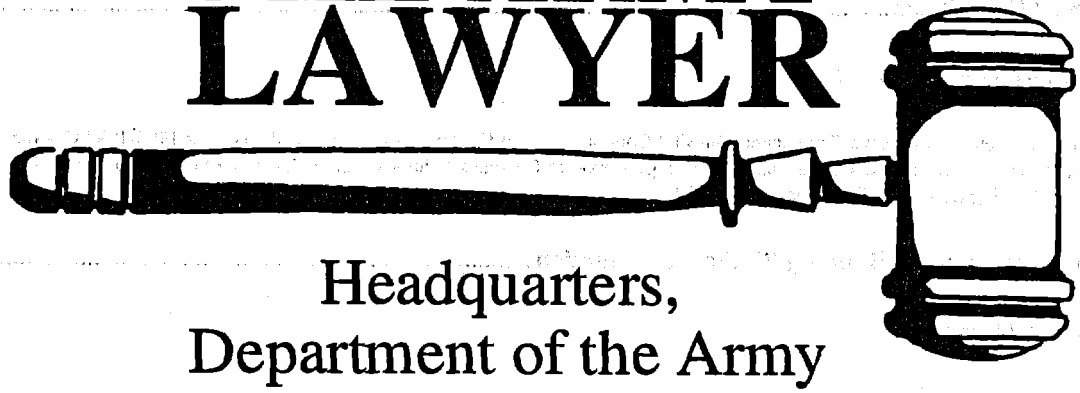
THE ARMY LAWYER



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Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries

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Introduction

Stop me if you have heard this one before. There you sit, fatigued from the rigors of securing a good deal for your client, but comfortably padded by the knowledge that you have skillfully ensured that your client will face punishment this day for only a fraction of his misdeeds. Professionally speaking, life is good. All that remains before a self-proclamation of a job well done is the small matter of the providence inquiry about the single drug possession specification and a presentencing case that you are prepared to pilot safely around several rocks and shoals of uncharged misconduct.

"Yes your honor," says your client, "I knew it was wrong to have marijuana in my room. I'm very sorry." Your heart does not exactly swell with pride at the sound of the client's seemingly sincere statement. At the same time, it sounds much better than his original comment to you that he couldn't believe the command was "making such a big deal over a nickel bag of dope."

Suddenly your relatively perfect day starts to unwind. "All right sergeant," the judge says, "I understand you are sorry. But let me ask you this, how do you know it was marijuana that was found in your room?" You start to lean over to remind your client about the report you showed him wherein the drug laboratory confirmed the nature of the contraband in question. Unfortunately, the synergistic effect of Murphy's Law and the Stupid Criminal Rule intervene. The accused says, "Oh, I've used marijuana lots of times sir. I know it when I see it."

The glare of the light reflecting off the trial counsel's smile begins to give you a headache.

Purpose

This article explores the ramifications of an accused's testimony about uncharged misconduct during providence inquiries. Standard judicial scripts imply that comments by the accused during the providence inquiry *will be* considered during the presentencing phase of the proceedings. Review of the applicable law reveals, however, that subsequent admissibility of an accused's statements is hardly a foregone conclusion. Perpetuation of this misconception would be curbed by a minor modification to the existing script. A closer look at the law reveals that the instructions need to be changed. Furthermore, until necessary changes are wrought, defense counsel must stand ready to object, when appropriate, to admission of evidence of uncharged misconduct revealed by the accused during the providence inquiry.

The Providence Inquiry

From the defense perspective, a sometimes unhappy feature of the providence inquiry is that the questions from the military judge,[1] or the self-destructive bent of the accused, lead to discussion of uncharged misconduct. When a military judge's question calls for discussion of uncharged misconduct, the defense counsel may feel himself caught on the horns of a dilemma. Objecting to opposing counsel's questions or actions during a trial is good sport and clearly a part of the adversarial process. Objecting to the judge's providence questions is another matter. After all, a prerequisite to enjoying the benefits of any pretrial agreement is getting the judge to accept the accused's plea. Further, the knowledge that they will be asking the judge for so many things in the future (perhaps even a favorable sentence in the case at bar) may temper a defense counsel's desire to object to discussion of matters that are *logically* related to the charged offense. As we shall see, however, logical relevance is not the alpha and omega of the admissibility analysis for evidence of uncharged misconduct at presentencing hearings.

The Limits of Judicial Inquiry During the Providence Inquiry

The discussion between the military judge and the accused known as the providence inquiry is a hallmark of the military justice system.[2] Before accepting a guilty plea at a court-mar-

[1] For example, in *United States v. Miller*, 23 M.J. 837 (C.G.C.M.R. 1987), the military judge exceeded the bounds of proper providence inquiry by asking the accused if he would go with the local police to identify his drug supplier. The judge explained that the question was one which would "weigh heavily in the question of sentence." *Id.* at 839.

[2] Using definitions supplied in WEBSTER'S NEW WORLD DICTIONARY (3d College ed., 1988) [hereinafter WEBSTER'S], a "provident" plea is one which: (1) provides for future needs or events; or (2) is prudent or economical. A future event contemplated during the guilty plea inquiry could be a subsequent appellate challenge to the acceptance of the plea. *See infra* note 7 and accompanying text. Using the prudence definition, the providence inquiry would be one that demonstrates caution in the judgment process.

tial, the military judge must determine the accuracy of the plea by questioning the accused to satisfy himself that there is a factual basis for the plea.[3]

The current procedure of questioning an accused under oath during the providence inquiry has been mandated by the *Manual for Courts-Martial (Manual)*[4] since 1984. Development of this practice, however, is a relatively recent phenomenon. Under the 1951 *Manual*,[5] the court was required to make only a cursory inquiry to determine that a plea was made voluntarily, with understanding of the nature of the charge.[6] Over time, however, the minimalist approach fell victim to frequent post-conviction repudiations of guilty pleas by accused.[7] In response, law officers adopted ad hoc providence inquiry procedures[8] and the United States Court of Military Appeals (COMA) recommended adopting a standardized inquiry "calculated to insure that the accused knows fully the nature of the offense, the punishment therefor, and that he is, in fact, guilty of the offenses, and has freely and voluntarily decided on a plea of guilty."[9] In 1969, the President amended the *Manual* to include a providence in-

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[3] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 910(e) (1995 ed.) [hereinafter MCM].

[4] *Id.*

[5] *Id.* (rev. ed. 1951) [hereinafter 1951 MANUAL].

