting separate convictions. In other words, it is the military judge's responsibility to determine the authorized punishment in a given case, and it will not be an abuse of discretion if the judge treats offenses which are separate for findings as separate for sentencing. As such, when determining the maximum period of confinement when instructing the members, the military judge may consider offenses which are separate for findings as warranting separate punishments.[148]

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[137] 42 M.J. 376 (1995).

[138] The defense did not object to the misjoinder of numerous bad-check offenses into two duplicitous specifications. MCM, *supra* note 2, R.C.M. 307(c)(4).

[139] The bad check specification at issue was charged as follows: "between on or about 6 January 1992 and 12 January 1992, . . . , utter certain checks . . . numbered and dated as follows, to wit: 0223, 6 January 1992, $100.00; 0225, 7 January 1992, $100.00; 0226, 7 January 1992, $100; 0228, 8 January 1992, $100.00; 0230, 8 January 1992, $100.00; 0234, 10 January 1992, $100.00; 0238, 10 January 1992, $100.00; 0240, 11 January 1992, $100.00; 0243, 11 January 1992, $100.00; 0245, 12 January 1992, $100.00; a total amount of $1,000.00, ..."

[140] As the aggregate amount of the 10 checks exceeded $100.00, the maximum period of confinement was calculated to be five years. MCM, *supra* note 2, part IV, ¶ 49e.(1)(b) (1988). This methodology was adopted by the Air Force Court of Criminal Appeals in an unpublished opinion. *See* United States v. Mincey, No. 30054, 1993 WL 76298 (A.F. Ct. Crim. App., Mar. 10, 1993). *See also* United States v. Oliver, 43 M.J. 668 (A.F. Ct. Crim. App. 1995).

[141] United States v. Poole, 26 M.J. 272 (C.M.A. 1988).

[142] In other words, six months for each check, or sixty months. The CAAF based its holding on R.C.M. 1003(c)(1)(A)(i), which authorizes punishment for "each separate offense." MCM, *supra* note 2. The CAAF viewed each bad check contained in each specification as a separate offense.

[143] 37 M.J. 379 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994). The accused in *Teters* plead guilty to and was separately convicted of, among other offenses, two specifications of larceny of money by using forged checks and two specifications of forgery of those same checks. The military judge found the offenses were not multiplicious for findings but considered them multiplicious for sentencing.

[144] Blockburger v. United States, 284 U.S. 299 (1932).

[145] *Teters* states that in determining whether offenses are multiplicious for findings, one need only compare the elements of the offenses; to be multiplicious, elements of one must be a subset of the other.

[146] 41 M.J. 482 (1995).

[147] *Id.* at 484.

[148] *Compare* United States v. Brownlow, 39 M.J. 484 (C.M.A. 1994) *with* United States v. Traxler, 39 M.J. 476 (C.M.A. 1994) (different offenses, same disposition).

In *United States v. Thomas*,[149] the defense raised several objections to the trial judge's death penalty sentencing instructions. Many of these issues were addressed by the CAAF in *United States v. Loving*,[150] which was reviewed by the authors in last year's instructions update.[151] Two issues addressed in *Thomas* involved instructions on reconsideration of sentences and when instructions on capital sentencing procedures must be given.

In *Thomas*, the defense alleged the military judge erred when he instructed the members that if their vote on an aggravating factor was not unanimous, and there was a request to reconsider, a majority vote would be required to permit reconsideration.[152] The Navy-Marine Court of Criminal Appeals (NMCCA) noted that even though the Rules for Courts-Martial[153] do not specifically address voting procedures for reconsideration of aggravating factors, they found no abuse of discretion in this case. The NMCCA held the military judge properly used the normal reconsideration rules as a basis for an instruction on the procedures for reconsidering a nonunanimous vote on aggravating factors.

The NMCCA also declined the opportunity to adopt a bright-line rule requiring the military judge to instruct on capital sentencing proceedings during preliminary instructions. As the Rules for Courts-Martial grant the military judge the discretion to give those preliminary instructions that the judge deems appropriate in a given case,[154] the NMCCA found no authority requiring a judge to instruct the members concerning capital sentencing procedures during preliminary instructions, especially absent a defense request to do so.[155]

In 1995, the *Manual* was amended to change the procedures for reconsidering a sentence.[156] Rule for Courts-Martial 1009[157] was amended to limit the members' ability to reconsider a sentence after it has been announced. The old rule permitted the members to decrease a sentence through reconsideration any time before the record of trial was authenticated.[158] Under the new rule, reconsideration is permitted after the sentence is announced only if the sentence announced was less than the mandatory minimum or more than the permissible maximum.[159]

The new rule also allows the military judge to clarify an ambiguous sentence after it has been announced.[160] The better practice is for the military judge to clarify ambiguous sentences before they are announced by carefully inspecting the sentence worksheet. If, however, the president of the court creates an ambiguity by misreading the worksheet, the new rule permits the judge to correct this.[161]

Conclusion

In deciding cases involving instructional issues during 1995, military appellate courts again took the position that:

> [J]ustice tends to flourish in an enlightened atmosphere. The requirements of the law foster it, and the intent . . . had always been to encourage that situation . . . . The court members must be furnished with the law pertinent to the facts developed in order that they may resolve the issues before them . . . . What is contemplated is the affirmative submission of the respective theories . . . to the triers of fact, with lucid guideposts, to the end that they may knowledgeably apply the law to facts as they find them.[162]

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[149] 43 M.J. 550 (N.M. Ct. Crim. App. 1995).

[150] 41 M.J. 213 (1994), *cert. granted*, 116 S. Ct. 39 (1996) (oral argument held Jan. 9, 1996).

[151] *See* Holland & Masterton, *supra* note 1, at 14.

[152] The defense argued, by analogy, that because members cannot reconsider a nonunanimous vote on findings in order to authorize a capital sentencing procedure, they should not be allowed to reconsider a nonunanimous finding of an aggravating factor.

[153] MCM, *supra* note 2, R.C.M. 1009 (detailing procedures governing sentence reconsideration).

[154] *Id.* R.C.M. 913(a).

[155] The question left unresolved is whether the military judge must give such instructions upon defense request.

[156] Exec. Order No. 12,960, 60 Fed. Reg. 26,647 (1995), *reprinted in* MCM, *supra* note 2, app. 25, at A25-26.

[157] MCM, *supra* note 2, R.C.M. 1009.

[158] *Id.* R.C.M. 1009 (1984).

[159] *Id.* R.C.M. 1009(b).

[160] *Id.* R.C.M. 1009(c).

[161] Not all errors can be corrected. *See, e.g.*, United States v. Baker, 32 M.J. 290 (C.M.A. 1991) (military judge improperly allowed members to "correct" sentence upwards after court was adjourned, by including dishonorable discharge in sentence, where both sentence worksheet and sentence as announced failed to mention discharge).

[162] United States v. Smith, 33 C.M.R. 3, 6 (C.M.A. 1963).

Judges and counsel alike need to keep this goal in mind when it comes to formulating instructions for the court members in each case. If justice is to prevail, court members cannot be left in the dark. Only through the diligent efforts of the trial judge and counsel working together will the members be instructed appropriately and appellate issues avoided.

APPENDIX A

Instructions Checklist

I. When Members First Enter Court.

A. Preliminary Instructions (Page 2-43, Update Memo 11) ..... ( )

B. Other General Introductory Explanations

1. Joint Offenders (Paragraph 7-2) ..... ( )

2. Vicarious liability—Principals and Conspirators (Paragraph 7-1) ..... ( )

3. _____ ..... ( )

II. Prior to Findings

A. Prefatory Instructions on Findings (Page 2-43, Update Memo 11) ..... ( )

B. Elements of Offenses Charged (para ____; para ____; para ____) ..... ( )

CH/SP_____ LIO_____ ..... ( )

CH/SP_____ LIO_____ ..... ( )

CH/SP_____ LIO_____ ..... ( )

1. Terms having special legal significance/connotation (para____; para____; para____) ..... ( )

2. Law of Principals (Paragraph 7-1) ..... ( )

C. Special and Other Defenses.

1. Self-Defense (Paragraph 5-2) ..... ( )

2. Defense of Another (Paragraph 5-3) ..... ( )

3. Accident (Paragraph 5-4, Update Memo 7) ..... ( )

4. Duress or Coercion (Paragraph 5-5) ..... ( )

5. Entrapment (Paragraph 5-6) ..... ( )

6. Agency (Paragraph 5-7) ..... ( )

7. Obedience to Orders (Paragraph 5-8) ..... ( )

8. Physical Impossibility or Inability (Paragraph 5-9) ..... ( )

9. Financial and Other Inability (Paragraph 5-10) ..... ( )

10. Ignorance or Mistake of Fact of Law (Paragraph 5-11) ..... ( )

11. Voluntary Intoxication (Paragraph 5-12) ..... ( )

12. Alibi (Paragraph 5-13) ..... ( )

13. Character Evidence (Paragraph 5-14) ..... ( )

14. Voluntary Abandonment (Paragraph 5-15, Update Memo 7) ..... ( )

15. Parental Discipline (Paragraph 5-16, Update Memo 8) ..... ( )

16. Evidence Negating Mens Rea (Paragraph 5-17, Update Memo 9) ..... ( )

17. Self-Help Under a Claim of Right (Paragraph 5-18, Update Memo 13) ..... ( )

18. Lack of Causation (Paragraph 5-19, Update Memo 14) ..... ( )

19. Mental Responsibility at Time of Offense (Paragraphs 6-3, 6-4, Update Memo 9) ..... ( )

20. Partial Mental Responsibility (Paragraph 6-5, Update Memo 9) ..... ( )

21. Personality (Character or Behavior) Disorders (Paragraph 6-6, Update Memo 9) ..... ( )

22. Other ..... ( )

D. Evidentiary and Other Matters

1. Pretrial Statements (Chapter 4) ..... ( )

2. Law of Principals (Paragraph 7-1) ..... ( )

3. Joint Offenders (Paragraph 7-2) ..... ( )

4. Circumstantial Evidence (Paragraph 7-3, Update Memo 1) ..... ( )

a. Proof of intent by circumstantial evidence (Paragraph 7-3, Update Memo 1) ..... ( )

b. Proof of knowledge by circumstantial evidence (Paragraph 7-3, Update Memo 1) .... ( )

5. Stipulations (Paragraph 7-4) ..... ( )

6. Depositions (Paragraph 7-5) ..... ( )

7. Judicial Notice (Paragraph 7-6) ..... ( )

8. Credibility of Witness (Paragraph 7-7) ..... ( )

9. Interracial Identification (Paragraph 7-7.1) ..... ( )

10. Character Evidence (Paragraph 7-8) ..... ( )

11. Expert Testimony (Paragraph 7-9, Update Memo 10) ..... ( )

12. Accomplice Testimony (Paragraph 7-10) ..... ( )

13. Prior Statements by Witness (Paragraph 7-11) ..... ( )

14. Accused's Failure to Testify (Paragraph 7-12) ..... ( )

15. Other Offenses or Acts of Misconduct by Accused (Paragraph 7-13) ..... ( )

16. Past Sexual Behavior of Nonconsensual Sex Victim (Paragraph 7-14) ..... ( )

17. Variance—Findings by Exceptions and Substitutions (Paragraph 7-15) ..... ( )

18. Value, Damage or Amount (Paragraph 7-16) ..... ( )

19. Spill-Over (Paragraph 7-17, Update Memo 8) ..... ( )

20. Have You Heard Impeachment Questions (Paragraph 7-18, Update Memo 8) ..... ( )

21. Grant of Immunity (Paragraph 7-19, Update Memo 10) ..... ( )

E. Closing Instructions on Findings.

1. Closing Substantive Instructions (Page 2-68, Update Memo 11) ..... ( )

2. Procedural Instructions on Findings (Page 2-72, Update Memo 11) ..... ( )

III Sentencing.

A. Instructions on Sentence (Page 2-86, Update Memo 11) ..... ( )

B. Types of Punishment (Page 2-89, Update Memo 11) ..... ( )

C. Other Instructions on Sentence (Page 2-97, Update Memo 11) ..... ( )

1. Summary of Evidence in Extenuation Mitigation ..... ( )
2. Accused's Failure to Testify/Failure to Testify Under Oath ..... ( )
3. Effect of Guilty Plea ..... ( )
4. Mendacity ..... ( )
5. Argument for Specific Sentence ..... ( )
6. Other ..... ( )

D. Concluding Instructions (Page 2-101, Update Memo 11) ..... ( )

Notes/Remarks:

5-18 Self-help Under a Claim of Right.

Introduction. Although the self-help defense is not listed in the *Manual for Courts-Martial*, the courts have acknowledged that it constitutes an affirmative defense in some cases involving a wrongful taking, withholding, or obtaining, *e.g.*, robbery, larceny, or wrongful appropriation. The military judge must instruct, *sua sponte*, on the issue when it is raised by some evidence. The self-help defense exists when three criteria co-exist: (1) the accused, takes, withholds, or obtains property under an honest belief that the accused is entitled to the property because either the accused is the owner or as security for a debt owed to the accused; (2) such taking, withholding, or obtaining is based upon a prior agreement between the accused and the alleged victim providing for either satisfaction or security of the debt by the use of self-help; and (3) the taking, withholding, or obtaining is done in the open, not surreptitiously. The following instruction may be used as a guide in such circumstances.

The evidence has raised the defense of self-help in relation to the offense(s) of _____ (and the lesser included offense(s) of _____) in that (*state the facts bearing on the issue and the contentions of the parties*).

The defense of self-help exists when three situations co-exist: (1) the accused has an honest belief that he/she had a claim of right entitling the accused to (take) (withhold) (obtain) the ((money) (property) (_____)) (because the accused was the rightful owner) (as security for a debt owed to the accused); (2) the accused and (name of alleged victim) had a prior agreement which permitted the accused to (take) (withhold) (obtain) the (money) (property) (_____) (to satisfy the debt) (as security for the debt); and (3) the (taking) (withholding) (obtaining) by the accused was done in the open, not surreptitiously. All three criteria must exist before the defense of self-help is applicable.

In deciding whether the defense of self-help applies in this case, you should consider all the evidence presented on the matter. The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. You must be convinced beyond a reasonable doubt that the accused did not act through self-help before you can convict the accused of (*state the name of the offense(s) and lesser included offense(s) to which self-help applies*).

Note 1: Taking in excess of what is due. When the evidence raises the self-help defense and the accused may have taken, withheld, or obtained more than that to which the accused was entitled, the following should be given:

Under the defense of self-help, the accused may only (take) (withhold) (obtain) that amount of (property) (money) (_____) reasonably approximating that which the accused honestly believed (he/she was entitled to) (was the amount of the debt owed to the accused).

If you are convinced beyond reasonable doubt that the accused (took) (withheld) (obtained) an amount of (property) (money) (_____) clearly in excess of that to which the accused honestly believed he/she was entitled, you may infer that the accused had the intent to wrongfully (take) (withhold) (obtain) the full amount of the (property) (money) (_____). The drawing of this inference is not required.

On the other hand, you could conclude that the accused had only the intent to wrongfully (take) (withhold) (obtain) the amount in excess of (that to which he/she was entitled) (the debt owed to the accused.) If that is your finding, your findings must reflect that the wrongful (taking) (obtaining) (withholding) was only as to the (amount) (property) (_____) that was in excess of the amount to which the accused was entitled.

NOTE 2: Self-help defense - aiding or conspiring with another to act through self-help. The defense of self-help is also available to an accused who assists or conspires with another in taking property when the accused honestly believes that the person being helped has a claim of right. It is the bona fide nature of the accused's belief as to the existence of the claim of right by the person being helped, and not the actual legitimacy of the debt or claim, that is in issue. These instructions must be tailored when the accused is not the one who has the claim of right.

NOTE 3: Robbery and other offenses where larceny or wrongful appropriation is a component. Because robbery is a compound offense combining larceny and assault, if the self-help issue arises in a robbery case, the defense of self-help may negate an intent to steal, but it is not a defense to the assault component. In such cases, the military judge must ensure that the members are aware that the defense exists to robbery and, if in issue, its lesser included offense of larceny. It will not, however, apply to the lesser included offense of assault. The defense of self-help also applies to other offenses where larceny or wrongful appropriation is a component of the charged offense, *e.g.*, burglary with intent to commit larceny or housebreaking with the intent to commit larceny or wrongful appropriation.

NOTE 4: Self-help to contraband. The defense of self-help does not apply when an accused has no legal right to possess the property to which the accused asserts a claim of right, *e.g.* illegal drugs. The defense also does not exist when the accused takes under a purported claim of right the value of the contraband property. *United States v. Petrie*, 1 M.J. 332, (C.M.A. 1976).

NOTE 5: Mistake of fact. The military judge must be alert to evidence that the accused had the mistaken belief the property taken belonged to the accused, the amount of the debt the accused believed the victim owed, or the value of the property was as the accused believed. In such cases, a tailored version of Instruction 5-11 (Mistake of Fact) may be appropriate. The accused's belief need only be honest; it need not be reasonable.

REFERENCE:

1. United States v. Smith, 8 C.M.R. 112 (C.M.A. 1953).
2. United States v. Kachougian, 21 C.M.R. 276 (C.M.A. 1961).
3. United States v. Dosal-Maldonado, 31 C.M.R. 28 (C.M.A. 1961).
4. United States v. Eggleton, 47 C.M.R. 920 (C.M.A. 1973).
5. United States v. Smith, 14 M.J. 68 (C.M.A. 1982).
6. United States v. Gunter, 42 M.J. 292 (1995).

APPENDIX C

5-5. Duress (Compulsion or Coercion).

Introduction. The military judge must instruct, *sua sponte*, on the issue of duress when the issue is raised by some evidence. Duress is not a defense to unlawful homicide. Generally, the defense of duress applies if the accused reasonably feared immediate death or serious bodily harm to himself/herself or another innocent person. The following instruction appropriately tailored, is applicable when duress has been raised.

The evidence has raised the issue of duress in relation to the offense(s) of (_____). Duress means compulsion or coercion. It is causing another person to do something against (his) (her) will by the use of either physical force or psychological coercion. In this regard, there has been (testimony) (evidence) that (*summarize the evidence and contentions of the parties*).

To be a defense, the amount of duress used on the accused, whether physical or psychological, must have been sufficient to cause a reasonable fear that if (he) (she) did not commit the offense(s) of (_____), then (the accused) (another innocent person) (_____) would be immediately killed or suffer serious bodily injury. The amount of coercion or force must have been sufficient to have caused a person of normal strength and courage to give in. The fear which caused the accused to commit the offense(s) must have fear of immediate death or serious bodily injury and not simply fear of injury to reputation or property. The threat and resulting fear must have continued throughout the commission of the offense(s). If the accused had a reasonable chance to avoid committing the offense(s) without subjecting (himself) (herself) (the other person(s)) (_____) to the threatened danger, the defense of duress does not exist. (You should consider the opportunity, or lack of opportunity, the accused may have had to report the threat to authorities, (and whether the accused reasonably believed that a report would protect (him) (her) (the other (person(s)) (_____) from the threatened harm.))

The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Duress is a complete defense to the offense(s) of (_____). If you are not convinced beyond a reasonable doubt that the accused did not act under duress, the defense of duress does not exist.

NOTE 1. Unauthorized absence offenses. Military courts have held that the defense of duress may apply to escape from confinement or absence without authority offenses where the accused escapes or absents himself/herself in order to avoid life endangering physical harm. *See United States v. Blair*, 36 C.M.R. 413 (C.M.A. 1966) (escape from confinement). Life endangering sexual and racial harassment may be sufficient to raise the defense of duress. *See United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983); *United States v. Sutek*, 14 M.J. 671 (N.M.C.M.R. 1982).