[6] The 1951 MANUAL provided the following script for the inquiry concerning the meaning and nature of the guilty plea:

> LO (Pres): _____, you have pleaded guilty to (Specification _____, Charge _____)(the lesser included offense of _____). By so doing, you have admitted every act or omission (charged) and every element of that (included) offense. Your plea subjects you to a finding of guilty without further proof of that offense, in which event you may be sentenced by the court to the maximum punishment authorized for it. You are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of that offense. Your plea will not be accepted unless you understand its meaning and effect. Do you understand?
>
> Accused: Yes sir.
>
> LO (Pres): Understanding this, do your persist in you plea of guilty?
>
> Accused: Yes sir. [I desire to change my plea(s) to not guilty.]

Id. para. 70a, app. 8a, at 509.

[7] United States v. Simpson, 37 C.M.R. 309 (C.M.A. 1967). One commentator observed that "[the requirement] is designed to protect the judicial process from willful deceit, protect the accused from falsely pleading guilty, and reduce the baseless collateral attacks on guilty pleas." DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE § 14-3(B)(2) (3d ed. 1992).

[8] *Simpson*, 37 C.M.R. at 309.

[9] *Id.* at 310 (citing United States v. Chancelor, 36 C.M.R. 453 (C.M.A. 1966); United States v. Brown, 29 C.M.R. 23 (C.M.A. 1960) (Ferguson, J., dissenting)). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the Navy-Marine Court of Criminal Appeals, the Unites States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces. For the purposes of this article, the name of the court at the time of the decision is the name that will be used in referring to that decision.

quiry, which provided a *potential* exchange between the court and the accused about the circumstances surrounding the commission of the charged offenses.[10]

Shortly after the 1969 *Manual* became effective, in *United States v. Care*,[11] the COMA created several procedural requirements for providence inquiries. In *Care*, the court required military judges to go beyond explanations and questions about voluntariness and the accused's understanding of the nature and meaning of his pleas. The COMA directed that, prior to accepting a guilty plea, the military judge must question the accused "about what he did or did not do, and what he intended (where this is pertinent) to make clear the basis for determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty."[12]

Based on the COMA's earlier analysis of law officers' ad hoc inquiries, the 1969 *Manual* still did not call for placing an accused under oath to explain his plea. The COMA recognized that the oath may enhance truth-telling.[13] It opined that this laudatory effect, however, was outweighed by an oath's "dampening effect upon a person's willingness to speak freely and fully on a subject."[14] Additionally, the court noted that it was virtually unheard of for a civilian defendant to be compelled by the court to testify under oath concerning the voluntariness of his plea.[15]

By the early 1980s, guilty plea practice across the country had changed. The *Federal Rules of Criminal Procedure* had been amended to permit federal district judges to require defendants to answer questions under oath to develop factual bases for guilty

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[10] In 1969, the military judge's script was amended to read:

> MJ: _____, you have proposed to plead guilty to (Specification _____, Charge _____)(the lesser included offense of _____) (all specifications and charges). By doing so, you will admit every act or omission and every element alleged with respect to the offense (offenses) to which you plead guilty. Your plea will subject you to (a) finding(s) of guilty without further proof of, (that) (those) offense(s), in which event you may be sentenced by the court to the maximum punishment authorized for (it) (them). You are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of (that) (those) offense(s). Your plea of guilty will not be accepted unless it appears that you understand its meaning and effect and that you are voluntarily pleading guilty because you are convinced that you are in fact guilty. If you are not convinced that you are in fact guilty, you should not allow any other consideration to influence you to plead guilty.
>
> MJ: Do you understand this explanation of the meaning and effect of your plea of guilty?
>
> ACCUSED: (Yes sir.) (_____).
>
> MJ: Are you voluntarily pleading guilty?
>
> ACCUSED: (Yes sir.) (_____).
>
> MJ: Are you convinced that you are in fact guilty?
>
> ACCUSED: (Yes sir.) (_____).
>
> Note. If the MJ considers it appropriate or if requested by the Secretary concerned, further inquiry and a more detailed explanation may be conducted. This may include for example, a detailed explanation of the elements of the offense, inquiry into the reason for the guilty pleas, and inquiry into and explanation of any agreement involved in connection with the pleas.
>
> MJ: Understanding the things we have discussed, do you still desire to plead guilty as previously indicated.
>
> ACCUSED: Yes sir. (I desire to plead _____).
>
> Note. If the accused persists in his proposal to plead guilty and the MJ finds cause to doubt its providence, he may discuss the question further.

MCM, *supra* note 3, app. 8 b at A8-15 (rev. ed. 1969).

[11] 40 C.M.R. 247 (C.M.A. 1969).

[12] *Id.* at 253 (citing United States v. Donohew, 39 C.M.R. 149 (1969); United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957)).

[13] *Simpson*, 37 C.M.R. at 310 (citing United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959), United States v. Claypool, 27 C.M.R. 376 (C.M.A. 1959)).

[14] *Id.*

[15] *Id.* Of course, analogy with civilian guilty plea practice is somewhat illusory because some civilian courts may accept a guilty plea without a factual basis developed on the record. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25 (1970).

pleas.[16] This change, along with continuing problems with collateral attacks on the providence of pleas at courts-martial led to amendment of Rule for Courts-Martial 910 to require that the accused be placed under oath when answering the court's questions to verify the accuracy of the plea.[17] In determining the accuracy of a guilty plea, the military judge must do more than simply secure the accused's agreement to legal conclusions concerning his guilt.[18] Instead, facts revealed by the accused must objectively establish the acts or omissions which constitute the offense to which a guilty plea has been entered.[19]

Preventive Action by the Defense During the Providence Inquiry

As described above, valid reasons support the military judge's duty to question an accused about the accuracy of a guilty plea. Nevertheless, when an accused pleads guilty to a charged offense, he is required to waive the privilege against self-incrimination *only* with regard to that offense.[20] Accordingly, when a military judge asks a question that may elicit discussion of uncharged misconduct, defense counsel[21] should object, or register a polite "excuse me your honor," and ask for which element of the offense the judge is trying to develop a factual basis. At the very least, the objection will stop the flow of traffic in the courtroom. Then, defense counsel may attempt to persuade the judge that the line of questioning is not necessary to establish a factual basis for the plea.[22]

If the military judge persists with the objectionable line of questioning, defense counsel should be well positioned to advise the accused how to limit disclosure of potentially damaging information. Beyond dealing with judicial questions that stray from a course free of uncharged misconduct, is the matter of muzzling the unnecessarily repentant accused. Similarly, defense counsel must identify those clients who might prompt close questioning during the providence inquiry by seeking to minimize their culpability to the charged offense.

Like so many other aspects of trial work, this sort of client control is essentially a question of proper pretrial preparation. In every guilty plea case, defense counsel should conduct a practice providence inquiry with the accused in the friendly confines of the counsel's office.[23] Typically, a military judge will start a providence inquiry by asking the accused to explain "in his own words" why he thinks he is guilty of the charged offense. Counsel should coach the accused to respond to this innocuous general question with a clearly stated answer that establishes a complete factual basis for the plea. In this manner the defense may preempt the judge from engaging in a long series of tedious or unnecessary dialogue.[24]

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[16] *See* FED.R.CIV.P. 11, and Notes of Advisory Committee to 1974 Amendments, subdivision (f).

[17] *See* MCM, *supra* note 3, R.C.M. 910(e), analysis, app. 21, at A21-57. For a more complete discussion of the history and rationale supporting the changes to the providence inquiry in the 1984 MCM, *see* Captain Jody Prescott, United States v. Holt: *The Use of Providence Inquiry Information During Sentencing*, ARMY LAW., Apr. 1988, at 34.

[18] United States v. Shields, 39 M.J. 718 (N.M.C.M.R. 1993) (seeking agreement to legal conclusions from accused may mask inadequate development of underlying facts); United States v. Tenk, 33 M.J. 765 (A.C.M.R. 1991) (judge merely inquired of accused whether his conduct was "dishonorable" without eliciting any facts upon which such a legal conclusion could be based); United States v. Duval, 31 M.J. 650 (A.C.M.R. 1990) (judge failed to elicit a sufficient factual predicate for guilty plea and failed to resolve appellant's assertion of matters inconsistent with his pleas).

[19] United States v. Schwabauer, 37 M.J. 338 (C.M.A. 1993). In *United States v. Sweet*, the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals (COMA)) ruled that the factual basis for a guilty plea may be established when, in conjunction with a plea accompanying a pretrial agreement, the military judge reads tailored elements of the charged offenses and the accused admits that those elements describe his misconduct. 42 M.J. 183 (1995). For further discussion of the use of stipulations accompanying pretrial agreements *see infra* notes 57-70 and accompanying text.

[20] MCM, *supra* note 3, R.C.M. 910(c)(3). *See also* United States v. Ramelb, 44 M.J. 625 (Army Ct. Crim. App. 1996) (accused's waiver of privilege against self-incrimination is a "limited waiver"); United States v. Nichols, 13 M.J. 154 (1982) (consistent with accused's right to remain silent, even after findings of guilt have been rendered, the military judge should not have attempted, either directly or indirectly, to compel him to discuss other offenses for which he was not then on trial).

[21] It should be pointed out that trial counsel share some responsibility for limiting the providence inquiry to the bounds of information necessary to establish the accuracy of the guilty plea. MCM, *supra* note 3, R.C.M. 502(d)(5), discussion, states: "Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings." As a practical matter, however, most judicial forays during providence inquiries fall far short of amounting to a "substantial irregularity in the proceedings."

[22] Counsel's ability to succeed in this regard will be enhanced by pretrial analysis of what facts are required to support a guilty plea for a particular charge.

[23] Counsel should also consider conducting a providence inquiry rehearsal in an empty courtroom. An on-location dress rehearsal will help bring home the gravity of the proceedings and the public nature of the providence inquiry.

[24] In *United States v McCann*, the Navy court complained that defense counsel poorly prepare their clients for providence inquiries. 11 M.J. 506 (N.C.M.R. 1981). The Navy court suggested that accused would be well served by reading "three or four lines of prepared remarks which address the essential elements of the offense." *Id.* at 508, n.1. While the judge could, and should, ask questions beyond receipt of a prepared statement, an initially forthright statement by the accused can go a long way toward limiting potentially troublesome judicial inquiry.

Subsequent Use of Statements by the Accused During the Providence Inquiry

Despite the best efforts of defense counsel, uncharged misconduct may still become of matter of record during the providence inquiry. The question then becomes what use may be made of the accused's statements during the presentencing proceedings?

The *Military Judges' Benchbook*[25] (*Benchbook*) provides that prior to commencing a providence inquiry, the military judge shall, among other things, advise the accused as follows:

> MJ: If you continue with your guilty plea, you will be placed under oath and I will question you to determine whether you are, in fact, guilty. *Anything you tell me may be used against you in the sentencing portion of the trial.* Do you understand this?[26]

Unfortunately, the *Benchbook* does not explain the meaning of the phrase "may be used."[27] I believe many trial practitioners assume that in stating that the statements "may be used" in sentencing, the judge is prospectively ruling on the admissibility of the accused's forthcoming statements. Military judges, however, may not by judicial fiat make that which is otherwise inadmissible, admissible.

Admissibility of Uncharged Misconduct During the Presentencing Hearings

In *United States v. Holt*,[28] the COMA held that sworn testimony given by the accused during the providence inquiry may be received at a presentencing hearing.[29] The court observed that "if the sworn testimony during the providence inquiry is sufficiently reliable to support findings of guilt, it would seem reliable enough to be considered in connection with sentencing."[30] In finding that statements made during the providence inquiry possess sufficient *reliability* to merit consideration in a subsequent presentencing hearing, the COMA also noted that the rule of *relevance* for presentencing hearings was still limited by Rule for Courts-Martial 1001.

During the presentencing phase of a court-martial, the prosecution and the defense may present matters to aid the court in determining an appropriate sentence.[31] Rule for Courts-Martial 1001 establishes five categories of evidence that the trial counsel may present during the presentencing hearing.[32] Matters

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

[26] *Id.* Update Memo 11, at 2-11 (emphasis added).

[27] A common dictionary definition demonstrates at least eight ways in which the word "may" can be used:

> *v.aux.* . . . **1** used to express ability or power: now generally replaced by can **2** used to express possibility or likelihood [it *may* rain **3** used to express permission [you *may* go] . . . **4** used to express contingency, as in clauses of purposes, result, concession, or condition [they did that we *may* be free] **5** used in exclamations and apostrophes to express a wish, hoe or prayer [*may* he rest in peace] **6** *Law* shall; must. . . —**vi. 1** used to express possibility or likelihood **2** used to express permission [yes you *may*].

WEBSTER'S, *supra* note 2, at 837.

[28] 27 M.J. 57 (C.M.A. 1988).