NOTE 2: Continuing offenses. The Supreme Court has held that the defense of duress is not available to one who commits a continuing offense unless he/she terminates the illegal activity (*e.g.*, continued absence from custody) as soon as the circumstances compelling the illegal behavior have ceased to exist. *United States v. Bailey*, 444 U.S. 394 (1979). When such an issue is raised, the above instruction should be appropriately modified.

REFERENCE: R.C.M. 916(h).

What Is the "Subterfuge Rule" of MRE 313(b) After *United States v. Taylor*?

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Introduction

The courts have long recognized administrative inspections as an important means for a commander to examine the overall fitness of his or her unit to accomplish military missions.[1] Generally, evidence of a crime discovered during an inspection is admissible at trial by court-martial under Military Rule of Evidence (MRE) 313(a). To qualify as an inspection under MRE 313(b), the commander's primary purpose for ordering the inspection of his or her unit must be administrative, not a search for evidence of a crime.

Under MRE 313(b), the government must normally show by a preponderance of evidence that the examination was an administrative inspection.[2] In certain circumstances, however, the government must show by clear and convincing evidence that an examination qualifies as an administrative inspection. This higher burden must be met when the examination is for weapons or contraband,[3] and: "(1) the examination was ordered immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same inspection."[4] This portion of MRE 313(b), known as the "subterfuge rule," prohibits the introduction of any evidence discovered during the examination if the government cannot meet this burden.

In 1994, the Court of Military Appeals (COMA), now renamed the Court of Appeals for the Armed Forces (CAAF),[5] addressed the subterfuge rule in two cases, *United States v. Taylor*[6] and *United States v. Campbell*.[7] In these cases, the COMA determined the commander's primary purpose by focusing on the facts known to the commander when he or she ordered an inspection. Both cases involved the admissibility of purported random urinalysis test results. In one case, the urinalysis was held to be an inspection, in the other, it was not. This article examines these two cases, discusses whether the court's focus on the commander's knowledge makes sense and suggests where the CAAF is headed in this area. Lastly, this article will offer some practical tips for both trial and defense counsel faced with this issue.

United States v. Taylor

In *Taylor*, the COMA addressed inspections under MRE 313(b) and found that the urinalysis in *Taylor* was a valid inspection because the commander had a valid primary purpose for ordering the inspection. The court reasoned that the commander's actual knowledge of the circumstances at the time he orders the examination is the key factor in determining the commander's primary purpose for the administrative inspection.[8]

The facts cited by the COMA in *Taylor* show how determined the majority of the court was in pursuing the narrow focus on what the commander knew. On 7 December 1989, Sergeant

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[1] *See* United States v. Bickel, 30 M.J. 277, 280 (C.M.A. 1990) *citing* United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981).

[2] TJAGSA Practice Notes, Criminal Law Notes, *Can the Government Ever Satisfy the Clear and Convincing Evidence Standard Under Military Rule of Evidence 313(b)?*, ARMY LAW., June 1992, at 33.

[3] The court has interpreted contraband to include "all items which are not lawfully possessed." United States v. Thatcher, 28 M.J. 20, 24 (C.M.A. 1989).

[4] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 313(b) (1984) [hereinafter MCM].

[5] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act also changed the names of the various courts of military review to the courts of criminal appeals. In this article, the name of the court at the time that the decision was published will be used. *See* United States v. Sanders, 41 M.J. 485, 485 n.1 (1995).

[6] 41 M.J. 168 (C.M.A. 1994).

[7] 41 M.J. 177 (C.M.A. 1994).

[8] *Taylor*, 41 M.J. at 172.

Ramon, the Substance Abuse Control Officer of Taylor's unit, received an anonymous telephone tip that someone in the S-1 section was using drugs. On 11 December 1989, Sergeant Ramon told Captain Jackson, the officer in charge of the S-1 section where Taylor worked, that a former member of the S-1 section reported that Taylor was a drug user. Captain Jackson then called the Headquarters Company Commander Captain Lindsay and volunteered the S-1 section for a urinalysis. Previously, no one had volunteered a section for a urinalysis. Captain Jackson did not relay to Captain Lindsay any information about the anonymous phone tip implicating Taylor of using marijuana. Captain Lindsay had already planned to conduct a urinalysis but had not decided how to select soldiers for the test. He decided to accept Captain Jackson's offer and test the S-1 section. Captain Lindsay directed Sergeant Ramon to conduct the urinalysis the next day.[9]

On 12 December 1989, Taylor was not at work, having received a "no duty" chit from the dental clinic because of some dental problems. That afternoon, Sergeant Ramon received another report that Taylor had smoked marijuana. Sergeant Ramon relayed this information to Captain Jackson. Captain Jackson then instructed Taylor's supervising noncommissioned officer to have Taylor report for work. When Taylor reported for duty, he was required to provided a urine sample and that sample later tested positive for marijuana.[10]

The issue before the COMA was whether the urinalysis ordered by Captain Lindsay was a lawful inspection or a subterfuge to conduct a search for evidence of a crime.[11] On behalf of the majority,[12] Judge Crawford wrote "[o]ur principal focus is on the role of Capt. Lindsay."[13] Judge Crawford detailed and reviewed the reasons given by Captain Lindsay for ordering the urinalysis[14] and Judge Crawford concluded that Captain Lindsay had a proper primary purpose, namely, to deter unit personnel from using drugs.[15] The court did not impute the knowledge of Captain Jackson and Sergeant Ramon to Captain Lindsay because the court found that Captain Lindsay had decided to conduct a urinalysis before Captain Jackson called him. Judge Crawford indicated that no evidence existed that either Captain Jackson or Sergeant Ramon informed Captain Lindsay of the allegations concerning Taylor. She further stated that not only were these allegations not relayed to Captain Lindsay, but there was also "no indication of a so-called 'wink and a nod' between Capt. Lindsay, Capt. Jackson, and Sgt. Ramon to create a pretext for inspection."[16] The COMA found that these facts did not raise any of the three factors in MRE 313(b) that would require the government to prove by clear and convincing evidence that the urinalysis was an inspection and not a subterfuge to conduct a search.[17] Because Captain Lindsay's primary purpose for conducting the inspection related to the performance of military duties, the court held this was a lawful inspection, and the results of the urinalysis were admissible at court-martial.

Chief Judge Sullivan and Judge Wiss both wrote dissenting opinions in *Taylor*. In his dissent, Chief Judge Sullivan noted that the majority reached its decision "without reference to military or civilian case law."[18] He did not agree with the majority that the knowledge possessed by others, particularly Captain Jackson, about Taylor could be disregarded in deciding this issue. Chief Judge Sullivan reminded the majority that military and civilian case law require that the conduct of those executing the inspection be considered in determining if it was a subterfuge to conduct a search.[19] Judges Sullivan and Wiss observed that it was through the "manipulation" of the urinalysis by Captain Jackson and Sergeant Ramon that Taylor was required to undergo the testing.[20] Chief Judge Sullivan's position was that the commander did not make his decision in a vacuum, and that the majority erred by treating it as such.

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[9] *Id.* at 168-69.

[10] *Id.*

[11] *Id.* at 172.

[12] *Id.* Judge Cox and Judge Gierke concurred in Judge Crawford's opinion.

[13] *Id.* at 172.

[14] *Id.* Reasons for the urinalysis listed in the majority opinion include Captain Lindsay's desire to conduct a urinalysis before his experienced substance abuse control officer separated from the service, he wanted to deter drug use over the Christmas holidays, and he wanted to comply with Marine Corps policy concerning urinalysis testing.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 173. Not only is the majority opinion lacking any reference to case law, it is also very short. Four pages contain a review of the facts and dicta discussing whether the fourth amendment to the Constitution applies to the military. The part of the opinion that discusses the court's holding is two paragraphs.

[19] *Id.*

[20] *Id.* at 175.

Judge Wiss's dissent concentrated on other facts not directly considered by the majority opinion. He challenged the majority's position that there was no "wink and a nod" between Captain Lindsay and his subordinates. Judge Wiss noted that after Captain Jackson volunteered the S-1 section for the urinalysis, Captain Lindsay asked Sergeant Ramon, "[is] there anything special going on in the S-1 shop I should know about?"[21] Sergeant Ramon replied, "I don't think I'm at liberty of discussing this with you at this particular time, Sir."[22] Judge Wiss believed that the commander cannot be isolated as a matter of law from information known to his subordinates but not relayed to him when the subordinates use that information to influence the commander's decision.[23] He asserted to do otherwise undermines the rationale behind MRE 313.[24] That is, to ensure that an inspection is not a subterfuge to avoid the constitutional requirements of a proper search authorization.

United States v. Campbell

The same day it decided *Taylor*, the COMA issued an opinion in another case on this issue,[25] *United States v. Campbell*. Campbell was ordered to submit a urine sample after his company first sergeant hand-picked some soldiers for testing. The first sergeant testified that he did this after hearing rumors that some soldiers were using drugs, and he based his selections on whether the soldiers associated with another soldier in the company who had previously tested positive for drugs. Unlike *Taylor*, the first sergeant in *Campbell* told the commander why he had selected the soldiers. The commander had no plans to conduct a urinalysis, but after hearing the first sergeant's explanation, he ordered the soldiers selected by the first sergeant to submit urine samples.[26] Campbell's sample tested positive for cocaine and formed the basis of his court-martial conviction.

Again, the issue before the COMA was whether the urinalysis was a lawful inspection or a subterfuge to conduct a search. Chief Judge Sullivan, writing for the majority, held that the government failed to prove by clear and convincing evidence that this was an administrative inspection under MRE 313(b).[27] The evidence showed that the first sergeant relied on his suspicion of drug use to select soldiers for testing. Fully informed of how soldiers were chosen, the commander relied on the first sergeant's selections. Chief Judge Sullivan, quoting from *United States v. Bickel*,[28] stated that to be admissible under MRE 313, "the testing must be performed on a nondiscriminatory basis pursuant to an established policy or guideline that will eliminate the opportunity for arbitrariness by the person performing the test."[29] As one might expect from his dissent in *Taylor*, Judge Wiss concurred in Chief Judge Sullivan's opinion.

Chief Judge Sullivan explained why the court held the government to the clear and convincing standard of the subterfuge rule. He noted that the first sergeant selected soldiers to test immediately after receiving reports of drug use in two of his platoons.[30] Directing an examination immediately after a report of a specific offense in the unit is one of the factors in MRE 313(b) that triggers the clear and convincing evidence standard. The COMA held that the military judge erred in finding that the government met this burden.[31]

Faced with these facts, Judges Crawford and Gierke joined Chief Judge Sullivan and Judge Wiss. They wrote very brief concurring opinions but expressed disagreement with the lead opinion that a previously established policy is a prerequisite for a valid inspection under MRE 313. For Judge Gierke, the key fact that further distinguished this case from *Taylor* was the subordinate's knowledge of possible criminal activity communicated to the commander.[32]

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] United States v. Campbell, 41 M.J. 177 (C.M.A. 1994).

[26] *Id.* at 180. Judge Gierke notes in his concurring opinion that when the commander discovered that there were not enough bottles available to test all of the soldiers on the first sergeant's list, he consulted with the first sergeant about which soldiers should be tested in light of the number of bottles available. *Id.* at 187.

[27] *Id.* at 182.

[28] 30 M.J. 277 (C.M.A. 1990).

[29] *Campbell*, 41 M.J. at 182 citing *Bickel*, 30 M.J. at 286.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 187.

Judge Cox's View on Inspections

Judge Cox has a unique view on the issue of inspections. For Judge Cox, the issue is simply whether the commander was acting to ensure the combat readiness of the soldiers in his command when he ordered the inspection. If he was, then the inspection is proper under MRE 313, and any evidence of criminality discovered is admissible at a court-martial.[33] This is so clear to Judge Cox that he has trouble understanding how others miss the point.[34]

Judge Cox also voiced his displeasure with the confusion in military search and seizure law in *United States v. Morris*[35] in which he concurred and dissented in part. The issue in *Morris* was the admissibility of evidence discovered during a search of Morris's vehicle. The COMA held that the commander did not have probable cause to authorize the search.[36] Judge Cox's main concern was that the court was taking rules developed by civilian courts for civilian society and applying them in the unique relationship between a commander and the personnel under his command.[37] For Judge Cox, the focus in the military should be on the actions of the commander and whether the commander acted reasonably and responsibly.

On the same day *Morris* was decided, Judge Cox wrote a dissenting opinion in *United States v. Thatcher*,[38] a case involving the examination of a marine's barracks room. The majority of the court held that the government failed to prove a valid inspection by clear and convincing evidence.[39] Accordingly, the evidence discovered was inadmissible under MRE 313(b).[40] Judge Cox argued that he would have allowed admission of this evidence because the commander's action "was responsible command conduct and reasonable under the fourth amendment to the Constitution, taking into consideration the military context in which the events occurred."[41]

In *United States v. Alexander*,[42] the majority of the court framed the issue as whether the commander had probable cause to authorize a search of Alexander's room.[43] Judge Cox, in his opinion concurring with the admission of the evidence, chose "to analyze the seizure in terms of inspection."[44] He argued for his position on inspections by stressing how they support the military mission. Any time the commander can relate his actions directly to the ability to perform the military mission, Judge Cox believes that "we have a presumptively valid military inspection."[45] It is this relation to the military mission that determines whether an examination is an inspection or a search for evidence of a crime.[46]

One commentator, speaking of Judge Cox's opinion in *Alexander*, stated: "Judge Cox completely ignored MRE 313(b) and the clear and convincing standard. He did not even mention the subterfuge rule."[47] Other commentators have argued that adoption of Judge Cox's view with its "focus on unit 'mission' and a

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[33] *Id.*

[34] *Id.* Judge Cox's dissenting opinion shows his exasperation with the other members of the court. He stated, "I recognize that I sometimes oversimplify matters, but for the life of me I cannot understand how reasonable people can hold, as a matter of law, that a general, invasive, intrusive seizure of private body fluids for no reason at all passes constitutional muster; yet, if the same type seizure and inspection is ordered by a commander who is able to articulate a valid reason for such action, his inspection fails to meet the same constitutional requirements."

[35] 28 M.J. 8 (C.M.A. 1989).

[36] *Id.* The court did, however, rule that the evidence was admissible. Judge Sullivan believed the commander did not have probable cause to issue the search authorization but voted to admit the evidence under the good faith exception. Judge Cox voted to admit because he believed the commander's actions were reasonable. Therefore, the evidence was admissible by a two to one vote.

[37] *Id.* at 18.

[38] 28 M.J. 20 (C.M.A. 1989).

[39] *Id.* at 24-25.

[40] *Id.* at 26.

[41] *Id.*

[42] 34 M.J. 121 (C.M.A. 1992).

[43] *Id.* at 122. It is interesting to note that the issue the court granted review on was "WHETHER THE GOVERNMENT FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE INTRUSION INTO THE APPELLANT'S DORMITORY ROOM WAS A LAWFUL INSPECTION UNDER MIL.R.EVID. 313."

[44] *Id.* at 127.

[45] *Id.*

[46] *Id.* at 128.

[47] TJAGSA Practice Notes, Criminal Law Notes, *Can the Government Ever Satisfy the Clear and Convincing evidence Standard Under Military Rule of Evidence 313(b)?*, ARMY LAW., June 1992, at 34.

commander's 'reasonableness'" would have the same practical effect as holding that "the fourth amendment does not apply to the military."[48]

At first glance, the COMA's four to one decision in *Campbell* suggests that Judge Cox is not winning any converts to his position. The Government Appellate Division specifically argued for adoption of Judge Cox's position on inspections in the brief it filed in *Campbell*.[49] The majority opinion in *Taylor*, however, contains the following one sentence paragraph: "But Mil. R. Evid. 313(b), which makes a distinction between administrative inspections and inspections for prosecutorial purposes, is probably more restrictive than it need be."[50] The opinion contains no further explanation of this statement. This statement, together with the result in *Taylor*, leads one to believe that Judges Crawford and Gierke are moving toward Judge Cox's view on this issue.

Analysis

Judge Crawford and Judge Gierke were the two swing votes in *Taylor* and *Campbell*. Judge Gierke explained his switch in the two cases because he found that the commander in *Campbell*, unlike the commander in *Taylor*, was made aware of the suspicion of drug use in the company. It appears that Judge Crawford has a similar view although she did not specifically state the reason for her position in *Campbell*. Military command, control, discipline, and protection of lives depends on the quality of a commander's decision, which directly relates to the free flow of information from subordinates to the commander. The COMA's focus on the commander's actual knowledge to distinguish between the facts in *Taylor* and *Campbell* is too narrow because it creates, if not encourages, the opportunity for subordinates to hide and color relevant information when reporting to the commander.

Judge Crawford and Judge Gierke have attempted to draw a distinction—what the commander actually knew—where one should not exist. Disregard for the moment that the commander in *Taylor* had already planned to conduct a urinalysis of some or all of his unit and consider the following. In *Taylor*, suppose Captain Jackson and Sergeant Ramon had informed the commander of the anonymous tips they had received about Taylor's drug use. Judges Crawford and Gierke would now view, following their reasoning in *Campbell*, that the commander conducted an impermissible inspection because the primary purpose was based on suspicions about a specific individual. In *Campbell*, suppose the commander, when presented with the list of soldiers that the first sergeant wanted to test, had asked whether "there was anything going on with these soldiers I should know about?" If the first sergeant had replied, as the sergeant did in *Taylor*, "I don't think I'm at liberty of discussing this with you at this particular time, Sir,"[51] and then the commander had directed the urinalysis, it would appear that Judges Crawford and Gierke would view this as a valid inspection under MRE 313(b).

In both sets of facts, the primary purpose of the inspection is based on suspicions of criminal activity by particular individuals. These suspicions arise first in subordinates in supervisory positions over the soldiers to be tested.[52] The only difference is that in one situation, the supervisory subordinates, at least one of whom is obviously in a leadership role, have kept their motives for their actions from the commander. The soldiers in both scenarios are being searched for evidence based on the suspicions of their superiors whether or not that fact is communicated directly to the commander. This violates the spirit, if not the letter, of MRE 313(b).

The reasoning behind the idea that only the commander's actual knowledge is important is suspect because, as one commentator noted, two of the factors triggering the clear and convincing standard—selecting specific individuals for examination and subjecting specific individuals to substantially different intrusions—"can be activated by actions of the commander's subordinates."[53] It appears that the COMA is allowing the third factor, an examination directed immediately following the report of a specific offense, to be treated differently because MRE 313(b) does not state that the subterfuge rule is triggered by a subordinate's knowledge of a specific offense (even though the subordinate provides information to the commander but does not report the suspicion of a specific offense).[54] The majority opinion in *Taylor* provides no explanation for drawing this distinction, which allows subordinates in supervisory positions to target suspects and manipulate the commander's decision. In such a case, the commander's decision, based on partial information, is flawed and counter productive to command and control.

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[48] Frederic I. Lederer and Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110, 120 (1994).

[49] Appellee's Answer to Final Brief at 8-9, *Campbell*, 41 M.J. 177 (C.M.A. 1994) (No. 93-0277/AR).

[50] United States v. Taylor, 41 M.J. 168, 171-72 (C.M.A. 1994).

[51] *Id.* at 169.

[52] *Id.* Taylor was not ordered to duty to produce a urine sample until late in the afternoon after Sgt. Ramon relayed to Captain Jackson the second tip about Taylor's drug use, which shows that Taylor was the specific target of Captain Jackson.

[53] TJAGSA Practice Notes, Criminal Law Notes, *Subordinate's Knowledge Does Not Turn Inspection into Subterfuge for Criminal Search*, ARMY LAW., Jan. 1995, at 55, n. 221.

[54] *Id.*

In *Taylor*, it appears that Judge Crawford and Judge Gierke placed significant weight on the commander's existing preliminary decision to conduct a urinalysis inspection of some portion of his unit. However, Judge Crawford and Judge Gierke's positions are particularly troubling in light of the undisputed facts in *Taylor*. The appellant in *Taylor* was ordered to work to submit a urine sample by Captain Jackson, the same officer who volunteered the S-1 section for testing based on the anonymous phone call, which he did not communicate to the commander. Captain Jackson issued this order in the middle of the afternoon after receiving a second report from Sergeant Ramon concerning Taylor's drug use. Captain Jackson stated he, not the commander, "had a policy to test 100% of his unit"[55] but that this was the first time that he had to bring someone in from home. Others, however, were excused from the test. Two members of the S-1 section were not tested. One was the regimental executive officer, a lieutenant colonel, who was unable to urinate, an the other was the executive officer who had left for the field and was not required to try a second time.[56] It seems that Captain Jackson was allowed to excuse these two soldiers without the commander's permission, but one wonders whether Captain Jackson would have allowed them to be excused if he had suspicions that they were using drugs.

It seems clear that Captain Jackson, with a suspicion of a particular offense, was not merely a conduit for Captain Lindsay's orders, but that Captain Jackson manipulated the commander's decision to conduct an inspection to target a particular soldier for a search. It is Captain Jackson who is informed of the allegations of drug use, Captain Jackson who volunteers the S-1 section for urinalysis, and Captain Jackson who decides who must come in from home and give a sample and who can leave without giving a sample. Focusing solely on the actions of the commander, Captain Lindsay, allows subordinates, like Captain Jackson, to pick and choose who should be tested based on suspicions without participation by the commander. Clearly, this is not the intent of MRE 313(b). In such a situation, the commander is precluded from exercising his or her discretion, yet Judges Crawford and Gierke did not explain why the commander's discretion should be given to a subordinate. In this light, one sees why Chief Judge Sullivan in his dissenting opinion in *Taylor* stated "I see basic fairness lacking."[57]

Judges Crawford and Gierke, with their concurring opinions in *Campbell*,[58] have effectively eliminated the requirement announced in *Bickel* that an inspection be conducted pursuant to a previously established policy or guideline that eliminates the opportunity for arbitrariness by the person ordering or performing the inspection. As mentioned earlier, both Judge Crawford and Judge Gierke took exception to this language even though the lead opinion in *Campbell* favorably cites this same language from *Bickel*.[59] Because Judge Cox stated in his concurring opinion in *Bickel* that he did not view a previously established policy as determinative on the lawfulness of an inspection,[60] three of the five CAAF judges have now distanced themselves from this requirement. The appellant in *Campbell* cited this language from *Bickel* in his brief to the court.[61]

Recommended Approach

Judge Wiss made the most sense out of this confusing area. In his dissent in *Taylor*, Judge Wiss first noted that the position taken by the majority ignored the facts. He took exception to Judge Crawford's statement that there was "no indication of a wink and a nod"[62] between the commander and his subordinates. Judge Wiss pointed out that the response received by the commander to his inquiries "likely heightened, rather than allayed, his suspicions."[63]

Judge Wiss offered a workable solution to the problem of when to impute the subordinate's knowledge to the commander. He proposed that the simple fact that a subordinate has some knowledge should not be imputed to the commander. However, where the subordinate uses that knowledge to influence the commander's

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[55] Government Reply to Assignment of Errors at 10, *Taylor*, 41 M.J. 168 (C.M.A. 1994) (No. 93-0595).

[56] *Id.* The other marine in the S-1 section not tested was precluded from being tested because he was assigned to transport the urine samples.

[57] *Taylor*, 41 M.J. at 175.

[58] United States v. Campbell, 41 M.J. 177, 186-87 (C.M.A. 1994).

[59] *Id.* at 182.

[60] United States v. Bickel, 30 M.J. 277, 288 (C.M.A. 1990). Judge Cox did add that, although not determinative, the existence of an established policy is good evidence of a proper purpose for an inspection. Judge Gierke in his concurring opinion in *Campbell* also stated that an established policy is good evidence of a valid inspection. *Campbell*, 41 M.J. at 187.

[61] Appellant's Final Brief at 13-14, *Campbell*, 41 M.J. 177 (C.M.A. 1994) (No. 93-0277/AR).

[62] United States v. Taylor, 41 M.J. 168, 172 (C.M.A. 1994).

[63] *Id.* at 175.

decision regarding the inspection, then that knowledge should be imputed to the commander.[64] To hold otherwise, as the majority did in *Taylor*, undermines the rationale behind MRE 313(b):[65] To uphold the commander's authority to inspect his unit to ensure readiness while making sure that the inspection is not a subterfuge to avoid the requirements for a search authorization.[66] The position of the *Taylor* majority allows subordinates to use an inspection as a subterfuge by withholding information from the commander.[67]

Unfortunately, it appears that most of the court does not agree with Judge Wiss. Practitioners are left with a situation where the court has encouraged, albeit unintentionally, subordinates to withhold information from commanders. Even more surprising, if commanders, like Captain Lindsay in *Taylor*, merely acquiesce to the suggestions of their subordinates as to whom they should inspect, the majority of the court will find this a valid inspection. The majority's view does not place any requirement on the commander to be more probing when he or she receives an evasive answer from a subordinate such as the answer Captain Lindsay received from Sergeant Ramon when he was suspicious about why the S-1 section was volunteered for a urinalysis. The majority offers no practical explanation or legal justification for endorsing this action by the commander.

Allowing commanders to be ignorant and encouraging subordinates to withhold information should not be an acceptable solution in the military. Adopting Judge Wiss's proposal would remove the temptations for commanders and subordinates to act this way. It would also be in keeping with the spirit of MRE 313(b) by ensuring that no soldier would be singled out for search based on suspicion less than probable cause. After *Taylor*, a soldier can be singled out for a search under the guise of an inspection based on the suspicions of subordinates if the commander ordering the inspection is not made aware of those suspicions.

Practical Advice for Trial and Defense Counsel

Taylor and *Campbell* show that to determine the commander's primary purpose for ordering an inspection, the focus of the court is on what the commander knew and when he knew it. Although Judges Crawford and Gierke will not look beyond what the commander actually knew, defense counsel should place on the record any information known to subordinates who advised the commander on his decision to inspect or who conducted the inspection at the commander's direction. Now that Judge Wiss has passed away, it appears that only Chief Judge Sullivan is willing to look at the circumstances, including the actions and knowledge of subordinates, to determine if knowledge should be imputed to the commander.

Defense counsel must be alert for any of the three circumstances listed in MRE 313(b) that will trigger the subterfuge rule. Raising the government's burden of proving an inspection to clear and convincing evidence obviously aids defense efforts to suppress any evidence discovered during the alleged inspection. Trial counsel should present evidence of the nexus between the inspection and the military mission. If the trial counsel can show a connection, he or she can count on Judge Cox's vote at a minimum. Trial counsel should not rely on this as their sole argument for admissibility because it has been rejected by the other members of the court.[68]

Defense counsel may be tempted to argue that the absence of an established policy on inspections is evidence that the examination is a subterfuge. Support for this position exists in the *Bickel* and *Campbell* decisions.[69] However, as discussed in the preceding section, trial counsel should argue that both Judge Crawford and Judge Gierke took exception to this language in their concurring opinions in *Campbell*.[70] Trial counsel should also inform the military judge that Judge Cox took exception to the requirement for an established policy in his concurring opinion in *Bickel*.[71] Trial counsel should inform the court if the inspection was conducted pursuant to an established policy. Even those judges who do not believe an established policy is determinative of the issue, believe it is good evidence that the commander had a proper purpose in ordering the inspection.[72]

Conclusion

This is an area of the law that counsel should continue to watch. The court will have ample opportunities to further interpret the subterfuge rule. Although the court seems unsettled on exactly what is a permissible inspection, Judge Crawford and Judge Gierke may be moving toward Judge Cox's broad view. Any movement toward Judge Cox's position may reduce the protections currently provided to service members by the subterfuge rule.

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[64] *Id.*

[65] *Id.*

[66] MCM, *supra* note 4, MIL. R. EVID. 313 analysis, app. 22, at A22-23 to A22-24.

[67] TJAGSA Practice Notes, Criminal Law Notes, *Subordinate's Knowledge Does Not Turn Inspection into Subterfuge for Criminal Search*, ARMY LAW., Jan. 1995, at 55, n. 222.

[68] The government in its brief in *Campbell* argued for adoption of Judge Cox's view. *See supra* note 49.

[69] United States v. Campbell, 41 M.J. 177, 182 (C.M.A. 1994).

[70] *Id.* at 186, 187.

[71] *Bickel*, 30 M.J. at 288.

[72] *See supra* note 61.

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Criminal Law Notes

Strict Scrutiny for Urinalysis Cases? *United States v. Manuel, United States v. Fisiorek,* and *United States v. Sztuka*

Introduction

On 29 September 1995, the Court of Appeals of the Armed Forces (CAAF) issued opinions in three urinalysis cases suggesting that it is scrutinizing these cases more strictly than others. These cases are *United States v. Manuel*,[1] *United States v. Fisiorek*,[2] and *United States v. Sztuka*.[3] In the past, the Court of Military Appeals (COMA)[4] created special protections for accused in urinalysis cases.[5] More recently, however, the COMA indicated that the law applicable to urinalysis cases should be the same as the law applicable to other cases.[6] In these three cases, the court appears to have reversed this recent trend by again creating special protections for accused in urinalysis cases.

United States v. Manuel

In *Manuel*, the CAAF upheld suppression of positive urinalysis test results where the government inadvertently destroyed the urine sample after the test was completed. The CAAF found that the regulations requiring retention of positive urine samples confer a substantial right on the accused, which was violated by destruction of the sample.[7]

The accused in *Manuel* was randomly selected to provide a urine sample for drug testing on 4 October 1991. His sample tested positive for cocaine metabolite; as a result, he was charged with use of cocaine. The defense requested a retest of the urine sample in March 1992,[8] but the government was unable to comply because the sample was inadvertently destroyed by the government drug testing laboratory.[9] The defense moved to suppress the results of the urinalysis test because it had been denied its right to equal access to evidence under Article 46, Uniform Code of Military Justice (UCMJ),[10] and because the government had not complied with its own rules requiring retention of positive urine samples. The military judge denied the motion and the accused was convicted.[11]

The Air Force Court of Military Review (AFCMR) reversed the accused's conviction, holding that the accused's urinalysis test results should have been suppressed. The AFCMR ruled that the government regulations, which required retention of positive urine samples for at least one year,[12] conferred a substantial right on the accused, which was violated when the sample was destroyed.[13]

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[1] 43 M.J. 282 (1995).

[2] 43 M.J. 244 (1995).

[3] 43 M.J. 261 (1995).

[4] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2633 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). This same act also changed the names of the various courts of military review. In this note, the title of the court that was in place when the decision was published will be used.

[5] *See, e.g.*, United States v. Arguello, 29 M.J. 198 (C.M.A. 1989) (urinalysis regulations prohibiting government use of negative urinalysis test results were designed to protect servicemembers; therefore, government's use of negative test result in rebuttal was reversible error).

[6] *See* United States v. Johnson, 41 M.J. 13 (C.M.A. 1994) (admissibility of negative urinalysis test results should be governed by Military Rules of Evidence, not regulations; therefore, military judge properly suppressed defense proffered negative urinalysis test result, and *Arguello* is overruled).

[7] United States v. Manuel, 43 M.J. 282, 287-88 (1995).

[8] The defense first requested a government retest in early March. When this request was denied, the defense again requested a retest on 31 March, this time asking that the retest be done at a private lab at the accused's expense. *Id.* at 284.

[9] The probable explanation for the destruction, given at trial, was that after the accused's specimen had tested positive, it was used in a special study and inadvertently placed with a group of negative samples, which were subsequently destroyed. *Id.*

[10] 10 U.S.C. § 946 (1988) [hereinafter UCMJ].

[11] *Manuel*, 43 M.J. at 284-85.

[12] Several directives and regulations require retention of positive urine specimens. *Air Force Drug Testing Laboratory Operating Instruction 160-202*, which was effective at the time the accused's sample was tested, required retention of all positive specimens for one year. *Manuel*, 43 M.J. at 287. *See also* DEP'T OF DEFENSE, DIRECTIVE 1010.1, DRUG ABUSE TESTING PROGRAM, encl. 3, para. I.3 (28 Dec. 1984) [hereinafter DOD Dir. 1010.1] (requires retention of positive urine specimens which may be used in a court-martial for 120 days); DEP'T OF ARMY REG. 600-85, PERSONNEL: GENERAL, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, paras. 10-4e(5), 10-4f(10)(b) (21 Nov. 1988) [hereinafter AR 600-85] (requires retention of all positive urine specimens for 60 days; requires retention for 180 days or more upon request of unit); DEP'T OF AIR FORCE INSTRUCTION 44-120, DRUG ABUSE TESTING PROGRAM, para. 5.2.4.1 (1 Aug. 1994) (requires retention of positive urine specimens for 180 days).

[13] United States v. Manuel, 39 M.J. 1107 (A.F.C.M.R. 1994).

The CAAF affirmed this decision. Judge Wiss, writing the majority opinion, agreed that the regulations conferred a substantial right on the accused.[14] He also found that the lower court did not abuse its discretion by ruling that suppression was the appropriate remedy for failure to comply with the regulation. Judge Wiss pointed out that the urine sample was of central importance to the defense and that the government's loss of the sample was due to gross negligence.[15] Chief Judge Sullivan and Judges Cox and Gierke concurred.[16] Judge Crawford dissented. She disagreed with the majority's finding that the sample was destroyed because of gross negligence. She also pointed out that the majority opinion ignored history and precedent and failed to consider a harmless error analysis.[17]

The CAAF's decision in *Manuel* creates a special rule for destruction of evidence, applicable only to urinalysis cases. Ordinarily, the due process clause provides the primary protection against government destruction of evidence.[18] Government destruction of evidence, which is not apparently exculpatory, does not violate due process unless the government acted in bad faith.[19] Absent bad faith, no remedial action, such as exclusion of evidence or dismissal of charges, is warranted.[20] In *Manuel*, evidence was excluded even though no bad faith was present.

This special rule appears to be inconsistent with prior case law.[21] Ordinarily, violation of a regulation will not justify exclusion of evidence, even in a urinalysis case. For example in *United States v. Johnson*,[22] the COMA ruled that negative urinalysis test results[23] should not be inadmissible solely because their use violates a regulation.[24] The court held that the Military Rules of Evidence, rather than regulations, should determine admissibility of negative urinalysis test results.[25] Similarly, in *United States v. Pollard*,[26] the COMA upheld admission of urinalysis test results even though the procedures used to collect the urine specimen did not comply with applicable regulations. The CAAF noted that deviating from a regulation, which sets out procedures for collecting, transmitting, or testing urine samples, does not render the sample inadmissible as a matter of law.[27]

In *Manuel*, the CAAF stated that the regulations requiring retention of positive urine specimens were designed to protect an accused's right to equal access to evidence under Article 46,

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[14] *Manuel*, 43 M.J. at 287-88.

[15] *Id.* at 288-89.

[16] *Id.* at 289.

[17] *Id.* at 289-94 (Crawford, J., dissenting).

[18] U.S. CONST. amend. V.

[19] The accused is entitled to no relief on due process grounds for government destruction of evidence unless (1) the evidence possesses exculpatory value that was apparent before it was destroyed, (2) the accused would be unable to obtain comparable evidence, and (3) the government destroyed the evidence in bad faith. *See* Arizona v. Youngblood, 488 U.S. 51 (1988); United States v. Mobley, 31 M.J. 273, 277 (C.M.A. 1990); United States v. Gill, 37 M.J. 501, 506 (A.F.C.M.R. 1993). The majority opinion in *Manuel* only mentioned the first two prongs of this test, citing *California v. Trombetta*, 467 U.S. 479 (1984) and *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986). However, both of these cases were decided before *Youngblood*, which clarified *Trombetta* by adding the bad faith requirement.

[20] *Mobley*, 31 M.J. at 277. *See also Kern*, 22 M.J. at 52.

[21] United States v. Manuel, 43 M.J. 282, 292-94 (1995) (Crawford, J., dissenting).

[22] 41 M.J. 13 (C.M.A. 1994).

[23] Although it may contain some traces of drugs or drug metabolites, a negative urinalysis result does not contain drugs or drug metabolites at a level above the Department of Defense cut-off levels for reporting a sample positive. *See* DOD Dir. 1010.1, *supra* note 12, encl. 3, para. H.1.

[24] In doing so, the court overruled *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989), which prevented the government from using such negative results, even in rebuttal, because such use violated *DOD Directive 1010.1*. *DOD Directive 1010.1* generally prohibits reporting details of a negative test to the government. DOD Dir. 1010.1, *supra* note 12, encl. 3, para. H.3.

[25] In *Johnson*, the COMA upheld the military judge's decision not to admit a negative screening radio-immunoassay test proffered by the defense because it did not meet the requirements for scientific evidence under the Military Rules of Evidence. *Johnson*, 41 M.J. at 16.

[26] 27 M.J. 376 (C.M.A. 1989).

[27] *Id.* at 377. *But see* United States v. Strozier, 31 M.J. 283 (C.M.A. 1990) (trial judge properly excluded positive urinalysis test result based on gross deviations from collection procedures mandated by urinalysis regulations).

UCMJ.[28] However, Article 46 was not designed to place additional obligations, beyond those contained in the Constitution, on the government to preserve evidence that is not apparently exculpatory.[29] Arguably, if a regulation is designed to give an accused substantive rights that, if violated, would lead to suppression of evidence or similar relief, the regulation should specifically state this.[30] To find otherwise, as the majority did in *Manuel*, may lead to great confusion because practitioners must guess which regulatory provisions confer substantive rights and which do not.[31]

The CAAF's decision that suppression was the appropriate remedy may be ill-founded. The CAAF states that the urinalysis result was of "central importance" to the defense.[32] However, the three tests performed on the sample all yielded positive results.[33] Although the sample was of central importance to the government, it was of little, if any, importance to the defense.[34]

To justify exclusion, the defense arguably must demonstrate that the sample was destroyed through gross negligence following the CAAF finding of gross negligence in *Manuel*.[35] However, the CAAF's finding was based on the government expert's concessions during cross-examination that the destruction of the sample could be called gross negligence "if you want to characterize it that way."[36] Neither the trial judge nor the AFCMR found gross negligence in *Manuel*. Defense counsel should argue for exclusion whenever a urine sample is destroyed, regardless of the degree of negligence involved.

Arguably, *Manuel* brought the law applicable to urinalysis cases off the beaten path of the law and into a wilderness of special rules.[37] It is likely to engender many challenges to the minor regulatory violations present in nearly every urinalysis case. It will be difficult to determine which violations warrant exclusion and which do not. Clearly, inadvertent destruction of a sample justifies exclusion. On the other hand, case law indicates that irregularities in collection of samples and government use of negative test results do not require exclusion.[38] Whether irregularities in testing justify exclusion remains to be seen.[39]

Practitioners must be alert to the new rules advanced by *Manuel*. Prosecutors should be more vigilant than ever in ensuring that the urinalysis cases they bring to trial are free of proce-

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[28] UCMJ art. 46 (1988).

[29] United States v. Manuel, 43 M.J. 282, 292 (1995) (Crawford, J., dissenting). The Court of Military Appeals has specifically ruled that Article 46 does not place stricter due process requirements on the government to preserve evidence that is not apparently exculpatory. United States v. Kern, 22 M.J 49, 51. *But see* United States v. Garries, 22 M.J. 288, 293 (C.M.A. 1986) (court held that accused was not denied due process by government destruction of evidence that was not apparently exculpatory; in dicta, the court mentioned that, under Article 46, the defense is entitled to equal access to all evidence, whether or not it is exculpatory).