[29] *Id.* at 59. Potential use of statements made during the providence inquiry of the case-in-chief involving mixed plea cases is beyond the scope of this article. This issue was recently discussed in United States v. Ramelb, 44 M.J. 625 (Army Cr. Crim. App. 1996).

[30] *Id.* For a lament concerning the changes wrought by *Holt*, see Captain James C. Pohl, *Practical Considerations of* United States v. Holt: *Use of Accused's Answers During the Providence Inquiry as Substantive Evidence*, ARMY LAW., Nov. 1988, at 20.

[31] MCM, *supra* note 3, R.C.M. 1001(a).

[32] *Id.* R.C.M. 1001(b) authorizes the following:

> (b) Matters to be presented by the prosecution.
>
> (1) Service data from the charge sheet.
>
> * * * *
>
> (2) Personal data and character of prior service of the accused.
>
> * * * *
>
> (3) Evidence of prior convictions of the accused.
>
> * * * *
>
> (4) Evidence in aggravation.
>
> * * * *
>
> (5) Evidence of rehabilitative potential.
>
> * * * *

be provided notice and an opportunity to object to admission of information gleaned during the providence inquiry.[49] If the accused's statements during the providence inquiry merit consideration for sentencing purposes, trial counsel should proffer this testimony during the presentencing hearing and be able to articulate a proper Rule for Courts-Martial 1001(b) category as a basis for their admission.[50] Should the testimony be admitted, it may be presented to the members either by properly authenticated transcript, by the testimony of the court reporter,[51] or by the playing of a tape of the providence inquiry.[52]

The best plan of attack for defense counsel depends on the forum, the actions of the trial counsel, and the likelihood of success of the objection. First, consider a case with members impaneled for sentencing, and revealed uncharged misconduct that probably will be viewed as directly related to the charged offense. If a proffer of statements from the providence inquiry is not forthcoming during presentation of the government's presentencing case, defense counsel should object to consideration of these matters at the moment trial counsel attempts to discuss them during argument on sentence. To object earlier would simply remind trial counsel of matters best forgotten.

If a trial counsel's first reference to the objectionable matter is during argument on sentencing, the proper objection would be that counsel is arguing facts not in evidence. While this clearly is a winning objection, the victory may be short lived if the judge allows trial counsel to reopen the government's presentencing case for the purpose of offering the providence inquiry statements.[53] In any event, the defense may also prevail if trial counsel is unable to articulate a valid basis for admitting the statements under Rule for Courts-Martial 1001(b).

Next, consider the same case setting, but with statements likely to be ruled inadmissible because they are not directly related to the charged offense. Here, defense counsel should ensure no mention is made of the statements before the members by making a motion for appropriate relief[54] at an Article 39(a) hearing[55] before the government's presentencing case begins. Such action will admittedly alert trial counsel about the need to seek admission of the accused's statement's before speaking of them before the panel. Under this method, however, the defense will neither be placed in the position of objecting to introduction of the statements in front of the members, and being cast in the role of an obstructionist, nor highlight in front of the members the very information he wants to exclude.

In a trial before a military judge alone, defense counsel must take into consideration not only the acts or omissions of the trial counsel, but also possible misunderstanding of the law by the military judge. Obviously, an objection would be in order if the trial counsel referred to or sought to admit evidence of arguably inadmissible uncharged misconduct. However, even if the trial counsel did not refer to the uncharged misconduct in the government's presentencing case, the danger would still exist that the statements would carry over from the providence inquiry to the judge's deliberations on sentence.[56] Accordingly, in judge alone cases, defense counsel should preemptively seek a ruling by the military judge that the evidence of uncharged misconduct is not admissible under Rule for Courts-Martial

[49] United States v. Irwin, 39 M.J. 1062 (A.C.M.R. 1994) (interpreting *Holt* in a manner consistent with the Navy-Marine Corps court in *English* and *Dukes*); United States v. English, 37 M.J. 1107 (N.M.C.M.R. 1993); United States v. Dukes, 30 M.J. 793 (N.M.C.M.R. 1990).

[50] If no reasonable basis for considering the accused's statements under Rule for Courts-Martial 1001 exists, those statements should not be offered, alluded to, or disclosed to members during the presentencing phase. *See* MCM, *supra* note 3, R.C.M. 502(d)(5) discussion.

[51] *Holt*, 27 M.J. at 58.

[52] *Irwin*, 39 M.J. at 1065.

[53] Although Rule for Courts-Martial 1001 (the rule governing presentencing procedure) does not provide authority for a military judge to permit a party to reopen its case after resting, Military Rule of Evidence 611 provides that the military judge shall exercise reasonable control over the presentation of evidence so as to make the presentation effective to ascertain the truth. Authority to permit reopening during presentation of the case on the merits is provided in Rule for Courts-Martial 913(c)(5). Some counsel may feel that a sustained objection with an accompanying curative instruction will mar the defense case in the eyes of the courts-martial members. This would be true if the members believed that the defense had succeeded in hiding the truth behind a veil of procedural maneuvering. In that case, counsel should take the matter up in an Article 39(a) session before arguments on sentence. *See infra* notes 54-55.

[54] Rule for Courts-Martial 906(b)(16) provides for preliminary rulings on admissibility of evidence outside the presence of members. "The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members." MCM, *supra* note 3, R.C.M. 906(b)(16), discussion.

[55] Courts-martial sessions without the presence of members may be conducted under the Uniform Code of Military Justice, Article 39(a), following Rule for Courts-Martial 803.

[56] In *English*, the military judge announced his commission of error by stating that in his view, "the military judge is presumed to consider matters in providency [sic], so I will note what the accused told me . . . [w]hether the counsel has requested it or not . . . ." United States v. English, 37 M.J. 1107, 1109 (N.M.C.M.R. 1993).

1001(b). In this area, earlier is probably better, and the motion for appropriate relief should be made before presentation of the government's presentencing case.

Uncharged Misconduct in Stipulations of Fact

Evidence of uncharged misconduct may also appear in the providence inquiry by way of a stipulation of fact. Pursuant to Rule for Courts-Martial 811, parties may stipulate to the truth of any fact, the contents of a document, or the expected testimony of a witness.[57] A pretrial agreement may include a promise by the accused to enter a confessional stipulation whereby the accused agrees to the truth of facts which establish the accuracy of the plea.[58] Properly drafted, these stipulations may benefit both parties at a court-martial.[59]

To the trial counsel, stipulations provide a streamlined vehicle for getting facts admitted by the accused during the providence inquiry before the military judge or the members impaneled for sentencing. In a judge alone case, the government benefits from symbolically[60] locking the accused into an admission of guilt and thereby enhancing the chances of a successful plea inquiry and an efficient case disposition. To the defense, stipulations provide a potential script for the military judge and accused to follow in establishing the required factual basis to support the plea.[61]

Stipulations accompanying plea agreements become problematic, however, when the government seeks to include admissions of uncharged misconduct. So long as the agreement is voluntary, a stipulation may include evidence of uncharged misconduct that would not otherwise be admissible under a Rule for Courts-Martial 1001(b) analysis.[62] Normally, the scope or permitted use of a stipulation is self-evident from the terms of the agreement. Along with a recitation of certain facts or statements, a stipulation will normally include language to the effect that "the parties agree that the stipulation is admissible for all purposes during the court-martial proceedings." Hence, the parties are normally agreeing not only to the truth of the matters described in the stipulation, but also to the admissibility of the evidence both during the providence inquiry and during the presentencing hearing.

Absent such an agreement, it should not be assumed that a stipulation accompanying a pretrial agreement is admissible during the presentencing hearing.[63] Rule for Courts-Martial 811 plainly states that the parties stipulate to the truth of the contents of a document and do not "add anything to the evidentiary nature of the testimony or document."[64] In the normal course of practice, the distinction between agreeing upon and admitting a stipulation is often lost. Even without a request for admission by the trial counsel, judicial scripts lead the military judge to ask the defense counsel if there is any objection to admission of a stipulation.[65] Once admitted, the stipulation is subject to consideration by the judge or the members at the sentencing hearing as an item of evidence properly admitted before findings.[66]

Gaining admission of information as part of a stipulation accompanying a pretrial agreement also provides an avenue for showcasing uncharged misconduct not otherwise admissible under Rule for Courts-Martial 1001(b).[67] A promise to waive

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[57] MCM, *supra* note 3, R.C.M. 811(a).

[58] *Id.* R.C.M. 705(b).

[59] In a guilty plea case, this stipulation should be marked as a prosecution exhibit.

[60] Pursuant to Rule for Courts-Martial 811(d), a party may withdraw from a stipulation any time before it is accepted by the military judge.

[61] *See infra* notes 3-19 and accompanying text. Even without a confessional stipulation, the defense should consider scripting a statement of the facts for the accused to read in anticipation of the military judge's inevitable request for the accused to explain what happened.

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

[63] *Id.* at 270.

[64] MCM, *supra* note 3, R.C.M. 811(e).

[65] BENCHBOOK, *supra* note 24, Update 11, at 2-15.

[66] MCM, *supra* note 3, R.C.M. 1001(f)(2).

[67] *See supra* notes 28-47 and accompanying text.

certain evidentiary objections may be included as a term of the accused's performance in exchange for a favorable pretrial agreement.[68] Here, the requirement that uncharged misconduct be directly related to the charged offense[69] is set aside in favor of arms length bargaining. Within the bounds of due process and public policy, the price of favorable posttrial action, guaranteed by a pretrial agreement, may include concurrence by the accused that certain uncharged misconduct is relevant to the determination of an appropriate sentence.[70]

This practice may appear to improperly permit circumvention of the rule of relevance for presentencing procedure prescribed by the President in Rule for Courts-Martial 1001(b). On the other hand, the current practice enables the accused to choose between gaining the benefit of his bargain or standing fast within the protective limits of the rule.[70]

A Proposal for Improved Practice

Fixing the Benchbook

With an understanding of Rule for Courts-Martial 1001(b) in hand, we return to the *Benchbook*'s imprecise language concerning the use of statements made by the accused during the providence inquiry.[71] The preceding discussion demonstrates that when a military judge says that statements by the accused "may be used" in the sentencing portion of the trial, he cannot be granting permission for the yet unspoken words to be put before the panel. Instead, the scripted declaration must be understood as advice to the accused that there is a *possibility* of such use.

Although the *Benchbook*'s language concerning use of the accused's statements is not plainly wrong, sentencing practices would benefit from a change that eliminates the existing invitation for misunderstanding. For example, the Navy-Marine Corps version of the *Benchbook* contains a more precise explanation of the law in this regard.

> MJ: In a moment, you will be placed under oath and we will discuss the facts of your case. If what you say is not true, your statements may be used against you in a prosecution for perjury or false statement. Do you understand that?
>
> ACC: Yes/No, sir/ma'am.
>
> MJ: In addition, the government may later ask that your answers be used against you in the sentencing portion of the trial. Do you understand that?[72]

This explanation signals only the *possibility* that the accused's statements will be a factor in the determination of his sentence. At the same time, however, these words remind the parties (and the judge) that the presentencing hearing is a wholly separate matter from the guilty plea inquiry. Consistent with established case law,[73] the Navy-Marine Corps script advises the trial counsel to offer any portion of providence inquiry deemed relevant for sentencing purposes. Meanwhile, the defense is reminded of its opportunity to object to improper use of the statements beyond the immediate purpose of establishing the accuracy of the guilty plea.

Conclusion

Before accepting a guilty plea, military judges are duty bound to place an accused under oath and discuss the circumstances surrounding the commission of a charged offense to determine the validity of the plea. They also are charged with regulating the types of evidence submitted for consideration by sentencing authorities (judge or panel members) following acceptance of a guilty plea. Statements made by an accused during providence inquiries are *sometimes* appropriate for consideration in the sentencing process. Military judges and counsel err, however, if they fail to analyze the admissibility of evidence of uncharged

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[68] United States v. Gibson, 29 M.J. 379 (C.M.A. 1990), *cert. denied* 496 U.S. 907 (1990) (public policy did not require invalidation of guilty plea induced by defense originated agreement to waive evidentiary objections). In 1991, Rule for Courts-Martial 705(d) was amended to allow initiation of pretrial negotiations and suggestion of pretrial agreement terms by the trial counsel. MCM, *supra* note 3, 1991 Amendment. Terms still must not be prohibited by law or public policy and must be freely and voluntarily agreed to by the accused. *Id.* R.C.M. 705(c)&(d).

[69] *See infra* notes 28-47 and accompanying text.

[70] The rapidly evolving free-market approach to pretrial negotiations was recently extended to negotiated waivers of unlawful command influence motions affecting the accusatory phase of courts-martial proceedings. *See* United States v. Weasler, 43 M.J. 15 (1995). In dissent, then Chief Judge Sullivan lamented that the "'contract' rationale" underlying the majority's decision and the "condonation of bartered justice." *Id.* at 21 (Sullivan, C.J. dissenting).