[30] Many regulations contain such provisions. For example, the Army's drug and alcohol regulation contains a limited use policy which, among other things, prohibits the use, at courts-martial, of urinalysis tests taken in conjunction with a soldier's participation in the Alcohol and Drug Abuse Prevention and Control Program. AR 600-85, *supra* note 12, para. 6-4a(1).

[31] For example, *DOD Directive 1010.1* requires the laboratory to report test results within ten working days of receipt of the sample. It also requires testing laboratories to maintain an internal quality control program consisting of at least ten percent of the specimens analyzed. The violation of these provisions might arguably give an accused substantive rights. DOD Dir. 1010.1, *supra* note 12, encl. 3, paras. H.2, G.

[32] *Manuel*, 43 M.J at 288.

[33] *Id.* at 294 (Crawford, J., dissenting). The accused's sample tested positive during two radio-immunoassay screening tests and one gas chromatography/mass spectrometry confirmation test. *Id.* at 284.

[34] After *Manuel*, defense counsel may be tempted to request additional testing of a client's urine sample *only if* the sample has been destroyed.

[35] *Manuel*, 43 M.J. at 288.

[36] *Id.* at 290 (Crawford, J., dissenting).

[37] *Compare* United States v. Johnson, 41 M.J. 13, 15 (1995): "This is an opportunity to get us back out of the wilderness and on the beaten path." (quoting from government's oral argument).

[38] United States v. Pollard, 27 M.J. 376, 377 (C.M.A. 1989); *Johnson*, 41 M.J. at 16.

[39] This area may be ripe for litigation given the recent problems discovered at some of the Department of Defense drug testing laboratories. For example, on 24 July 1995, the commander of the Fort Meade Forensic Toxicology Drug Testing Laboratory discovered that technicians had violated procedures by switching quality control samples during the radio-immunoassay screening tests to ensure the samples would meet quality control standards. The laboratory's oversight agency has opined that the affected positive test results are still scientifically supportable because the confirming gas chromatography/mass spectrometry tests were not affected. *See* Memorandum, Commander, Walter Reed Army Medical Center, MCHL-CG, to Unit Commanders Serviced by the FTDTL, Fort Meade, subject: Batch Screening at the FTDTL, Fort Meade (18 Aug. 1995). The COMA has suggested, in dicta, that such testing irregularities would not require exclusion of positive test results. *Pollard*, 27 M.J. at 377. Given the CAAF's ruling in *Manuel*, however, it may be advisable to dispose of the affected positive test results administratively.

dural errors. Defense counsel, on the other hand, should exploit any procedural errors by requesting suppression of urinalysis test results or dismissal of charges.

United States v. Fisiorek

In *Fisiorek*, the CAAF created new rules governing the defense's right to reopen its case after findings have been announced in a urinalysis case. The CAAF held that the military judge erred by not allowing the accused to reopen his case based on newly discovered evidence where, after findings had been announced and before sentencing, a friend of the accused stated that he had surreptitiously placed cocaine in the accused's food.[40]

The accused in *Fisiorek* was charged with using cocaine sometime between 13 and 20 October 1988. At trial, the accused denied using cocaine but was found guilty. Following findings, the court recessed for the evening. During the recess, a friend of the accused stated that he attended a party at the accused's parents' house on 8 October 1988 and surreptitiously blew cocaine across a plate of cookies. The accused allegedly took some of these cookies back to his base and consumed them.[41]

The defense requested a mistrial on the basis of newly discovered evidence and an opportunity to reopen its case to present the newly discovered evidence. The military judge denied both requests because the "newly discovered" evidence could have been discovered through due diligence. The AFCMR affirmed this ruling.[42]

The CAAF reversed the accused's conviction. Judge Cox, writing the majority opinion, held that the trial judge applied the wrong standard to determine whether to allow the defense to reopen its case.[43] The trial judge applied the due diligence standard applicable to a motion for a new trial.[44] Judge Cox found this rule inappropriately severe where the trial is still on-going, and all of the members are still present. Declining to fashion a particular rule, he noted that the primary consideration should be whether discovery of the new evidence is *bona fide* and whether the new evidence, if true, casts substantial doubt upon the accuracy of the proceedings. Judge Cox found that the trial judge abused his discretion by failing to allow the defense to reopen its case because the defense counsel arguably demonstrated due diligence, the court members were still assembled, and the newly discovered evidence could have created a reasonable doubt as to the accused's guilt.[45] Chief Judge Sullivan and Judges Gierke and Wiss concurred.[46] Judge Crawford dissented. She pointed out that the defense knew about the presence of cocaine at the party held at the accused's parents' house; therefore, she concluded that the judge did not abuse his discretion in denying the defense request to reopen its case.[47]

The new rule created by *Fisiorek* is not well defined. Because the majority declined to create a clear standard, it will be difficult for practitioners and military judges to determine when the defense should be allowed to reopen its case after findings have been announced. As Judge Crawford pointed out in her dissent, it would have made more sense to use the due diligence standard applicable to granting a new trial.[48] The rationale behind the due diligence standard—judicial economy and finality—

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[40] United States v. Fisiorek, 43 M.J. 244, 245.

[41] *Id.* at 245-46.

[42] *Id.*

[43] *Id.* at 247.

[44] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1210(f)(2) (1984) [hereinafter MCM]. This rule provides:

> (2) Newly discovered evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

[45] United States v. Fisiorek, 43 M.J. 244, 247-49.

[46] *Id.* at 249.

[47] *Id.* at 249-51 (Crawford, J., dissenting).

[48] *Id.* at 249-50 (Crawford, J., dissenting).

applies equally to motions to reopen after findings have been announced as to motions for a new trial. New evidence, such as that raised in *Fisiorek*, typically can be presented only after a lengthy recess to permit the government the opportunity to investigate it.

Additionally, permitting the defense too much latitude to reopen its case after findings arguably is unfair. Obviously, the government cannot reopen its case after a not guilty finding has been announced.[49] Permitting the defense to reopen its case after findings may encourage defense witnesses to wait and see whether the accused will be convicted without their testimony before they come forward.[50]

In theory, the CAAF's rule in *Fisiorek* applies to all requests to reopen a case after findings. However, *Fisiorek* involved a urinalysis and may suggest that the CAAF is willing to grant the accused preferred treatment in urinalysis cases. Defense counsel in urinalysis cases should continue their investigation after findings have been announced and should ask to reopen if they discover any additional evidence that might benefit their client.[51]

United States v. Sztuka

Sztuka dealt with the issue of granting a new trial in a urinalysis case based on newly discovered evidence.[52] In *Sztuka*, the CAAF held that the military judge should have granted the accused a new trial where, approximately one month after the trial, the accused's estranged husband allegedly admitted that he had placed marijuana in her food.[53]

The accused in *Sztuka* was an Air Force nurse holding the rank of major. She was married to Captain Sztuka, an Air Force jet pilot.[54] According to the accused, she tried to convince her husband that their marriage would not work, but he threatened her and pleaded with her to stay. At the end of February 1991, the accused allegedly told her husband that she had obtained a new assignment that would require her to move to New York without him. Her husband allegedly became furious. The accused testified that her husband served her a bowl of Cajun gumbo on 8 March 1991.[55] The next day, her husband reported to the Air Force Office of Special Investigations (OSI) that he had smelled marijuana on his wife's person and had seen a baggie of it in her bathroom. That evening, OSI agents obtained a urine sample from the accused, which later tested positive for marijuana metabolite. The accused was convicted of use of marijuana in August 1991.[56]

Before the AFCMR, the accused moved for a new trial based on newly discovered evidence. During a fact finding hearing held pursuant to *United States v. Dubay*,[57] First Lieutenant Rebecca Guest testified that in December 1991 Captain Sztuka admitted to her that he had put marijuana in the accused's food. Lieutenant Guest was Captain Sztuka's paramour from September 1991 to August 1992 when he informed her he was engaged to another woman. Captain Sztuka denied having made the admissions and denied having put marijuana in his ex-wife's food. The AFCMR denied the accused's request for a new trial.[58]

The CAAF reversed the AFCMR's decision and set aside the accused's conviction. Judge Wiss, writing the majority opinion, found that the lower court abused its discretion when it held that the new evidence would not produce a substantially new result.[59] Chief Judge Sullivan and Judges Cox and Gierke concurred.[60] Judge Crawford dissented. She argued that the majority improperly rejected the findings of fact by the judge at the *Dubay* hearing and the lower court and cast aside the proper standard of review.[61]

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[49] This would constitute impermissible double jeopardy. UCMJ art. 44 (1988); U.S. CONST. amend. V.

[50] This is especially true in urinalysis cases, such as *Fisiorek*, where the defense of innocent ingestion is raised. This defense often involves testimony by a friend or spouse who must incriminate himself or herself by admitting that he or she surreptitiously placed drugs in the accused's food or drink. *See, e.g.*, United States v. Robertson, 39 M.J. 211 (C.M.A. 1994) (accused's roommate testified that she put cocaine in beer which accused unwittingly drank); United States v. Gilbert, 40 M.J. 652 (N.M.C.M.R. 1994) (accused allegedly smoked cigarette borrowed from civilian which, unknown to accused, contained marijuana; civilian refused to answer questions about what cigarette contained).

[51] Defense counsel in urinalysis cases may be encouraged to request that sentencing not be scheduled on the same day as the findings portion of the trial.

[52] MCM, *supra* note 44, R.C.M. 1210(f)(2).

[53] United States v. Sztuka, 43 M.J. 261, 262 (1995).

[54] *Id.*

[55] *Id.* at 263.

[56] *Id.* at 263-64.

[57] 37 C.M.R. 411 (1967).

[58] United States v. Sztuka, 43 M.J. 261, 264-67 (1995).

[59] *Id.* at 271.

[60] *Id.*

[61] *Id.* at 276 (Crawford, J., dissenting).

In *Sztuka*, the majority used the standard of review for granting a new trial based on newly discovered evidence. However, it interpreted the facts very favorably for the accused[62] and failed to discuss facts that were damaging to the accused.[63] The majority opinion also did not grant much deference to the findings of fact by the military judge at the *Dubay* hearing or to the findings of the AFCMR. *Sztuka*, like *Fisiorek*, is a urinalysis case, which indicates that the CAAF may be giving the accused in such cases special benefits not available to other accused.

Defense counsel in urinalysis cases must be prepared to take advantage of these special benefits. The defense should actively continue its investigation during the post-trial and appellate process. Any new evidence that emerges after trial may justify a request for a new trial.

Both *Sztuka* and *Fisiorek* are examples of the importance of the innocent ingestion defense. Defense counsel should aggressively pursue any evidence raising this defense. Trial counsel, on the other hand, should look for evidence rebutting the defense. This may include scientific evidence indicating that the alleged innocent ingestion is impossible or implausible[64] or testimony that the accused or other defense witnesses who raise the issue are biased or untruthful.[65] If the defense has not provided the government with proper notice of the innocent ingestion defense,[66] the trial counsel may need a continuance to obtain rebuttal evidence.

Conclusion

These three cases suggest that the CAAF is subjecting urinalysis cases to stricter scrutiny than other cases. The CAAF appears to be establishing special protections for the accused in these cases and holding the government to a higher standard.[67] Practitioners need to be aware that the ordinary rules may not apply in a urinalysis case. Defense counsel must be vigilant to request protections, which in other cases would not exist. Trial counsel, on the other hand, need to be particularly careful to ensure that urinalysis cases are error-free. The existence of minor errors, which would be tolerated in other cases, may make it advisable to dispose of some urinalysis cases administratively. Major Masterton.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. 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.

Office Management Note

TJAGSA Legal Assistance Course

You may have missed the 38th Legal Assistance Course during the week of 26 February to 1 March 1996. It is never too late, however, to plan ahead and budget for our next course which will be held in October 1996. Specific dates for this one-week course will be identified in the near future. Interested personnel should refer to the Continuing Legal Education News section of *The Army Lawyer* for information on obtaining a quota. Major Block.

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[62] For example, the majority's rendition of the facts is based largely on the accused's testimony and the testimony of Lieutenant Guest, a defense witness. *Id.* at 262-66. The appendix to the opinion, which contains selected portions of Captain Sztuka's testimony, is comprised almost entirely of cross examination by the defense. *Id.* at 271-76.

[63] For example, the majority did not discuss the allegations that the accused attempted to flush her bladder prior to the urinalysis and delayed the search of her house. *Id.* at 278 (Crawford, J., dissenting).

[64] *See, e.g.*, United States v. Perry, 37 M.J. 363 (C.M.A. 1993) (accused's explanation that he unwittingly smoked a cigarette laced with cocaine twenty-eight hours before urinalysis test was not credible, given expert's testimony that the accused would have had to ingest an almost toxic dose of cocaine to achieve the 98,000 nanograms per milliliter test result his sample yielded and that the cocaine would not vaporize or pass through a cigarette filter). *See generally* David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sep. 1988, at 7, 17; R. Peter Masterton & James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., April 1995, at 3, 13.

[65] MCM, *supra* note 44, MIL. R. EVID. 608.

[66] The defense is required to notify the trial counsel of the innocent ingestion defense before the beginning of trial on the merits. MCM, *supra* note 44, R.C.M. 701(b)(2).

[67] In *Manuel*, Judge Crawford pointed out that these three cases evince a "distrust of the urinalysis program *en toto*." United States v. Manuel, 43 M.J. 282, 289 (1995) (Crawford, J., dissenting). Judge Crawford also pointed to several other recent cases which demonstrate the same trend. One is *United States v. Nimmer*, 43 M.J. 252 (1995), a urinalysis case where the military judge precluded the defense from introducing negative results of a hair test for drugs because the test would not rule out a one time use of cocaine. The CAAF remanded the case for relitigation of this issue using the proper standard under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). Judge Crawford did not believe that remand was necessary. *Nimmer*, 43 M.J. at 260 (Crawford, J., dissenting). Another case mentioned by Judge Crawford was *United States v. Mosley*, 40 M.J. 300 (1995), in which the CAAF held that the military judge did not abuse his discretion by ordering a retest of a urine sample for the benzoylecgonine and ecgoninemethylester metabolites of cocaine and raw cocaine. Judge Crawford felt that the military judge abused his discretion by ordering the retest because the defense had not made an adequate showing of necessity. *See also* United States v. Robinson, 39 M.J. 88 (C.M.A. 1994) (military judge did not abuse his discretion by denying defense request for secretor test to show accused was not the source of positive urine sample, where accused was unable to show discrepancies in collection and testing of sample).

Mobilization and Deployment Note

SSCRA and USERRA Training Materials for Deploying Units

The Dayton Peace Accord for Bosnia required mobilization and deployment of significant numbers of Reserve Component (RC) personnel. Some of these soldiers deployed to Bosnia while others went to Germany as back fill for deploying units there. All mobilizing RC personnel, whether United States Army Reserve (USAR) or Army National Guard (ARNG), are beneficiaries of significant legal protection under the Soldiers' and Sailors' Civil Relief Act (SSCRA)[68] and the Uniformed Services Employment and Reemployment Rights Act (USERRA).[69] Judge advocates have a significant responsibility to ensure that soldiers understand and exercise their rights under these acts.

In an effort to assist all judge advocates called on to provide SSCRA or USERRA training, the Administrative and Civil Law Department of The Judge Advocate General's School, United States Army (TJAGSA), prepared training packets about both acts. Hard copies of the training packets have been provided to the Guard and Reserve Affairs Department, Office of The Judge Advocate General. Electronic copies have also been posted to the Legal Automation Army-Wide Systems Bulletin Board Service (BBS). The training packets include teaching notes and briefing slides for use by judge advocates in preparing and teaching classes, and information papers that can be distributed to soldiers who have questions.

Deploying judge advocates and those supporting mobilizing or deploying soldiers may also be able to use the materials found in TJAGSA's Deployment Guide (JA 272). Although developed primarily based on Desert Shield/Desert Storm experiences, the guide does have sample procedures and briefings that can be adapted for local use. We continue to solicit the assistance of practitioners who believe they have information papers, briefing packets, or other materials that should be added to or that replace outdated materials in the Deployment Guide. Please send copies of your materials, hard copy and disk copy, if possible, to: TJAGSA, Attn: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781. We can also accept your submission by downloading it from the BBS.

Education and assistance with SSCRA and USERRA issues, and mobilization and deployment issues in general, are major elements of the Army Legal Assistance Program. Please share your ideas and encourage discussion of ways in which we can improve the materials we presently have available. Our ability to keep these materials up to date with the changing missions of the Army is especially dependent on input from those with current experiences. Your submissions will contribute to the knowledge base of the entire JAGC! Major McGillin.

Legal Assistance Administrative Law Note

Military Whistleblower Protection

Legal Assistance Attorneys (LAA) may see clients who question what they perceive to be inappropriate reactions to complaints they have made about management. Just as possible, a LAA may see a client who is afraid to make a complaint out of fear of reprisal. For both individuals, the information in *DOD Directive 7050.6, Military Whistleblower Protection* (12 August 1995), will be of interest.

According to the *DOD Directive 7050.6*, it is Department of Defense (DOD) policy to allow soldiers freely to make "protected communications" to members of Congress, inspectors general (IG), law enforcement personnel, and others without fear of reprisal. Acts of reprisal that take the form of unfavorable personnel actions or withholding of favorable personnel actions, or threats of either, are punishable under Article 92 of the Uniform Code of Military Justice.[70]

So what type of information is considered a protected communication? According to Enclosure 2 to *DOD Directive 7050.6*, a protected communication involves information a soldier "reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial or specific danger to public health or safety."[71] Also included are complaints of sexual harassment or unlawful discrimination.[72] This information is a protected communication when it is conveyed to a member of Congress, an IG, law enforcement personnel, or other agency officials designated to receive complaints, for example, a fraud, waste and abuse hotline).

Defining a "personnel action" for purposes of determining an act of reprisal under *DOD Directive 7050.6* is also important. The directive broadly defines a "personnel action" as anything that can affect the soldier's current position or career.[73] The directive includes referral for mental health evaluations as a personnel action.

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[68] 50 U.S.C. App. §§ 500-592 (1995). Major Howard McGillin is The Judge Advocate General's School, United States Army, point of contact for these materials.

[69] 38 U.S.C. §§ 4301-4433 (1995). Major Christopher Garcia is The Judge Advocate General's School, United States Army, point of contact for these materials.

[70] 10 U.S.C. § 892 (1995).

[71] *See* the definition of "protected communication" in enclosure 2 to *DOD Directive 7050.6*. *Supra* note 71, at 2-1.

[72] *Id.*

[73] *See* the definition of "personnel action" at enclosure 2 to *DOD Directive 7050.6*. *Id.* at 2-1.

Quick action is critical to taking advantage of the protections available in *DOD Directive 7050.6*. While not an absolute bar, the directive provides that allegations of reprisal made more than sixty days after a soldier becomes aware of the reprisal do not have to be investigated.[74] Also, reprisal allegations must be made either directly to the DOD IG, or through individual service IGs to the DOD IG. The DOD IG is responsible for ensuring that allegations are promptly investigated. The soldier will be provided a copy of a resulting report of investigation. Soldiers dissatisfied with the investigations or action taken can petition the Army Board for Correction of Military Records (ABCMR) for further relief. Representation before the ABCMR by a judge advocate is possible depending on the circumstances.

The protections of *DOD Directive 7050.6* provide a powerful response to improper acts of reprisal. Its provisions create a very real potential to satisfy complainants, *but only if he or she is familiar with its terms*. Untimely allegations or allegations that are directed to improper sources may prevent an individual from obtaining relief.