[71] *See supra* notes 25-26 and accompanying text.

[72] DEP'T OF NAVY, NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE, Jan. 1994, at 16-17. Yet another explanation of this point might be:

> MJ: In addition, the government may later *seek to use* your answers to my questions against you in the sentencing portion of the trial. Do you understand that?

[73] *See supra* notes 28-46 and accompanying text.

misconduct revealed during the providence inquiry in accordance with the relatively narrow constraints of Rule for Courts-Martial 1001(b).

When developing a stipulation to accompany a pretrial agreement, or discussing the use of an accused's statements during a guilty plea inquiry, clarity should be maintained concerning the admissibility of evidence of uncharged misconduct that would not otherwise be admissible under the rules governing presentencing procedure. An accused may agree to bargain away procedural barriers to judicial consideration of uncharged misconduct. Such a bargain, however, should be the result of choice, and not inattention.

Government Employees as *Qui Tam* Relators

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Clearly, Government employees who fortuitously happen to be working on fraud cases and manage to rush to the courthouse first, should not be permitted to divert millions of dollars from the Treasury for their own personal gain. When Congress amended the False Claims Act in 1986, it surely did not intend to give Government employees this type of windfall for performing their Government jobs.[1]

Senator Strom Thurmond

Introduction

The English translation of the Latin phrase "*qui tam* pro domino rege quam pro si ipso in hac parte sequitur" is "he who sues on behalf of the King as well as himself."[2] To combat fraud against the government during the Civil War, Congress tapped private resources by passing "*qui tam*" legislation authorizing private parties to bring lawsuit on behalf of the government as "*qui tam* relators." For more than a century, a share in the potentially lucrative monetary recovery has provided *qui tam* relators ample incentive to vigorously prosecute *qui tam* lawsuits.

The contemporary concern for financial efficiency in government causes some, like Senator Thurmond, to see a conflict of interest between government employment and the potentially lucrative benefits of serving as a *qui tam* relator. Should government employees have standing as *qui tam* relators under the False Claims Act (FCA)?[3] Senator Thurmond answers that question with a resounding "No!" Federal courts, however, have not shared Senator Thurmond's opinion. Since the 1986 amendments to the FCA, conflicting federal court opinions on this question have lead to uncertainty and confusion in the contracting community.[4]

This article addresses the *qui tam* relator issue through a six part analysis. It introduces the issue, provides the legislative history of the *qui tam* provisions to the FCA, discusses the present statutory scheme, evaluates the federal case law, addresses the policy considerations of government employee relators, and finally recommends a solution to resolve this issue.

Background and Legislative History

The Original FCA

In 1863, Congress passed the FCA "to combat rampant fraud in Civil War defense contracts."[5] The FCA, known at the time as the "Lincoln Law," provided for both civil and criminal sanctions for acts of fraud on government contracts.[6] Such fraudulent conduct included "misrepresenting the costs of producing a product or charging the government more than the product's

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[1] 138 CONG. REC. S7217 (daily ed. May 21, 1992). Senator Thurmond made the statement in the context of introducing a bill to make technical amendments to the False Claims Act. According to Senator Thurmond:

> The problem this bill addresses is that Federal courts have determined that Government employees may also file "*qui tam*" suits and share in the recovery. Previously, no Government employee brought such a claim. However, technical amendments to the False Claims Act in 1986 removed the language that had been interpreted to prohibit such suits. As a result, Government employees have now filed suits all over the country.

[2] BLACK'S LAW DICTIONARY 1251 (6th ed. 1991). "*Qui tam*" is an abbreviation for the Latin phrase, "*qui tam* pro domino rege quam pro si ipso in hac parte sequitur." A qui tam action is a lawsuit under a statute, which gives to the plaintiff bringing the action a part of the penalty recovered and the balance to the state. The plaintiff describes himself as suing for the state as well as for himself. *Id.*

[3] 31 U.S.C. §§ 3729-3733 (1988).

[4] H. R. REP. No. 837, 102d Cong., 2d Sess. 6 (1992) (report notes that three federal courts of appeals, and several district courts have rendered conflicting opinions on the issue of whether the 1986 amendments to the False Claims Act permit federal employee suits) [hereinafter H. R. Rep No. 837].

[5] Act of Mar. 2, 1863, ch. 67, sec 3, 12 Stat. 698. The purpose of the FCA was to encourage private citizens to assist in the fight against fraud.

[6] *See* REV. STAT. § 3490 (1874); REV. STAT. § 5438 (1874).

reasonable value."[7] Civil penalties under the 1863 FCA included a $2000 penalty for each false claim plus double the actual damages incurred by the government.[8]

The original FCA also allowed private citizens to bring *qui tam* suits on behalf of the United States. The private plaintiffs, known as "relators," received fifty percent of the damages and forfeitures recovered by the government plus litigation costs.[9] Notwithstanding the potential windfall for successful relators, relatively few *qui tam* actions were initiated in the late nineteenth and early twentieth centuries.[10]

During the period of industrial mobilization before World War II, the number of *qui tam* suits brought by relators dramatically increased.[11] The Department of Justice considered many of these suits "parasitic" because the relators based their suits on information obtained from indictments, newspapers, and other public records.[12] The problem peaked in 1943 following the Supreme Court's decision in *United States ex. rel. Marcus v. Hess*.[13] In that case, the relator's complaint closely resembled a pending criminal indictment. The government argued that this relator should not recover under the FCA because he did not contribute anything new to the discovery of the alleged fraud.[14] In the majority opinion, Justice Black wrote that nothing in the language of the FCA barred the relator's action. Moreover, there was "no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward."[15]

The 1943 Amendments to the FCA

Following the Supreme Court's decision in *Hess*, the number of parasitic suits increased. In response, United States Attorney General Francis Biddle asked Congress to repeal the *qui tam* provisions of the FCA.[16] In 1943, Congress amended the *qui tam* provisions to bar relators from bringing an action based on information that the government already possessed.[17] One of the effects of the 1943 amendments to the FCA was to bar *qui tam* suits by federal government employees.[18]

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[7] REV. STAT. § 5438 (1874).

[8] *Id.* The statute provides, in part, as follows:

> Every person who makes or causes to make, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States . . . knowing such claim to be false . . . or who . . . causes to be made . . . any false bill . . . or who enters into agreement to defraud the Government . . . or who, having charge . . . of any money . . . conceal(s) such money . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand dollars nor more than five thousand dollars.

[9] S. Rep. No 345, 99th Cong., 2d Sess. 8 (1986). *Qui tam* is an abbreviation for the Latin phrase, "*qui tam* pro domino rege quam pro si ipso in hac parte sequitur." The translation is "[w]ho sues on behalf of the King as well as himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1991).

[10] Francis E. Purcell, Jr., *Qui tam under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U.L. REV. 935, 940 (1993).

[11] Tammy Hinshaw, *Construction and Application of "Public Disclosure" and "Original Source" Jurisdictional Bars under 31 USC Section 3730(e)(4)—Civil Actions for False Claims*, 117 A.L.R. FED. 263 (1994).

[12] *See* 89 CONG. REC. 10,846 (1943).

[13] 317 U.S. 537 (1943).

[14] Joan R. Bullock, *The Pebble in the Shoe: Making the Case for the Government Employee*, 60 TENN. L. REV. 365, 369 (1993).

[15] *Hess*, 317 U.S. at 546, n.12.

[16] *See* Letter from Attorney General Biddle to Senator Frederick Van Nuys, Chairman of the Senate Judiciary Committee (Mar. 22, 1943), *reprinted in* 89 CONG. REC. 7,571 (1943). In the letter, Biddle stated as follows:

> The result of [the Hess] decision is that whenever a grand jury returns an indictment charging fraud against the Government there may be a scramble among would-be informers to see who can be the first to file civil suit based on charges in the indictment. There are now pending 19 such suits. In 18 of these suits the basic allegation of the informers' pleadings were copied from the indictments. To offset this condition the Department of Justice has undertaken to file civil actions at the same time that the indictment are returned. But this has been found impractical. Moreover, this make-shift practice does not give adequate time in which to prepare proper pleadings. I believe that Congress should by legislation put a stop to this unseemly and undignified scramble. The Government should have sufficient time in which carefully to consider the advisability of bringing such suits and the nature and contents of the pleading to be filed, instead of being forced to proceed in the hasty manner which alone is now available.

[17] Hinshaw, *supra* note 11, at 2.

[18] Patrick W. Hanifin, *Qui Tam Suits by Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 557, 567 (1990).

The 1986 Amendments to the FCA

During the early 1980s, Congress dramatically increased spending for government procurements, resulting in a corresponding increase in procurement fraud.[19] To combat this fraud, in 1986 Congress made sweeping amendments to the FCA to strengthen and modernize the statute.[20] The most significant change concerned the status of the *qui tam* relator.[21] Congress made the change, in part, because:

> Judicial interpretation of the 1943 amendment found that it not only barred parasitic lawsuits, but also closed the door to two kinds of legitimate whistleblower, or "honest informer" actions: (1) suits by those who had independent information of fraud that the government also happened to possess; and (2) suits by those who had given the information to the government before they sued and then found themselves barred by having done so.[22]

The 1986 amendments, in marked contrast to the 1943 amendments, enlarged the role of the relator by lowering jurisdictional requirements for "honest informers."[23] The sponsors of the amendments did not contemplate government investigators and auditors filing *qui tam* suits based on information obtained during the course of their employment.[24]

The Current Statutory Framework

Because the majority of the recent federal decisions turn on the specific language of the statute, it is important to consider that language. The statute provides, in part, as follows:

> (4)(A) No court shall have jurisdiction over an action under this section *based upon public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.
>
> (B) For the purpose of this paragraph, "original source" means an individual who has *direct and independent knowledge* of the information on which the allegations are based and has *voluntarily provided the information to the Government before filing an action* under the section which is based on the information.

To determine if jurisdiction exists for *qui tam* actions under the present statutory framework, the following questions must be considered: (1) have allegations made by plaintiffs been publicly disclosed?; (2) if so, is the disclosed information the basis of the plaintiff's action?; and (3) if yes, is the plaintiff the original source of that information?

Public Disclosure

The language of § 3730(e)(4)(A) only bars actions based upon the public disclosure of allegations or transactions through certain reports, hearings, audits, investigations, or the news media. The phrase "based upon" means "derived from." A relator bases their *qui tam* action upon public disclosure only where the relator has actually derived from that disclosure knowledge of facts underlying his action.[25] The section's language arguably reflects congressional intent that parasitic suits, such as *Hess*, should remain prohibited.[26] In *United States v. CAC-Ramsay*,

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[19] Purcell, *supra* note 10, at 943. Purcell states, "A 1981 Government Accounting Office's report estimated that fraud cost the federal government between $150 and $200 million dollars over a two-and-half year period." *Id.* According to Mark A. Thompson, the Department of Justice estimates the level of fraud to be one-tenth of the entire federal budget or $100 billion. *Stealth Law: Cashing In on Military* Fraud, Cal. Law., Oct. 1988, at 33.

[20] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3156-57 (1986). Congress changed three areas of the False Claims Act's prior language: damages and awards, filing procedures, and the status of *qui tam* relators.

[21] 31 U.S.C. § 3730(b)-(d).

[22] H. R. REP. No. 837, *supra* note 4, at 7.

[23] Purcell, *supra* note 10, at 948-49.

[24] H.R. REP. No. 837, *supra* note 4, at 8.

[25] *See* United States *ex. rel.* Siller v Becton Dickinson, 21 F.3d 1339 (4th Cir. 1994). The United States Supreme Court interpreted the phrase "based upon" in a manner similar to the court in *Becton Dickinson in Saudi Arabia v. Nelson*. 113 S. Ct 1471 (1993). In that case, the Court was asked to interpret a statute that provides jurisdiction against a foreign state. The Court stated, "Although the Act [FCA] contains no definition of the phase 'based upon,' and the sparse legislative history offers no assistance, guidance is hardly necessary." *Id.* Referring to a dictionary definition, the Court held that a claim was "based upon" conduct only if that conduct formed the basis or foundation for the claim. *Id.*

[26] Hanifin, supra note 18, at 570.