Although not routinely in the personnel business, LAAs may find that an understanding of *DOD Directive 7050.6* is a handy tool to have in their bags. Major Block.

Family Law Note

Considering the Custody and Visitation Rights of Third Parties

It is hardly unusual in our society to find other than natural parents involved in caring for children. In many cases, regular child care is provided not by commercial child care services but by family members. In others, children actually live with their grandparents or other persons on a full-time basis and receive visits from their natural parents. In both situations, persons other than the natural parents develop relationships that are important to the children involved. What happens when the natural parents of children in these situations separate with the intent to obtain a divorce?

Contrary to the expectations of some natural parents, many courts are willing to consider the rights of visitation and even custody in third parties. While inconsistent with the common law that left the issue of visitation to natural parents, addressing nonparent visitation is consistent with state legislation focused on rights of some third parties, like grandparents, to visitation under some circumstances.[75] Defining the scope of visitation rights, if any, and the standing of nonparents to seek visitation when fit parents object[76] are issues that continue to be litigated.[77] A recent Oregon case considers one such situation.

In the case of *In re Shoffer*, the Oregon Court of Appeals addressed a trial court's failure to consider a stepfather's "prayer for visitation rights" with his stepchild.[78] Distinguishing the father's "prayer for visitation" from a "petition for custody," the court found that visitation may be permitted if appropriate and in the child's best interest, which is a determination to be made on a case-by-case basis.[79] What is appropriate will depend on (1) the impact on the parent's right to custody, (2) the nature of visitation sought, and (3) the child's best interest.[80]

In *Lucero v. Hart*, the New Mexico Court of Appeals was asked to interpret New Mexico's Grandparent Visitation Privileges Act.[81] At trial, Tonnie Lucero was awarded visitation privileges for her grandchild. The father, Tonnie Lucero's son, had acknowledged paternity but had never been judicially declared the father. Also, he had voluntarily relinquished his parental rights to the child prior to this action being initiated.[82]

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[74] *Id.* para. E.1.a.

[75] All states have some statutory provision relating to grandparent or nonparent *visitation*. *See* Linda H. Elrod, *Family Law and Practice*, *in* CHILD CUSTODY AND VISITATION, ch. 32, § 32.09[7] (Linda H. Elrod, as revised by Stephen C. Windsor, 1992). Some state statutes limit application of the visitation rights to situations where the grandparents' own child has died or is a noncustodial parent and otherwise does not object to the exercise of visitation by the grandparents.

[76] The issue of parental consent may be determinative in grandparent visitation cases. *See Steward v. Steward*, 21 FAM. LAW REPT. 1223 (Nev. Sup. Ct. 1995), holding that visitation with grandparents over the objection of divorced parents is presumptively not in the best interests of the child.

[77] For example, the Bureau of National Affairs Family Law Reporter includes cases from Iowa, New Jersey, Virginia, Nevada, North Carolina, Indiana, Minnesota, Tennessee, Mississippi, Kentucky, Alabama and New Mexico in the period 1 November 1994 to 19 December 1995 (*See* 21 FAM. LAW REPT. Final Index (BNA 1995); 22 FAM. LAW REPT. Index Summary (Report Nos. 1-7) (BNA 1995).

[78] 22 FAM. LAW REPT. 1059 (BNA) (Ore. Ct. App. 1995).

[79] *Id.* at 1060.

[80] *Id.*

[81] *Id.* at 1077 (New Mexico Ct. App. 27 Nov. 1995 citing to New Mexico Statutes Annotated §§ 40-9-1 et seq.).

[82] *Id.* at 1078.

On appeal, after concluding that Tonnie Lucero's status as a grandparent was adequately demonstrated, the court held that her grandparent visitation privileges were not automatically extinguished when her son relinquished his parental rights to the child. Instead, the court found that several factors, including best interests of the child and all relationships involved, the grandparent-grandchild, grandparent-child and grandparent-parent), must be considered on a case-by-case basis, with no presumption in favor of grandparent visitation.[83] In evaluating these factors with regard to Tonnie Lucero's petition, the court found, primarily based on her limited relationship with her grandchild and a poor relationship with the child's mother, that visitation privileges should not be granted.[84]

In addition to nonparent visitation issues, courts are being asked to consider requests for custody by nonparents. While this may be anticipated where natural parents are unavailable or unfit, there are situations where nonparents have challenged the custody rights of natural parents. One such case recently reached the Pennsylvania Supreme Court.

In *Rowles v. Rowles*,[85] a couple living with the husband's parents moved out to give themselves a chance to address marital problems. The two children of the marriage remained behind to keep them in a stable environment. When the couple divorced, a written agreement confirming continued custody with the grandparents was incorporated into the divorce decree. The mother of the children subsequently petitioned the court for custody. At the trial level, the court recognized a prima facie, although not conclusive, right to custody in favor of a children's parents. Despite application of this standard, the court found that the circumstances in this case overcame a presumption in favor of the parents and retained custody with the grandparents.

The Pennsylvania Supreme Court first reviewed the standard applicable to this case. Focusing on the reasonableness of automatically concluding that biological relationships are the best guarantee that a child's needs will be met, the court rejected a presumption in favor of parental custody. Instead, the court held that a custody decision should hinge on a best interests analysis supported by a preponderance of the evidence.[86] The court did confirm, however, that parent-child relationships do retain their importance and merit special consideration.[87] Despite applying a standard less deferential to the parent, the court reevaluated the facts in this case and found that granting custody to the mother, with reasonable visitation to other parties, was the alternative best supported by the evidence.[88]

It is very possible that Legal Assistance Attorneys (LAAs) will see nonparent visitation and custody questions raised by parties to a separation agreement. Also likely is the possibility that nonparents or grandparents, who are senior members or retirees, will raise questions regarding access to children. Where parties are in agreement, the LAA may be able to facilitate the best interests of a child by expressly recognizing visitation rights and obligations in written agreements. Where agreement does not exist, the LAA should recognize a clear potential for conflicts and ensure that nonparents, if eligible for legal assistance, are provided independent counsel.

Even where not expressly raised by clients, the LAA should be sensitive to the possibility that nonparents will have an enforceable interest in visitation or custody of children. This may be more likely in situations involving sole parents or relationships where both parents work. The increasing focus on the best interests of children, which as reflected by Pennsylvania's *Rowles* decision, may involve some subjugation of traditional parental rights, suggests that this is an area we should continue to monitor closely. Major Block.

Tax Notes

State Taxation of Retirement Income Is Limited

Good news for retirees and service members or civilian employees who will one day be retirees! The President has signed legislation that prohibits states from taxing the retirement income of nonresidents and nondomiciliaries.[89]

Prior to the enactment of this legislation, some states were taxing the retirement income of individuals who earned their entitlement to retirement income while living in their state but who no longer lived in that state. For example, if a service member was stationed in state X for five of his twenty years of active military service but retired in state Y, state X would seek to impose a tax on twenty-five percent of his retirement income. State

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[83] *Id.* at 1079 (citing with approval Santaniello v. Santaniello, 850 P.2d 269 (Kan Ct. App. 1992)).

[84] *Id.*

[85] 22 FAM. LAW REPT. 1063 (BNA) (Pa. Sup. Ct., 29 Nov. 1995).

[86] *Id.*

[87] *Id.* at 1064.

[88] *Id.*

[89] Act of Jan. 6, 1996, Pub. L. No. 104-95, 109 Stat. 979 (to be codified at 4 U.S.C. § 114).

X's position was that a portion of the retirement income was earned in state X. This type of taxation is referred to as a "source tax." Although California, New York, and Vermont were the most aggressive in collecting this tax, Arizona, Georgia, Iowa, Kansas, Kentucky, Louisiana, Minnesota, North Dakota, Ohio, and Oregon also had laws allowing them to tax the pensions and retired pay of former residents.[90]

Military and federal civilian retiree associations have been lobbying Congress for years to prohibit states from taxing the retirement income of nonresidents and nondomiciliaries. The Senate has passed source tax prohibitions several times, but the legislation died in the House.[91] The House recently passed legislation that prohibits states from imposing the source tax.[92]

The President signed this legislation and it became effective 31 December 1995. Thus, retirees who were subject to the source tax will still have to pay it for 1995, but they will not have to pay it in the future. Legal Assistance Attorneys should inform their clients of this favorable legislation and be prepared to assist them with their state tax returns. Major Henderson.

Custodial Parent Entitled to Exemption

In the case of divorced parents, the custodial parent is generally deemed to be the one who provides over half of each child's support and is, therefore, entitled to the dependency exemption.[93] The exception to this rule is when the custodial parent elects to release his claim to the exemption for the children in his custody and provides a written release to that effect.[94] The noncustodial parent must attach the written release to his tax return.[95]

In *Peck v. Commissioner*,[96] the petitioner, Mrs. Peck, claimed her three children on her 1990 and 1991 tax returns. She was divorced in 1990, and custody of her three children was given to her ex-husband. In 1993, she obtained custody of the three children, and the court also ordered her ex-husband to provide her with a release of his claim to an exemption for the children for 1992. The court did not order him to provide her with a release for 1990 and 1991, and he did not do so. The Tax Court held that Mrs. Peck was not entitled to the dependency exemptions for 1990 and 1991, and ordered her to pay back taxes and any applicable interest and penalties.

Legal Assistance Attorneys should ensure that clients who claim an exemption for a child who is not in their custody attach a waiver by the custodial parent. An I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, is used by the custodial parent to waive the dependency exemption and should be attached to the taxpayer's tax return. Major Henderson.

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[90] Rick Maze, *Source Tax Shield Delayed Until Next Year*, THE ARMY TIMES, Oct. 31, 1994, at 22.

[91] *Id.*

[92] Act of Jan. 6, 1996, Pub. L. No. 104-95, 109 Stat. 979 (to be codified at 4 U.S.C. § 114).

[93] I.R.C. § 152(e)(1) (RIA 1995).

[94] *Id.* § 152(e)(2).

[95] *Id.* § 152(e)(2)(B).

[96] T.C. Memo 1996-33 (1996).

The Brave New World of Morale, Welfare, and Recreation Advertising

Introduction

Your Ad Here!
Contact Fort Ticonderoga MWR Marketing Director

Announcements such as the above have become a reality at Army installations due to a recent change in Department of Defense (DOD) advertising policy. The new policy was first announced on 6 January 1995 by the Assistant Secretary of Defense (Force Management Policy)[1] and subsequently issued in a DOD instruction.[2] Implementation of this new policy in the Army was first accomplished by means of an electronic message[3] and later formalized in *Army Regulation 215-1*.[4]

Under the new policy, Army marketing personnel are authorized to advertise certain Morale, Welfare, and Recreation (MWR) events in publications distributed off-post and to accept advertising from commercial sources in any MWR media.

Prior to implementing the new advertising policy, the DOD prohibited both the placement and acceptance of advertising by MWR activities.[5] Limited exceptions to this rule permitted MWR activities to place ads in the United States Armed Forces newspapers and civilian enterprise publications,[6] to contribute informational articles in military newspapers,[7] and to prepare media such as flyers and bulletins for local dissemination directly to authorized users.[8] The sale of advertising in any media produced for or prepared by MWR activities was expressly prohibited.[9] This policy was effected in the Army through the former *Army Regulation 215-1*.[10]

DOD Policy Parameters

The first change in DOD policy permits MWR programs to advertise in non-DOD newspapers if such media are directed to an audience consisting of authorized patrons.[11] Such advertising must inform readers that the offer or event is open only to authorized patrons.

A second change allows MWR programs to pay for ads in appropriate civilian media for the purpose of promoting MWR events open to the public.[12] The word "appropriate" is not defined.

Advertising of events open to the general public are subject to the following conditions:

(1) Events shall not directly compete with similar events offered in the local civilian community.

(2) Open events shall be coordinated in advance with the local public affairs office.

(3) Events must be infrequent, not weekly or monthly, increase interaction between the military and civilian communities, and enhance community relations.

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[1] Memorandum, Assistant Secretary of Defense, Force Management Policy, to Secretaries of the Military Departments, subject: DoD Nonappropriated Fund Instrumentality (NAFI) Advertising Policy, (6 Jan. 1995).

[2] DEP'T OF DEF., INST. 1015.10, PROGRAMS FOR MORALE WELFARE, AND RECREATION (MWR), encl. 10 (3 Nov. 1995) [hereinafter DOD INST. 1015.10].

[3] Message, Commander, United States Army Community and Family Support Center, subject: DoD Nonappropriated Fund Advertising (6 Feb. 1995).

[4] DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES, para. 7-44 (29 Sept. 1995) [hereinafter AR 215-1].

[5] DEP'T OF DEF., INST. 1015.2, OPERATIONAL POLICIES FOR MORALE, WELFARE, AND RECREATION, encl. 4, § B3 (17 May 1985) [hereinafter DOD INST. 1015.2].

[6] *Id.* encl. 4, § B3a.

[7] *Id.* encl. 4, § B3e.

[8] *Id.* encl. 4, § B3c.

[9] *Id.* encl. 4, § B3f.

[10] DEP'T. OF ARMY, REG. 215-1, THE ADMINISTRATION OF ARMY MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. 10-15 (10 Oct. 1990).

[11] DOD INST. 1015.10, *supra* note 2, encl. 10, § B2.

[12] *Id.* encl. 10, § B3.

(4) Event advertising may not include the advertising of merchandise. At the actual event, however, event related merchandise, food, and beverages may be sold for on premises consumption.[13]

In locations other than the continental United States, advertising shall conform to status of forces agreements, command policy and local laws.

The third change to the DOD advertising policy permits MWR programs, with the exception of exchanges, to sell space for commercial advertising in any media, produced for or prepared by them. The MWR programs may accept such advertising, subject to the following conditions:

(1) The advertising is subject to the same standards that apply to ads in civilian enterprise publications.

(2) Ads shall include a disclaimer that they are not endorsed by the DOD.

(3) Acceptance of paid commercial advertising on Armed Forces Radio and Television Service, local commander's channels, or any appropriated funded electronic media is prohibited.

(4) Local commanders are authorized to make final decisions on whether or not to accept advertising. In making such decisions, consideration of public perceptions, impact to the local economy, and the effect on any local civilian enterprise newspaper, installation guide, and installation map must be considered.

(5) Advertising in MWR media shall be accomplished in a manner so as to reach *bona-fide* users in accordance with established patronage policies.

(6) The MWR media containing commercial ads shall not be distributed off the installation. Mailing of such media to authorized patrons, however, is permitted.[14]

The DOD Instruction retains policy regarding several additional advertising related issues, which are unchanged from prior DOD policy.[15]

Army Implementation

Army Regulation 215-1 implements current DOD advertising policy.[16] The Army regulation actually predated the publication of *DOD Instruction 1015.10* by several days, but it is consistent with the guidance in *DOD Instruction 1015.10*. *Army Regulation 215-1*, however, provides more detailed policy guidance than *DOD Instruction 1015.10* in several respects.

First, *Army Regulation 215-1* makes the positive statement that MWR activities are expected to "communicate their presence and the availability of the goods and services they offer"[17] to as many potential patrons as possible. Advertising of MWR goods and services is not to be frowned upon or used as a means of last resort. To the contrary, a robust advertising program is to be the norm. To promote professionalism and to avoid inappropriate results, advertising is placed and solicited on a centralized basis by a person designated by the Director of Community Activities at the installation and major command levels and by the Commander of the United States Army Community and Family Support Center. Advertising shall not be solicited by individual MWR managers or policy makers.[18]

All MWR activities may place ads in civilian enterprise media to include installation cable television. Brand names; prices of items offered for sale; descriptions of feature films, acts or talents; admission prices; cover charges; and the names of commercial sponsors may be included in MWR advertising. Advertising will prominently display the phrase "PAID ADVERTISING."

Publication of paid commercial advertising by MWR activities is bound by the same standards of propriety applied to civil-

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[13] *Id.*

[14] *Id.* encl. 10, § B4.

[15] DOD INST. 1015.2, *supra* note 5.

[16] AR 215-1, *supra* note 4.

[17] *Id.* para. 7-44a.

[18] *Id.* para. 7-44h.

ian enterprise publications by *Army Regulation 360-81*.[19] These standards are described as follows:

(1) Ads may not be accepted if they undermine or appear to undermine successful mission performance, loyalty, morale or discipline. In reviewing proffered ads, the "local situation," content of the advertising, identity, and reputation of the advertiser should be considered.

(2) Advertising will not contain anything that is contrary to DOD or Army regulations. Among the specific prohibitions listed are games of chance, political advertising, and discriminatory activities.

(3) A supplement or advertising insert containing commercial ads may be distributed with MWR media (such as club bulletins) provided that a *fair and equal opportunity* is offered to compete for this privilege.

(4) Truth in lending statutes will be met as verified by the Staff Judge Advocate.

(5) Good judgment will be used in accepting commercial ads that compete with MWR activities.

(6) Any prominent display of signs that contains commercial advertising will comply with Army Communities of Excellence standards and shall be coordinated with installation engineers.

Contrast with the Commercial Sponsorship Program

The liberalization of advertising policy is intended to create a new source of MWR revenue that complements the commercial sponsorship program. With the greater latitude given to commercial advertising when compared to commercial sponsorship by existing regulation, the advertising program may have great appeal to commercial firms.

The DOD[20] and Army[21] commercial sponsorship policy places significant restrictions on the freedom of MWR marketing personnel. For example, program training of sponsorship personnel is required. Sponsorship agreements must be in writing and must include a term of one year or less (with annual renewals for up to five years permitted). Special concessions or favored treatment to sponsors is expressly prohibited as are reprisals on firms who elect to forego sponsorship. Tobacco and alcohol firms may not be solicited although unsolicited offers for sponsorship from such companies may be accepted. Procedures for solicited sponsorship must follow principles concerning competition and evaluation of offers similar to those employed by nonappropriated fund contracting personnel.

Few of the restrictions on commercial sponsorship described above currently apply to commercial advertising. Current DOD and Army policy would appear to allow marketing personnel to solicit advertising on a noncompetitive basis, to accept ads from defense contractors, execute oral agreements, seek out tobacco companies and distillers, and enter into long term agreements. Given the similar intent of the sponsorship and advertising programs, it is difficult to discern a valid reason for this policy gap. In practice, however, since the two programs will often be executed by the same person, it is likely that the limitations imposed on commercial sponsorship will also be applied to commercial advertising.

Success Stories

Despite being less than one year old when this article was written, the commercial advertising program has already achieved marked success. Fort Lewis, for example, has been very active in commercial advertising since March 1995.[22] This installation generated revenue by allowing the posting of corporate banners and the sale of advertising on an electronic bulletin board. Fort Benning, likewise, has generated nonappropriated fund revenue in excess of $10,000 by selling advertising on benches placed next to golf course tee boxes.[23]

Potential Challenges

Army policy concerning commercial advertising is broad in scope, with few regulatory controls. As a result, responsibility for avoiding overzealous promotion of the program lies with in-

[19] DEP'T OF ARMY, REG. 360-81, COMMAND INFORMATION PROGRAM, para. 2-29 (20 Oct. 1989).

[20] DOD INST. 1015.10, *supra* note 2, encl. 9.

[21] AR 215-1, *supra* note 4, para. 4-47.

[22] Interview with Ms. Robin Donohoe, Marketing Director of the United States Army Community and Family Support Center, Washington, D.C. (Dec. 18, 1995).

[23] *Id.*

stallation program managers. Advertising policy generally allows commercial advertising in on-post media to be placed in "any media."[24] Absent restraint by MWR marketeers, standards of good taste can easily be violated. For example:

(1) The MWR administrative vehicles could be emblazoned with signs touting commercial products. These placards could be garish or could promote products that would offend those with delicate sensibilities.

(2) The MWR buildings could be turned into giant billboards.

(3) Uniforms worn by MWR employees could carry inappropriate commercial advertising.

(4) Basketball courts could be painted with gaudy commercial logos.

(5) Highways could be cluttered with unsightly billboards.

Army Regulation 215-1 attempts to limit ill considered forms of advertising by requiring consultation with post engineers and conformance with Army Communities of Excellence standards. Nonetheless, the potential still exists for poor taste advertising.

Marketeers should not be so anxious to generate advertising revenue that they accept ads from MWR competitors that potentially lose more MWR revenue than is generated by the ad. An example of this recently occurred at an Army club that employed place mats containing advertising for an off-post dining establishment.

Another issue involves the equitable treatment of potential advertisers. It is unclear whether a defensible rationale would exist for refusing to accept proposed ads once advertisements are accepted for similar products. Coordination should also be effected with installation public affairs officials (PAO) to ensure that PAO exclusivity agreements with civilian enterprise newspapers or publishers of welcome packets are not breached.

One final concern is grounded on fiscal law. Appropriated funds should not be used to place advertising in off-post publications for MWR activities which themselves could not be paid for with appropriated funds. An example would be an ad for a fireworks display for which the use of appropriated funds would be prohibited.[25]

Conclusion

The relaxation of the former stringent restrictions on the placing and acceptance of commercial advertising is already making significant contributions to Army installation nonappropriated fund coffers. Care must be employed, however, to assure that the program is carried out in a prudent manner. Mr. Joseph P. Zocchi, Contract Attorney, United States Army Community and Family Support Center, Alexandria, Virginia.

[24] AR 215-1, *supra* note 4.

[25] *See* Use of Appropriated Funds for Navy Fireworks Display, 82-2 CPD 1 (2 June 1982).

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, produces *The Environmental Law Division Bulletin (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 Systems Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue is reproduced below.

Editor's Note

The Environmental Law Division has received several requests from installation environmental coordinators to be put on the distribution list for the *Bulletin*. Rather than sending two copies of the *Bulletin* to each installation, we request that each month, on receipt of the *Bulletin*, you provide a copy to your environmental coordinator. A significant amount of information in the *Bulletin* is useful not only to attorneys, but to technical personnel as well. Your support will assist us in disseminating important information to the field and enhance communication between environmental law specialists and environmental coordinators.

Bulletin Via E-Mail

The ELD will begin sending the *Bulletin* via electronic mail instead of by United States mail to those recipients with e-mail. The *Bulletin* will continue to be available from the Legal Automation Army-Wide Systems Bulletin Board Service, The Army Lawyer, and by United States mail for those who do not have e-mail. Please e-mail the following information to me at fedelsab@otjag.army.mil:

Name of recipient (rank or Mr./Ms.)
Name of installation
Installation address
E-mail address
Telephone number

We plan to begin e-mailing the *Bulletin* with the March issue, so please respond no later than 5 March 1996. The *Bulletin* is processed in Wordperfect 5.1, and our e-mail software is Groupwise. Ms. Fedel.

Telephone Contacts

In the event that the ELD attorney you are calling is unavailable (or, as just happened, in the event that the office is shut down due to the largest snowfall since 1922!) and you have an urgent need to reach us, please feel free to leave a voice mail message at one of the following numbers. We promise to get back to you promptly! Mr. Nixon.

* For Compliance issues, call Lieutenant Colonel David Bell at (703) 696-1592.

* For Litigation issues, call Lieutenant Colonel Mike Lewis at (703) 696-1567

* For Restoration and Natural Resources issues, call Mr. Steve Nixon at (703) 696-1565

* For other issues, or for matters affecting the ELD generally, call Colonel Calvin M. Lederer at (703) 696-1570

Proposed Hazardous Waste Identification Rule

On 21 December 1995, the Environmental Protection Agency (EPA) proposed the long-awaited Hazardous Waste Identification Rule (HWIR). The HWIR amends Resource Conservation Recovery Act (RCRA) regulations to allow for certain low risk hazardous wastes to exit the Subtitle C management program. Risk-based exit levels are set for constituents found in low-risk wastes that are considered hazardous due to having contained, or been mixed with or derived from, a listed hazardous waste. The EPA will accept comments on the proposed rule, located at 60 Federal Register 66344, until 20 February 1996. Comments should be submitted to:

Bart Ives
Office of the Director
Army Environmental Programs
ACSIM (DAIM-ED-Q), Room 2A684
600 Army Pentagon
Washington, DC 20310-0600
E-mail:ives@pentagon-acsim1.army.mil.

Major Anderson-Lloyd.

The Munitions Rules

The EPA's Proposed Munitions Rule

The EPA published its proposed Munitions Rule on 8 November 1995. Copies were distributed to the Services and, within the Army, to DA staff and MACOMs, with a request that comments be provided. The comments were consolidated into a sixty-seven page packet, which DUSD(ES) signed out on 5 January 1996. The Services identified ten major issues, which the DOD had previously identified to EPA, along with several other specific comments. The major issues, with DOD's recommendations, are:

(a) Uniform National Standard: Promulgate the Rule as a uniform national standard.

(b) Definition: Define munitions as a waste upon certification for treatment/disposal at a treatment/disposal facility.

(c) Ranges: Do not apply RCRA to munitions remaining at closed or transferred ranges. In the alternative, defer RCRA regulation pending completion of DOD's Range Rule (see following discussion).

(d) Storage: Do not promulgate proposed Subpart EE. Instead, defer to DDESB explosives safety standards.

(e) Transportation: Shipments of waste military munitions should be subject only to DOD and DOT requirements, and not be further regulated under RCRA.

(f) Emergency Responses: Object of an explosive emergency response should be exempt from definition of solid waste. In the alternative, support EPA's exemption from specific RCRA requirements.

(g) Permit Modification: Define munitions as waste IAW paragraph b above. In the alternative, permit modifications should be self-implementing.

(h) Organization of the Rule: Rule should be promulgated as a separate Subpart of 40 CFR Part 266, as opposed to piecemeal amendment of existing RCRA provisions.

(i) Analysis of Costs and Benefits: Revise the cost estimate to consider actual costs, including range clean-up. Demonstrate through risk analysis that proposed RCRA regulations will increase protection over existing DOD and Service standards.

(j) On-Site Definition: Support EPA's expansion of the definition of "on-site" to include contiguous property under one persons control, thereby alleviating need to comply with transportation requirements.

The DOD Comment Packet is available on DENIX.

The DOD's Proposed Range Rule

The EPA has proposed to define military munitions on closed or transferred ranges as a statutory solid waste, thereby subjecting them to RCRA's remedial authorities. This provision, however, will "sunset" upon promulgation by DOD of rules addressing military munitions on closed or transferred ranges. Although the EPA's proposal indicates that the DOD's rules will supersede the EPA's rules whenever promulgated, it is critical that the DOD promulgate its rules prior to 31 October 1996, which is the EPA's deadline for promulgation of the EPA Military Munitions Rule. The Army has the lead within the DOD and has committed substantial resources to meet this deadline. While details must still be worked out, the Army's concept is to address munitions and constituents on closed, transferring, or transferred ranges, using a process that incorporates the best of CERCLA and the best of RCRA. The DOD will rely on its statutory authorities, as set forth in the Defense Environmental Restoration Program (10 U.S.C. § 2701, et seq.) and DOD Explosives Safety Board (10 U.S.C. § 172). The process will provide for substantial involvement of the public and regulators in the remedy selection and implementation process. The DOD is promulgating its rule under the Administrative Procedures Act and expects to publish a proposed rule this Spring. Lieutenant Colonel Bell.

Multi-Sector General Stormwater Permit Update

In the November 1995 edition of the ELD *Bulletin*, I indicated that installations in affected states had until 28 December 1995 to submit a notice of intent to be covered by the multi-sector general stormwater permit. The EPA recently extended that deadline. Installations now have until 29 March 1996 to submit a notice of intent and until 25 September 1996 to provide a Stormwater Pollution Prevention Plan. If you are in an affected state, please share this information with your Environmental Coordinator. Major Saye.

Regional Environmental Centers

The Army Environmental Center (AEC) has officially opened its Regional Environmental Centers (RECs) to assist installations and MACOMs with environmental issues. Please give ELD notice of any issues raised to the Army RECs. The Army RECs will coordinate issues with the DOD RECs. The list of offices is attached. Ms. Fedel.

The EPA's Final Audit Policy

The EPA published its Final Environmental Audit Policy on 22 December 1995. An information paper analyzing the policy and its application to Army installations follows. Captain Anders.

Introduction

An installation that detects, then voluntarily reports and corrects, environmental infractions can qualify for a penalty reduction under the EPA's new environmental audit policy ("policy").[1] In most respects, the final policy, which became effective 22 Janu-

[1] 60 Fed. Reg. 66,706 (December 22, 1995) (Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations).

ary 1996, mirrors the interim policy.[2] The most significant change from the former policy is the EPA's expansion of which self-reported violations are permitted a penalty reduction. Although the former policy applied only to violations found through audits, the final policy gives a 75% penalty reduction for self-disclosed violations found at any time. The policy, however, raises some concern, such as disallowing an outright audit privilege for self-reported information and granting the EPA considerable discretion in the policy's application. Consequently, installations should treat the "penalty reductions" offered by the EPA with caution.

The final policy is hailed by many in the enforcement community as a compromise between the EPA's tough enforcement goals and industry efforts to protect audit results. Carol Andress, policy analyst for the Environmental Defense Fund, stated, "[t]he final policy provides responsible companies a reliable break in penalties without letting scofflaws off the hook."[3] Spokespersons for the regulated community, however, view the policy with skepticism. Paul Wallach, counsel for the Corporate Environmental Enforcement Council, an industry-sponsored group, fears that "[t]he policy doesn't bind the agency or Justice . . . or other government agencies," referring to the discretionary nature of the penalty reduction provisions.[4]

No Outright Privilege for Audit Results

The policy ends speculation over the EPA's willingness to allow installations a blanket audit privilege for self-reported environmental information obtained through due diligence. The decision not to include such a provision rejects a strong congressional and industry support of an outright privilege. Currently, two such audit bills are pending before the House and Senate Judiciary Committees. H.R. 1047, the "Voluntary Environmental Self-Evaluation Act," introduced by Rep. Joel Heffley (R-CO), provides that the results of a voluntary, good faith environmental audit shall not be admissible in evidence in any federal enforcement proceeding. The Senate bill, S. 582, the "Voluntary Environmental Audit Protection Act," introduced by Sen. Mark Hatfield (R-OR), mirrors much of H.R. 1047, but goes further in two respects. First, it would treat as privileged both the audit report itself *and* any information "constituting a part of" an environmental audit. Second, it would protect the information from being admitted into evidence or from being the subject of disclosure. The EPA policy lists the following as reasons for its opposition to an evidentiary privilege for environmental audits: "[p]rivilege, by definition, invites secrecy,"[5] the EPA's rare use of audit reports as evidence; defendants' likelihood of shielding as much information as possible within the privilege; the probable increase in litigation; and the fact that the law enforcement community opposes the privilege. The ELD will keep installations apprised as to the progress of the two bills.

Penalty Reduction for Self-Reported Violations

The primary concept of the policy is its provision that, where nine specified conditions are met, the "EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected." Further, the policy grants a 75% reduction of the gravity portion of a penalty discovered by a means *other* than through an audit where all of the remaining eight conditions are met.[6] In other words, even a violation discovered in the normal course of business, not during or as a result of an audit, if disclosed and corrected pursuant to the provided conditions, is still entitled to a 75% reduction of the gravity portion of the penalty.

No Criminal Prosecutions Based on Self-Disclosed Information

The policy also provides, as did the interim policy, an assurance that the EPA "will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions."[7] Note, however, that this assurance only applies to "regulated entities." While that term is not specifically defined, the policy does state that the "EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual."[8] Furthermore, the guarantee is not unconditional because the policy is limited to "good actors." The EPA reserves the right to pursue criminal prosecution "where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance."[9] It is unclear where on the scale of scienter "consciously involved in" sits. Presumably, it is equivalent to "knowing," but time will tell whether the EPA instead uses the "knew or should have known standard called for in a negligence analysis.

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[2] 60 Fed. Reg. 16,875 (April 3, 1995) (Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement)

[3] *Browner Signs Final Policy: EDF Says Priviledge Still Rejected,* Dec. 12, 1995, *available in* DENIX, 243 d3.

[4] *Id.*

[5] 60 Fed. Reg. 66,709 (citing language taken from United States v. Nixon, 418 U.S. 683 (1973)).

[6] *Id.* 66,707.

[7] *Id.*

[8] *Id.*

[9] *Id.*

No Routine Requests for Audits

The policy also "reaffirms" the EPA's 1986 policy "to refrain from routine requests for audits."[10] Notice, however, that this policy only applies to "routine" requests for information. Given a basis for suspicion, the EPA reserves the right to request the reports at that time. The policy explains that "[i]f the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability."[11] In an attempt to placate perceived concerns, the EPA explains, "a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government."[12] Obviously, this statement only refers to criminal prosecutions, not civil penalties imposed for violations; realize that the EPA is free to assess civil penalties based solely upon a self-disclosed audit report.

Policy Offers Little to Army Installations

The policy represents the EPA's good faith attempt to grant industry a break for self-disclosing their environmental problems. Army installations, however, will find little help from the policy, for two reasons.

First, industry, not DOD entities, is the target of the policy. The Agency views its policy as an investment. Theoretically, the more attractive and cost-effective it makes confessions by regulated entities, the less time and money it must expend on inspections, administrative proceedings, and negotiations. Additionally, the increased self-policing should lead to cleaner industrial grounds. Thus, the policy's obvious goal is to provide an economic incentive for industries to develop an audit program. Under the policy, an audit system could earn a company a 100% reduction in the gravity-based portion of a penalty, as opposed to a mere 75% reduction without such a program. Further, when the company does violate a permit or statute, it can react in one of three ways: ignore the violation, secretly correct it, or report it. The EPA is hoping industry will heed the EPA's promise of tougher enforcement, and will try to cut its losses by disclosing a known violation before it is discovered. From an Army perspective, the policy does not offer a great deal. Army installations heavily self-regulate, and have long since abandoned the practice of sweeping environmental problems under a rug. It is common knowledge throughout the chain of command that a demonstration of good environmental stewardship pays incalculable dividends with regard to community relations and avoided expense and embarrassment later on.

Second, the policy makes self-reporting a gamble. The 75% penalty reduction incentive is presumably intended to promote open disclosure of violations by entities without an audit program in place. It is, however, of questionable utility to Army installations whose use of the Environmental Compliance and Assessment System, which mandates internal and external audits every two and four years, respectively, is perhaps the most intensive audit program in existence. Furthermore, the policy places environmental managers in a precarious position, wagering which violations should be self-reported and which should simply be immediately corrected. Imagine the following scenario. A director of public works employee discovers an environmental infraction and immediately reports to his supervisor who reports to the environmental manager. The manager checks with the environmental law specialist (ELS) to determine if the violation must be reported pursuant to statute or ordinance, permit requirements, or any other agreement. The ELS determines that it need not be reported and can simply be corrected. If begun immediately, the corrective action may take six months. Should the environmental manager self-report the violation to the EPA? If she elects not to report it, and the EPA somehow learns of the violation, the installation is at that point no longer eligible to deduct 75% percent of the gravity portion of whatever fine may evolve. If, however, she elects to report, she forecloses the possibility of correcting the problem before the EPA ever learns of it, ruling out a fine altogether. Unfortunately, there does not appear to be an easy answer. Each situation must be examined based on the seriousness of the violation, the time and expense required to fix the problem, and the likelihood of its discovery by a regulator.

Policy Unclear in Many Areas

Even if the premise of the policy is advantageous to Army installations, tread cautiously before assuming a self-disclosure will automatically wipe out the gravity portion of the penalty. As with any new administrative policy guideline or new piece of legislation, many provisions are undefined and vague, most of which will not be answered until the issue becomes ripe in a contested case. Vexing questions include the following:

1. Unsatisfactory definition of "gravity-based penalty." The policy defines "gravity-based penalties" as "that portion of a penalty over and above the economic benefit. That is, the punitive portion of the penalty, rather than the portion representing a defendant's economic from non-compliance."[13] Department of Defense installations derive no economic benefit from noncompliance and there is no profit or tax incentive to be made by a DOD entity, as there might be in a corporation that can pass on savings or dividends to stockholders. The EPA's stance on this issue is not clear. Also, the definition does not state whether the penalty reduction applies to the gravity portion alone, or to the gravity portion plus the multi-day enhancement, which can often amount to many times

[10] *Id.* 66,708.

[11] *Id.*

[12] *Id.*

[13] *Id.* 66,711.

the gravity portion. Admittedly, the EPA treatment of this issue can be a double-edged sword. If the multi-day component of a penalty is considered as part of the gravity-based figure, then under this policy the installation would be entitled to a larger reduction. On the other hand, if the installation is seeking to offset a portion of its assessed fine by performing a supplemental environmental project (SEP), the EPA's SEP interim policy mandates a minimum cash penalty, which is a percentage of the gravity portion of the assessed fine. Under those circumstances, the EPA treating the multi-day enhancement as a component of the gravity portion operates to the installation's detriment.

2. What is "voluntary" disclosure? To qualify for the penalty reduction, Section D(2) mandates that the violation must have been "identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order."[14] How does this provision treat tangential discoveries, for example, where a required NPDES sampling reveals another violation unrelated to the excessive discharge?

3. When has the violation already been "discovered"? Section D(4) conditions penalty reduction on identification of the violation "prior to the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity . . . or imminent discovery of the violation by a regulated agency."[15] How specific must the "information request" be to deny any subsequent self-reported violation a penalty reduction? Who determines whether discovery of the violation was "imminent" and when is such a determination made?

4. To what standard are the mandatory "corrections" held? Section D(5) requires that the entity correct the violation within sixty days by "tak[ing] appropriate measures as determined by the EPA to remedy any environmental or human harm due to the violation."[16] When is such a determination made? Will the EPA's determination time toll the sixty days?

5. When has a violation "previously occurred" or it part of a "pattern"? Section D(7) requires that the self-reported violation cannot "[have] occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years."[17] The policy then defines a violation as any violation "identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement." This definition treats an alleged violation, which was neither admitted or denied in a consent order, as the basis for a "repeat occurrence." Further, the policy would ostensibly treat any violation contained in an NOV as the basis for this "repeat occurrence" characterization, without regard to any administrative process. Finally, does the final sentence above mean that an Army-wide pattern of a particular violation will estop an installation from seeking waiver of the gravity portion after having committed the violation and self-disclosing?

As always, compliance is the key. You need never consider these issues if you are in a continuous posture of compliance. Watch for developments as these and other issues are resolved. Captain Anders.

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* 66.712.

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(303) 289-0485 (Facsimile)

Additionally, installations should be aware of the following DOD regional environmental offices:

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Atlanta, GA 30335-6801
(404) 331-6771 (Telephone)
(404) 331-2537 (Facsimile)
E-mail: tsims@afceeb1.brooks.af.mil

Phillip Lammi
Director
Region X, DOD REC
USAF Western RCO
630 Sansome Street
San Francisco, CA 94111-2278
(415) 705-1672 (Telephone)
(415) 705-1682/1711 (Facsimile)
E-mail: plammi@afceeb1.brooks.af.mil

Ed Lopez
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Region VI, DOD REC
USAF Central RCO
525 Griffin Street, Box 116
Dallas, TX 15205-5023
(214) 767-4653 (Telephone)
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(619) 725-5132 (Facsimile)

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CG Marine Corps Base Quantico
POC: Bruce Frizzell
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(703) 278-4953 (Facsimile)

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(910) 451-1143 (Facsimile)

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Regions I and II (Navy REC)
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(203) 449-2217/4699 (Facsimile)

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(804) 444-3000 (Facsimile)

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Claims Report

United States Army Claims Service

Tort Claims Note

Administrative Filing Requirements for Tort Claims

Army claims offices will often receive a claim filed by more than one claimant on the same Standard Form 95, Claim for Damage, Injury, or Death (SF 95). For example, a husband files a claim for personal injury, and on the same claim form, the wife requests compensation for loss of consortium. They claim a total dollar amount of $25,000. This is an improperly filed claim because no sum certain is stated for each claimant. A properly filed claim must state a separate dollar amount for the respective claimant's damages. To remedy this problem, the husband and wife may each file their own separate claim or they may amend their improperly filed claim by listing separate dollar amounts for their claims on the same claim form.

Claims judge advocates must acknowledge and specify the defects of improperly filed claims in the acknowledgment letter such as no sum certain or claim not signed. The acknowledgment letter should also contain the substance of any oral discussions with the claimant or the claimant's attorney concerning the defective filing of the claim. Claims offices should never acknowledge a defectively filed claim with the hope that the statute of limitations will run and the claim will be barred. Federal courts will independently determine whether a claimant has satisfied the statutory requirements of filing under the Federal Tort Claims Act. A federal court's interpretation of a "defective" claim may differ from the agency's decision.[1] A claimant is entitled to an acknowledgment of the purported claim that specifies all errors in the claim and explains the impact of any filing errors. Informing claimants of defects in their claims is a continuing requirement. When a defect is discovered after acknowledgment, the claimant must be informed at once of the nature of the defect.[2]

Sometimes a claim is defectively filed and the statute of limitations will soon expire. In such cases, the claims judge advocate should acknowledge the purported claim by the quickest means possible and inform the claimant of the impending statute of limitations. Claims personnel should record the number of attempts to contact the claimant and any discussions with the claimant. A letter confirming the conversation should be mailed to the claimant. If time is of the essence, claims personnel should instruct the claimant to file the corrected claim with the nearest Army office, which may include recruiting stations and Reserve Officer Training Corps offices, or by sending the claim by facsimile or other expedient means to the claims office.[3]

Many claims offices are not date stamping all copies of the SF 95. When a purported claim is received, the date and the designation of the receiving command or office must be stamped or otherwise noted on all copies. Even if the claim does not appear to be properly filed, the claim form must be date stamped and initialed by the person logging in the claim. The installation mail office receiving the mail should also date stamp the envelope. This envelope should then be secured in the claimant's file for future reference. In most cases, the date a claim arrives in the installation mail office is the date used for determining the tolling of the two year statute of limitations for filing a claim. The acknowledgment letter to the claimant should include a copy of the claim, with the office date stamp reflecting the date of receipt by the Army.[4]

An authorized agent or legal representative of a proper claimant may file a claim on behalf of a claimant if the agent provides a power of attorney or other document that specifically grants permission to file a claim. This document must accompany the claim when filed. If the document does not accompany the claim when filed, the claims office should inform the agent that proper documentation of his or her authority to act on behalf of the claimant is a condition of administrative settlement. The courts may, however, infer such authority should the agency ultimately reject the claim on this basis.[5]

The legal guardian of a minor or claimant declared incompetent by a court may file a claim for the claimant. An executor, personal representative, or beneficiary may usually file a claim on behalf of a deceased claimant. However, the claims judge advocate should review the state laws to determine who can file a claim for wrongful death and survival actions on behalf of a deceased claimant. If the claim is meritorious under state law, proof of guardianship or probate documents must be obtained before payment of the claim.[6]

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[1] *See, e.g.*, Kokaras v. United States, 980 F.2d 20 (1st Cir. 1992), *cert. den.*, 114 S. Ct. 74 (1993) (holding that the courts are not bound by an agency's finding of defective claim).

[2] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, paras. 5- 7a(3), 5-8 (15 Dec. 1989) [hereinafter DA PAM. 27-162].

[3] *Id.* para. 5-8.

[4] ARMY REGULATION 27-20, LEGAL SERVICES: CLAIMS, para. 2-9a (1 Aug. 1995) [hereinafter AR 27-20]; DA PAM. 27-162, *supra* note 1, para. 11-10b.

[5] *See, e.g.*, Conn v. United States, 867 F.2d 916 (6th Cir. 1989) (finding failure of agent to provide proof of authority to act is not jurisdictional bar to suit). A copy of the authorizing document should be attached to each copy of the SF 95. *See* AR 27-20, *supra* note 4, para. 2-8f(4); DA PAM. 27-162, *supra* note 1, para. 2-9.

[6] AR 27-20, *supra* note 4, para. 2-8; DA PAM. 27-162, *supra* note 1, para. 2-9.

Joint Claimant Payments

The General Accounting Office (GAO) has recently been returning payment vouchers to claims offices for failing to identify individual amounts payable to joint claimants. For instance, a defective payment voucher may list husband and wife as payees in the amount of $10,000. The GAO will not pay these claims because they do not know if each claimant is entitled to a payment in excess of $2500. To correct this problem, prepare a separate payment voucher for each payment in excess of $2500. Alternatively, list both claimants on the same payment voucher, but state separate payment amounts in excess of $2500 over the signature of each claimant. Captain McConnon.

Personnel Claims Note

Corps of Engineers Personnel Claims

On 2 March 1988, Colonel Jack Lane, the former commander of the United States Army Claims Service (USARCS), issued a memorandum outlining the transfer of Corps of Engineer (COE) personnel claims to Army field claims offices. That transfer is still USARCS policy.

The COE offices receiving personnel claims must immediately date stamp claims to toll the statute of limitations and forward them to the appropriate Army field claims office. Prior coordination with USARCS is not required. The COE offices need not maintain a claims log for these claims. Telephonic coordination with the Army field claims offices should be done prior to forwarding such claims, and the COE offices should assist in investigating personnel claims when requested by the Army field claims offices.

As an exception to this general policy, the Trans Atlantic Program Center of the United States Army COE will continue to process personnel claims from civilian COE personnel arising from shipments to and from Saudi Arabia. Lieutenant Colonel Kennerly.

Missing Video Cassette Recorder Not Listed on Inventory: To Prove Tender, Use All Available Information

In *Allied Freight Forwarding, Inc.*,[7] the Army was able to establish tender of a missing Goldstar Video Cassette Recorder (VCR) even though it was not listed on the inventory.

Allied contended that the Army failed to establish "proof of tender," the first element of a *prima facie* case of carrier liability. The Army agreed that the VCR was not listed on the inventory, but submitted that the claim file contained sufficient substantiating evidence to establish that a VCR was tendered.

Less than one month before the move, the shipper filled out a DD Form 1701, Inventory of Household Goods. This was a premove transportation requirement done for the Personal Property Shipping Office. The DD Form 1701 provided a general description of the items the shipper intended to include in his shipment. In this case, the DD Form 1701 reflected that the shipper intended to include a VCR as part of his shipment. The VCR was noted in two places on the DD Form 1701, on the front side in the "Other Items" section and again on the reverse side. On the reverse side, the shipper noted that he intended to ship a Goldstar VCR purchased in 1986. This form was filled out shortly before the move. The DD Form 1701, Inventory of Household Goods, manifested the shipper's intent to include a VCR as part of his shipment.

The second piece of evidence was a handwritten statement by the shipper indicating that the carrier omitted the VCR from the inventory. The shipper noted that he hoped the carrier had put the VCR in another carton. At delivery, the shipper noted on the DD Form 1840 that the carrier failed to deliver the VCR.

The Comptroller General noted: "When an item is not listed on the inventory, the shipper must present at least some substantive evidence of his tender of the item to the carrier beyond his claim and the acknowledgement on it of the penalties for filing a false claim."[8] A service member can provide a statement reflecting personal knowledge of the circumstances surrounding the tender of the item to the carrier or other substantive evidence to support a tender.[9]

In this case, the Comptroller General concluded that the record contained sufficient evidence to support tender of the VCR. The DD Form 1701, coupled with the service member's statement, provided the Comptroller General with enough evidence to conclude that the VCR was shipped, despite the carrier's failure to list it on the inventory.

Some files also include a DD Form 1299, Application for Shipment and Storage of Personal Property. Occasionally, the remarks sections of this form indicate intent to ship particular items. It also can be a helpful tool in establishing tender of a missing item.

In sum, even if an item that should be listed on the inventory is not listed, and turns up missing, all may not be lost. The entire claim file should be scrupulously studied to see if other evidence such as a DD Form 1701 or a DD Form 1299 could be used to help establish tender of a missing item. Ms. Schultz.

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[7] B-260695, Sept. 29, 1995.

[8] *See* Department of the Army, B-205084, June 8, 1993.

[9] *See* Aalmode Transportation Corp., B-240350, Dec. 18, 1990.

Regimental News from the Desk of the Sergeant Major

Sergeant Major Jeffrey A. Todd

Enlisted Training Developments

Since its inception, 71D enlisted training development has been imbedded at The Adjutant General's School while officer training has been conducted separately at The Judge Advocate General's School. In 1994, however, under the direction of Major General Nardotti, the enlisted training development mission moved to The Judge Advocate General's School, United States Army (TJAGSA). Having recently returned from a training symposium at TJAGSA, it occurred to me that our soldiers in the field should be regularly kept abreast of enlisted training news coming from our Regimental Headquarters—and that is the purpose of this article.

Briefly put, our training developers are responsible for the creation and revision of all 71D curriculum. This includes programs of instruction, lesson plans, practice exercises, tests, and other related materials. Their responsibility includes both active components, reserve components, and resident and nonresident courses. The advanced individual training, the Noncommissioned Officer Education System, and the enlisted functional courses at TJAGSA all fall within their scope of responsibility. Our development team consists of Sergeants First Class Kathy Fontenot and Rob Moore, Master Sergeant Jim Brett, and is led by Sergeant Major John Fonville.

If we consider only the revision efforts needed, we see that they have assumed a mountain of tasks. However, they are not merely focusing on revision, and they have accepted the challenge of taking enlisted training into the 21st Century. The way we have trained in the past will not suffice in the future. Our development team is aware of this and is taking steps to prepare for it.

From 17 through 21 December 1995, Sergeant Major Fonville hosted an Enlisted Training Symposium at TJAGSA; the purpose was to focus on the future of 71D training. Of course, most of the attendees were noncommissioned officers with extensive training backgrounds, but of more historical importance is the fact that several attorneys played key roles. The attorneys were all members of the TJAGSA staff, and each were subject matter experts in particular areas of law. I do not use the term "historical" loosely. To my knowledge, there has never been a similar training initiative in which TJAGSA attorneys and noncommissioned officer developers worked closely together—but then again, they have always been geographically separated. Now they are collocated at the regimental school, TJAGSA.

I foresee an ongoing exchange between those who train our attorneys and those who train our enlisted soldiers. This collaboration will result in a focused training mission; in other words, we'll be on the same sheet of music. I will keep you informed as we reach other training milestones.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

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

The following is an up to date schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires that all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units must attend the On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend the On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380. Major Storey.*

THE JUDGE ADVOCATE GENERAL'S RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING, ACADEMIC YEAR 1995-1996

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
9-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
16-17 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402 (707) 544-5858
23-24 Mar	Chicago, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
26-28 Apr Note: 2.5 days	St. Louis, MO **CANCELLED** (314) 421-1776	LTC John O'Mally (816)836-7031
4-5 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM Sheraton Grand Hotel 4860 W. Kennedy Blvd. Tampa, FL 33609 (813)286-4400	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 (305) 357-7600

Professional Responsibility Notes

Standards of Conduct Office, OTJAG

Ethical Awareness

Army Rule 3.3
(Candor Toward the Tribunal)

Army Rule 8.4(c)
(Misconduct involving Dishonesty, Fraud, Deceit, or Misrepresentation)

Most Army lawyers are aware that they must disclose to a tribunal "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[1]

However, many Army lawyers may not be aware that, under the *Army Rules of Professional Conduct*, when litigating matters where the case law is not developed or is in a state of flux, they may have an affirmative duty to disclose known adverse case law from *noncontrolling jurisdictions*.

The situation arises when a lawyer, litigating a matter of first impression, discovers legal authority from another jurisdiction that strongly supports the opponent's position, and opposing counsel has not disclosed the authority to the tribunal. Disclosure to the tribunal is required, under the Army rule, even when the case is not binding precedent in the forum handling the litigation. The comment to Army Rule 3.3, which is not contained in the comment in American Bar Association (ABA) Model Rule 3.3, or, to our knowledge, in any state attorney ethics rule, states as follows:

> A lawyer should not knowingly fail to disclose to the tribunal legal authority from a noncontrolling jurisdiction, known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, if the legal issue being litigated has not been decided by a controlling jurisdiction and the judge would reasonably consider it important to resolving the issue being litigated.[2]

The Army Rule does not require that an Army lawyer, performing the function of an advocate, make a disinterested exposition of the law; however, it does require that counsel recognize, and bring to the tribunal's attention, the existence of pertinent legal authorities. The underlying concept is that counsel have an obligation to assist the tribunal in its search to determine the legal premises that are applicable to, or may be appropriate for, a case.

Those states which have adopted the 1982 ABA Model Rules[3] leave attorneys to their own instincts as to when they choose to disclose adverse authority in a noncontrolling jurisdiction, at least insofar as facing sanctions from their bars. The reason is that the 1982 draft, first adopted by the ABA House of Delegates and then by numerous states, omits the Army Rule comments quoted above. The result is that, under state bar rules, a lawyer has no duty to disclose noncontrolling legal authority to the controlling forum. For Army lawyers, the situation can arise not only in courts-martial and criminal appeals but also in the other forums in which Army lawyers practice such as the federal courts and the various boards of contract appeals.[4]

A lawyer's first reaction might be not to disclose the adverse precedent. Because Army Rule 3.3(a)(3) is violated only when opposing counsel has not disclosed the adverse authority, some lawyers may take a wait and see approach. Their reasoning is to wait and see whether the opponent ultimately mentions the authority in a reply brief or memorandum of law or even in oral argument. They feel that it is safe to see if the opponent drops the ball before mentioning the adverse precedent.

However, Army Rule 3.3(a)(3) overlaps Army Rule 8.4(c).[5] Therefore, such an approach could result in the court being misled and, ultimately, violations of Army Rules 3.3(a)(3) and 8.4(c). Instead of taking a piecemeal approach, it is better to cite the adverse authority unequivocally, followed by the most favorable, credible and persuasive interpretation of the case, to include distinguishing and discrediting the logic of the adverse authority, if such an argument can be made in good faith. Taking a direct approach and massaging the case's holding into the main argument at the outset is a credible and effective way to present a case and meet the requirements of the Army Rules.

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[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 3.3(a)(3) (1 May 1992) [hereinafter AR 27-26].

[2] *Id.* Rule 3.3 cmt.

[3] ABA Center for Professional Responsibility, *Annotated Rules of Professional Conduct*, 1992 A.B.A. SEC. PUB. 329-330 (Rule 3.3 and comment).

[4] The Army Rule also applies before legislative and administrative tribunals. *See* AR 27-26, *supra* note 4, Rule 3.9 (makes Army Rule 3.3(c) applicable to a lawyer representing a client before a legislative or administrative tribunal).

[5] *Id.* Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

When faced with making a decision on whether to disclose noncontrolling legal authority, Army lawyers might find it helpful to ask themselves these three questions:

First, what is my *intent* in not disclosing the adverse legal authority? Is it to keep useful but adverse knowledge from the court? If I were the judge, would I consider the authority important in resolving the issue being litigated?

Second, what *method* did I use to "disclose" adverse authority? If I place an adverse citation in the middle of a half page of string citations, without a meaningful explanatory note, have I met the requirement to disclose adverse legal authority?

Third, what is the *effect* of my not disclosing or disclosing only in a manner clearly guaranteed to bring about an incorrect evaluation of the authority? For example, what if I bury an adverse citation in a reply brief filed at a time when the tribunal is preoccupied with a dozen pending motions and working under a tight briefing schedule? Or what if I only mention, orally, a clearly adverse authority once during an unrecorded, informal meeting with a motions judge whom I know will not preside at the trial?

Army lawyers and private attorneys practicing before military justice tribunals should keep in mind the unique comment to Army Rule 3.3(a)(3) that, in the circumstances specified, requires advocates to disclose adverse legal authority from noncontrolling as well as controlling jurisdictions. Colonel Neveu and Mr. Eveland.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1996

March 1996

4-15 March:	136th Contract Attorneys' Course (5F-F10).
18-22 March:	20th Administrative Law for Military Installations Course (5F-F24).
25-29 March:	1st Contract Litigation Course (5F-F102).

April 1996

1-5 April:	135th Senior Officers' Legal Orientation Course (5F-F1).
15-18 April:	1996 Reserve Component Judge Advocate Workshop (5F-F56).
15-26 April:	5th Criminal Law Advocacy Course (5F-F34).
22-26 April:	24th Operational Law Seminar (5F-F47).
29 April- 3 May:	44th Fiscal Law Course (5F-F12).
29 April- 3 May:	7th Law for Legal NCOs' Course (512-71D/20/30).

May 1996

13-17 May:	45th Fiscal Law Course (5F-F12).
13-31 May:	39th Military Judge Course (5F-F33).
20-24 May:	49th Federal Labor Relations Course (5F-F22).

June 1996

3-7 June:	2d Intelligence Law Workshop (5F-F41).
3-7 June:	136th Senior Officers' Legal Orientation Course (5F-F1).
3 June - 12 July:	3d JA Warrant Officer Basic Course (7A-550A0).
10-14 June:	26th Staff Judge Advocate Course (5F-F52).
17-28 June:	JATT Team Training (5F-F57).
17-28 June:	JAOAC (Phase II) (5F-F55).

July 1996

1-3 July:	Professional Recruiting Training Seminar
1-3 July:	27th Methods of Instruction Course (5F-F70).
8-12 July:	7th Legal Administrators' Course (7A-550A1).
8 July - 13 September:	140th Basic Course (5-27-C20).
22-26 July:	Fiscal Law Off-Site (Maxwell AFB) (5F-12A).
24-26 July:	Career Services Directors Conference.
29 July - 9 August:	137th Contract Attorneys' Course (5F-F10).
29 July - 8 May 1997:	45th Graduate Course (5-27-C22).
30 July - 2 August:	2d Military Justice Managers' Course (5F-F31).

August 1996

12-16 August:	14th Federal Litigation Course (5F-F29).
12-16 August:	7th Senior Legal NCO Management Course (512-71D/40/50).
19-23 August:	137th Senior Officers' Legal Orientation Course (5F-F1).
19-23 August:	63d Law of War Workshop (5F-F42).
26-30 August:	25th Operational Law Seminar (5F-F47).

September 1996

4-6 September:	USAREUR Legal Assistance CLE (5F-F23E).
9-11 September:	2d Procurement Fraud Course (5F-F101).
9-13 September:	USAREUR Administrative Law CLE (5F-F24E).
16-27 September:	6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1996

March 1996

6-8, NITA:	Deposition Skills Programs: Southeast Deposition, Chapel Hill, NC
15, NITA:	Discovering the Secrets of Effective Depositions, Las Vegas, NV
15-24, NITA:	Basic Trial Skills Programs, Chicago, IL
22-24, NITA:	Advocacy Teach Training Programs, Cambridge, MA
25-27, GI:	Environmental Laws and Regulations Compliance Course, Jackson Hole, WY

July 1996

21-26, APA:	31st Annual Seminar/Workshop, New Orleans, LA

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

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200

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.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

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

ESI:
Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3203
(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
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

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 70803-1000
(504) 388-5837

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

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

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

NITA:
National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(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

NMTLA:
New Mexico Trial
Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI:
Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774

PLI:
Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-eight states currently mandate continuing legal education (MCLE). Attorneys licensed in these MCLE states must attend approved continuing legal education (CLE) programs for a specified number of hours each year or over a period of years. TJAGSA *resident* CLE courses have been approved by most MCLE jurisdictions. Bar members must periodically report either their compliance or reason for exemption from compliance with CLE requirements. Due to the varied MCLE programs, *JAGC Personnel Policies, JAG Pub. 1-1*, paragraph 10-2 (1995-96), provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change.

The jurisdictions listed below have adopted some form of MCLE, and the list includes a brief summary of the requirement, the address of the local official, and the reporting date. Many jurisdictions have additional special requirements (particularly with respect to new attorneys) or unique bases for exceptions. Attorneys must maintain regular contact with their licensing jurisdiction to ensure full compliance with all requirements. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state for MCLE credit.

State	Local Official	CLE Requirements
Alabama*	Administrative Assistant for Programs AL State Bar 415 Dexter Ave. Montgomery, AL 36104 334-261-6310	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona*	Administrator State Bar of AZ 111 W. Monroe Ste. 1800 Phoenix, AZ 85003-1742 602-271-4930	-Fifteen hours per year; three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas*	Director of Professional Programs Supreme Court of AR Justice Building 625 Marshall Little Rock, AR 72201 501-374-1853	-Twelve hours per year. -Reporting date: 30 June.
California*	Director, Office of Certification State Bar of CA 100 Van Ness Ave. 28th Floor San Francisco, CA 94102 415-241-2133	-Thirty-six hours over three year period. Eight hours must be in legal ethics or law practice management; at least four of which must be in legal ethics. -Full-time U.S. Government employees are exempt from compliance. -Reporting date: 1 February.

State	Local Official	CLE Requirements
Colorado*	Executive Dir.CO Supreme Court Board of CLE & Judicial Ed. 600 17th St., Ste., #520-S Denver, CO 80202 303-893-8094	-Forty-five hours over three year period; seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware*	Executive Director Commission on CLE 200 W. 9th St., Ste. 300-B Wilmington, DE 19801 302-658-5856	-Thirty hours over a two year period; three hours must be in legal ethics, and a minimum of two hours., and a maximum of six hours, in professionalism. -Reporting date: 31 July.
Florida*	Director, Legal Specialization & Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5842	-Thirty hours over a three year period; two hours must be in legal ethics. -Active duty military attorneys, and out-of-state attorneys are exempt but must declare exemption during reporting period. -Reporting date: Every three years during month designated by the Bar.
Georgia*	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 404-527-8715	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January.
Idaho*	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 208-334-4500	-Thirty hours over a three year period; two hours must be in legal ethics. -Reporting date: Every third year determined by year of admission.
Indiana*	Executive Director, IN Commission for CLE Merchants Plaza, South Tower 115 W. Washington St. Indianapolis, IN 46204-3417 317-232-1943	-Thirty-six hours over a three year period. (minimum of six hours per year). -Reporting date: 31 December.
Iowa*	Executive Director, Commission on CLE State Capitol Des Moines, IA 50319 515-246-8076	-Fifteen hours per year; two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas*	Executive Director, CLE Commission 400 S. Kansas Ave., Suite 202 Topeka, KS 66603 913-357-6510	-Twelve hours per year; two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE course.
Kentucky*	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 502-564-3795	-Twelve and one-half hours per year; two hours must be in legal ethics. -Reporting date: June 30.

State	Local Official	CLE Requirements
Louisiana*	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-Fifteen hours per year; one hour must be in legal ethics. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Minnesota*	Director, MN State Board of CLE 25 Constitution Ave., Ste. 110 St. Paul, MN 55155 612-297-1800	-Forty-five hours over a three-year period. -Reporting date: 30 August.
Mississippi*	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 601-354-6058	-Twelve hours per year; one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt, but must declare exemption. -Reporting date: 31 July.
Missouri*	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-Fifteen hours per year; three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana*	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660, ext. 5	-Fifteen hours per year. -Reporting date: 1 March.
Nevada*	Executive Director Board of CLE 295 Holcomb Ave., Ste. 2 Reno, NV 89502 702-329-4443	-Twelve hours per year; two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampshire*	Assistant to the NH MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942	-Twelve hours per year; two hours must be in ethics, professionalism, substance abuse, or the prevention of malpractice or attorney-client disputes. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
New Mexico*	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-Fifteen hours per year; one hour must be in legal ethics. -Reporting date: 31 March.
North Carolina*	Associate Director, Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 919-733-0123	-Twelve hours per year; two hours be in legal ethics. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February .

State	Local Official	CLE Requirements
North Dakota*	ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 701-255-1404	-Forty-five hours over three year period; three hours must be in legal ethics. -Reporting date: Reporting period is 1 July - 30 June. Report must be filed by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. Second Floor Columbus, OH 43266-0419 614-644-5470	-Twenty-four hours over two year period; two hours must be in legal ethics and substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma*	MCLE Administrator OK State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-Twelve hours per year; one hour must be in legal ethics. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 February.
Oregon*	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 503-620-0222, ext. 368	-Forty-five hours over three year period; six hours must be in legal ethics. -Reporting date: Every three years from admission; new members must report after first year.
Pennsylvania (Pennsylvania does *not* grant credit for TJAGSA courses)	Administrator, PA CLE Board 5035 Ritter Rd., Ste. 500 Mechanicsburg, PA 17055 717-795-2139	-Twleve hours per year; one hour must be in legal ethics. -Active duty military attorneys outside the state of PA are exempt, but must declare their exemptions. -Nonresident active status is available to out-of-state attorneys. -Reporting date: Thirty days after the CLE course.
Rhode Island*	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 401-277-4942	-Ten hours each year; two hours must be in legal ethics. -Reporting date: 30 June.
South Carolina*	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 803-799-5578	-Fourteen hours per year; two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1430 Nashville, TN 37219 615-741-3096	-Fifteen hours per year; three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt -Reporting date: 1 March.
Texas*	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711 512-463-1471	-Fifteen hours per year; one hour must be in legal ethics. -Reporting date: Last day of birth month each year.

State	Local Official	CLE Requirements
Utah*	MCLE Board Administrator, UT Law & Justice Center 645 S. 200 East, Ste. 312 Salt Lake City, UT 84111-3834 801-531-9095	-Twenty-four hours, plus three hours in legal ethics per two year period. -Reporting date: 31 December (end of assigned two-year compliance period).
Vermont*	Director, MCLE Board 109 State St. Montpelier, VT 05609-0702 802-828-3281	-Twenty hours over two year period. -Reporting date: 15 July.
Virginia*	Director of MCLE VA State Bar 8th & Main Bldg. 707 E. Main St., Ste. 1500 Richmond, VA 23219 804-775-0577	-Twelve hours per year; two hours must be in legal ethics. -Reporting date: 30 June.
Washington*	Executive Secretary WA State Board of CLE 500 Westin Bldg. 2001 6th Ave. Seattle, WA 98121-2599 206-727-8219	-Forty-five hours over a three-year period. -Reporting date: 31 January.
West Virginia*	Mandatory CLE Coordinator MCLE Commission WV State Bar 2006 Kanawha Blvd., East, Charleston, WV 25311-2204 304-558-7992	-Twenty-four hours over two year period; three hours must be in legal ethics and/or office management. -Reporting date: Reporting period ends on 30 June every 2 years. Report must be filed by 31 July.
Wisconsin*	Director, Board of Bar Examiners 119 Martin Luther King, Jr. Blvd., Room 405 Madison, WI 53703-3355 608-266-9760	-Thirty hours over two year period; three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period end 31 December every two years. Report must be filed by 1 February.
Wyoming*	CLE Assistant WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-Fifteen hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is 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, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

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. These publications are for government use only.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506(93) (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).
AD A263082	Real Property Guide—Legal Assistance, JA-261(93) (293 pgs).
AD A281240	Office Directory, JA-267(94) (95 pgs).
AD B164534	Notarial Guide, JA-268(92) (136 pgs).
AD A282033	Preventive Law, JA-276(94) (221 pgs).
AD A266077	Soldiers' and Sailors' Civil Relief Act Guide, JA-260(93) (206 pgs).
AD A297426	Wills Guide, JA-262(95) (517 pgs).
AD A268007	Family Law Guide, JA 263(93) (589 pgs).
AD A280725	Office Administration Guide, JA 271(94) (248 pgs).
AD A283734	Consumer Law Guide, JA 265(94) (613 pgs).
AD A289411	Tax Information Series, JA 269(95) (134 pgs).
AD A276984	Deployment Guide, JA-272(94) (452 pgs).
AD A275507	Air Force All States Income Tax Guide, April 1995.

Administrative and Civil Law

AD A285724	Federal Tort Claims Act, JA 241(94) (156 pgs).
AD A301061	Environmental Law Deskbook, JA-234(95) (268 pgs).
AD A298443	Defensive Federal Litigation, JA-200(95) (846 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA 231-92 (89 pgs).
AD A298059	Government Information Practices, JA-235(95) (326 pgs).
AD A259047	AR 15-6 Investigations, JA-281(92) (45 pgs).

Labor Law

AD A286233	The Law of Federal Employment, JA-210(94) (358 pgs).
*AD A291106	The Law of Federal Labor-Management Relations, JA-211(94) (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(94) (191 pgs).

AD A274541 Unauthorized Absences, JA 301(95) (44 pgs).

*AD A274473 Nonjudicial Punishment, JA-330(93) (40 pgs).

*AD A274628 Senior Officers Legal Orientation, JA 320(95) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA 310(95) (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA 422(95) (458 pgs).

Reserve Affairs

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

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

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

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
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.

b. 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 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.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

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

(2) Units that require publications that are not on their initial distribution list can requisition publications using *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.

(3) 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.

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

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community by providing the Army and other Department of Defense (DOD) agencies access to the LAAWS BBS. Whether you have Army access or DOD-wide access, all users may download The Judge Advocate General's School, United States Army (TJAGSA), publication 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 by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D);

(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. Request 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 currently is restricted to all DOD personnel dealing with military legal issued (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791.

c. The telecommunications configuration is 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT 100/102 or ANSI terminal emulation.

d. 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.

e. *The Army Lawyer* will publish information on new publications and materials available through the LAAWS BBS.

4. Instructions for Downloading Files from the LAAWS BBS

Instructions for downloading files from the LAAWS BBS are currently being revised. If you have a question or a problem with the LAAWS BBS, leave a message on the BBS. Personnel needing uploading assistance may contact SSG Aaron P. Rasmussen at (703) 806-5764.

5. 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
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	April 1995	1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995.
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.
BULLETIN.ZIP	April 1995	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CHILDSPT.ASC	November 1995	A Guide to Child Support Enforce Against Military Personnel, October 1995.
CHILDSPT.WP5	November 1995	A Guide to Child Support Enforcement Against Military Personnel, October 1995.
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	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	December 1995	Federal Tort Claims Act, August 1994.
FOIAPT1.ZIP	November 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	November 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
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.
JA200.ZIP	November 1995	Defensive Federal Litigation, August 1995.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	April 1995	Law of Federal Labor-Management Relations, December 1994.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	November 1995	Environmental Law Deskbook, Volumes I and II, September 1995.
JA235.ZIP	August 1995	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, April 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	July 1995	Legal Assistance Wills Guide, June 1995.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	December 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses Protection Act Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations, August 1992 in ASCII text.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA301.ZIP	December 1995	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	December 1995	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	December 1995	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	December 1995	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	December 1995	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA501-1.ZIP	August 1995	TJAGSA Contract Law Deskbook Volume 1, May 1993.
JA501-2.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA501-3.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 3, May 1993.
JA501-4.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 4, May 1993.
JA501-5.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 5, May 1993.
JA501-6.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 6, May 1993.
JA501-7.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 7, May 1993.
JA501-8.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 8, May 1993.
JA501-9.ZIP	August 1995	TJAGSA Contract Law Deskbook, Volume 9, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	August 1995	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506.ZIP	November 1995	Fiscal Law Course Deskbook, October 1995.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA5082.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	March 1995	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	March 1995	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	March 1995	Procurement Fraud Course, March 1995.
41JA5061.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
41JA5062.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
41JA5063.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
41JA5064.ZIP	June 1995	Forty-first Fiscal Law Course, May 1995.
JA509-1.ZIP	March 1994	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	June 1995	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	June 1995	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	June 1995	Sixth Installation Contracting Course, May 1995.
OPLAW95	December 1995	Operational Law Deskbook 1995.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.
YIR94-1.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 1, 1995. Symposium.
YIR94-2.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.

FILE NAME	UPLOADED	DESCRIPTION
YIR94-3.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1995	Contract Law Division 1994 Year in Review Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1995	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review.

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, 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.

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG Aaron P. Rasmussen, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. Articles

The following information may be of use to judge advocates in performing their duties:

Steven R. Adang, *The Use of the Polygraph With Children*, 24 POLYGRAPH 259 (1995).

Kathy Jo Cook, *An Opinion: Federal Judges Misconstrue Rule 704. (Or Is That an Impermissible Legal Conclusion?)*, 32 COURT REVIEW 33 (1995).

Warren D. Holmes, *Interrogation*, 24 POLYGRAPH 237 (1995).

Barbara A. Lee, *Preventing and Responding to Sexual Claims in and out of the Courtroom*, 32 COURT REVIEW 27 (1995).

7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addressess for TJAGSA personnel are available by e-mail through the IMO office at godwinde@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

8. The Army Law Library Service

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.

b. Law librarians having resources available for redistribution should contact Ms. Nell Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

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

Staff Judge Advocate
HQ, I Corps and Fort Lewis
ATTN: AFZH-JA (CW3 Gardner)
Fort Lewis, Washington 98433-5000
COM (206) 967-0701

*Corpus Juris Secundum, 173 Vols (no updates since 1992)

Staff Judge Advocate
USAEC & Fort Leonard Wood
Building 1705, Attn: ATZT-JA
Fort Leonard Wood, Missouri 65473-5000
POC WO1 Holbrook
COM (314) 596-0625
DSN 581-0625

*American Jurisprudence 2d, last update 1987

*American Jurisprudence Proof of Facts, last update 1986

*United States Statutes at Large, last update 1993

*Vernon's Annotated Missouri Statutes, complete set of 66 books, last full update 1992

Division Law Library
USACOE, Missouri River Division
P.O. Box 103, Downtown Station
Omaha, Nebraska 68101
POC Christine T. Carmichael
COM (402) 221-3229

*Federal Reporter 1st Series, Vols. 1-300

*American Law Reports Annotated, Series 1, Vols. 1-175

*Northeastern Reporter, Vol. 1-200

*Northeastern Reporter Digest, 68 Vols., 1933-1969

*Pacific Digest, Vol. 1-40

*Pacific Reporter 1st Series, Vols. 1-300

*Court of Claims Reports, Vols. 104-159

*Modern Federal Practice Digest, 81 Vols., 1960-1967

*West's Federal Practice Digest 2d Series, 105 Vols., 1976-1982

*Digest of Opinions, 19 Vols., 1958-1959

Staff Judge Advocate
HQ, USA Garrison
Bldg. 2257, Huber Road
Fort Meade, Maryland 20755-5030
POC LTC Warren G. Foote
COM (609) 562-2455
DSN 944-2455

*Atlantic Reporter (1st series only)

*Federal Reporter (1st series only)

*Atlantic Reporter Digest (1st series only)

*Page on Wills

*Blashfield Auto Law, 1992

*Modern Legal Forms, 1984

*Court Martial Reports (5 sets)

*Military Justice Reporters (1 series)

*Vale Pennsylvania Digests, 1982

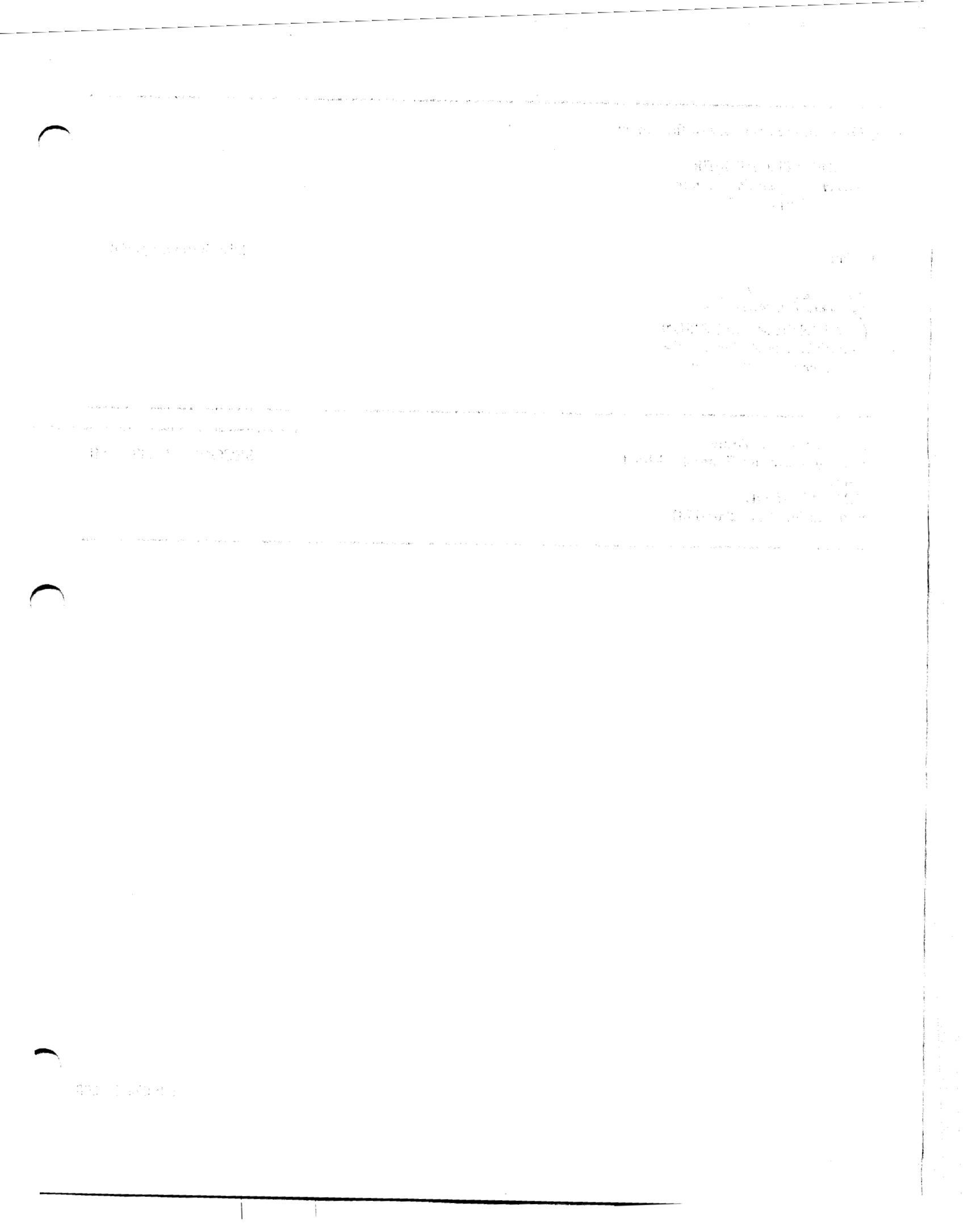
*New Jersey Practice Digests, 1990

*New Jersey Law Digests, 1986

*West New Jersey Digests, 1990

*All Shepard's citations for United States Supreme Court Reporter; Federal Register; Federal Supplement; and Atlantic Reporters (current through 1990)

*U.S. Government Printing Office: 1996 - 404-577/20010



By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:

Yvonne M. Harrison
YVONNE M. HARRISON
Administrative Assistant to the
Secretary of the Army
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