Inc.,[27] the court stated it is evident from § 3730(e)(4) that Congress intended to bar parasitic law suits, that is, suits based on public information. In contrast, other courts have noted that § 3730(e)(4) lacks adequate legislative history to fully know and understand the intent of Congress. These courts have narrowly defined the statutory language.[28]

Original Source

The second element is the "original source" provision. The statute explicitly states that a relator is an "original source" who may file a *qui tam* suit if he has direct and independent knowledge of the information on which the allegation is based and has voluntarily provided the information before filing an action. Most courts addressing this language have interpreted "direct" to mean that a relator who based his action on public disclosures must also have witnessed a portion of the fraudulent conduct.[29] The courts have interpreted "independent" to mean the relator did not derive his information from a public source.[30]

Whether a government employee has direct and independent knowledge is a factual determination to be made by a court. Obviously, some types of government positions lend themselves to direct and independent knowledge. Two recent court decisions address this issue. In *United States ex. rel. Fine v. MK Ferguson Co.*,[31] a federal district court held that Harold R. Fine, an auditor for the Office of the Inspector General for the Department of Energy, did not have direct and independent knowledge because he did not personally conduct the audits that led to the public disclosures. Similarly, in *LeBlanc v. Raytheon Co.*,[32] the federal court held that Roland LeBlanc could not have independent knowledge, reasoning that the "fruits of [his] effort belong to his employer."

Judicial Interpretation

The federal courts, at the district and appellate levels, have rendered conflicting opinions on the issue of whether the 1986 amendments to the FCA permit federal employee suits.[33] The first case after the 1986 amendments to percolate to a court of appeals was *United States ex. rel. Erickson v. American Institute of Biological Sciences*.[34] In *American Institute*, the relator, Dr. James Erickson, was an employee of the Agency for International Development (AID), a Department of State agency. Erickson was the cognizant technical officer for the AID Malaria Project, which included responsibility for the administration of the project. The AID contracted with the defendant, American Institute of Biological Science (AIBS), to work on the Malaria Project. In December 1986, Dr. Erickson reported alleged contract violations and misconduct by AIBS to officials at AID. In February 1988, AID decided not to pursue the allegations of fraud against AIBS, and Erickson filed a *qui tam* action.

The federal appellate court addressed the issue of government employees as *qui tam* relators, in part, as follows:

> The current *qui tam* statute does not directly address whether government employees may maintain *qui tam* actions. Thus, the answer to this question must be sought indirectly through the statute's structure, history, and purpose. Such an inquiry makes clear that there is no blanket exclusion of government employees as potential *qui tam* relators.[35]

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[27] 744 F. Supp. 1158, 1159 (S.D. Fla. 1990).

[28] United States *ex. rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499 (11th Cir. 1991).

[29] *See, e.g.*, United States v. Wang, 975 F.2d 957, 961 (9th Cir. 1994).

[30] United States *ex. rel.* Stinson, Lyons v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3rd Cir. 1991).

[31] 861 F. Supp. 1544, 1554 (D.N.M. 1994).

[32] 913 F.2d 17, 20 (1st Cir. 1990).

[33] H. R. REP. No. 837, *supra* note at 9.

[34] 716 F. Supp. 908 (E.D. Va. 1989).

[35] *Id.* at 912.

Regarding the statute's structure, the court made several observations. First, in defining the classes of persons eligible to bring *qui tam* actions, Congress could either have chosen to make eligible only certain defined groups of persons and exclude others or have chosen to include all persons as eligible *qui tam* relators with certain specific exceptions.[36] Congress chose the latter scheme.[37] As a result, the statute first permits any "person" to bring an action and then specifically excludes two groups of people and two categories of information. The groups of people include members of the armed forces, Congress, the judiciary, and senior executive branch officials.[38] The two categories of information are those (1) based on allegations that are subject of a civil suit or administrative civil money penalty proceeding[39] and those (2) based on the public disclosure of allegations or transactions unless the person bringing the action is an original source of the information.[40]

Commenting on the statutory structure, the court concluded that "[t]he inference invited by Congress' choice on structure is compelling: Government employees are included in the general universe of permissible *qui tam* plaintiffs unless, in the particular circumstances, they fall into one of the four specifically defined excluded groups."[41]

The next significant case to address the issue was *LeBlanc v. Raytheon Co., Inc.*[42] Roland A. LeBlanc, a quality assurance specialist for the Defense Contract Administration Service (DCAS), alleged that he observed fraud in the performance of government contracts by Raytheon Company.[43] LeBlanc filed a lawsuit under the *qui tam* provisions of the FCA. The district court concluded that the FCA excludes government employee relators.[44] The court of appeals sustained the decision but significantly narrowed its impact.

The appellate court soundly rejected the district court's analysis of the public disclosure issue and concluded that the FCA does not preclude government employees from bringing *qui tam* actions based on information acquired during the course of their employment.[45] The appellate court, however, held that because it was LeBlanc's responsibility, as a condition of his employment, to uncover fraud, he did not possess the independent knowledge necessary to qualify as an original source.[46]

In *United States ex. rel. Williams v. NEC Corp.*,[47] the court held that the public disclosure provisions of the FCA prohibit a government employee from filing a *qui tam* suit based upon information acquired while working for the government.[48] In *Williams*, the relator worked as a civilian attorney for the Air Force, and as part of his official duties, he investigated NEC Corporation and its wholly owned subsidiary for bid rigging. He submitted a report of the alleged bid rigging to his supervisor.[49] The Department of Justice moved to dismiss the relator's

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[36] *Id.*

[37] 31 U.S.C. § 3730(e)(1)(1995).

[38] *Id.* § 3730(e)(2).

[39] *Id.* § 3730 (e)(3).

[40] *Id.* § 3730 (e)(4).

[41] United States *ex. rel.* Erickson v. American Institute of Biological Sciences, 716 F. Supp. 908, 913 (E.D. Va. 1989).

[42] 913 F.2d 17 (1st Cir. 1990).

[43] *Id.* at 17.

[44] *Id.* at 31. The district court concluded that because government employees "maintain a dual status—arms of the government while at work, private citizens while not at work—a 'public disclosure' necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* suit in his private capacity." The district court went on to conclude that all government employees are barred under the original source exception, as well.

[45] *Id.* at 32. The Court stated that the lower court's analysis of the issue required the assumption that government employees lead schizophrenic lives and can publicly disclose information to themselves.

[46] *Id.* The court emphasized that the decision was limited to the facts and that the conclusion did not mean that no government employee could qualify to bring a *qui tam* action under the original source exception.

[47] 931 F.2d 1493 (11th Cir. 1991).

[48] *Id.* at 1499.

[49] *Id.* at 1495. The relator contended that when he first became suspicious about the award of contracts to the defendant he discussed his suspicions with the appropriate authorities, and they indicated that they were not interested in pursuing the matter. The United States claimed that the Air Force did not ignore the relator's allegations, but was conducting an active ongoing investigation of his allegations. The court, noting that nothing in the FCA requires a relator to wait until the United States declines to initiate suit before filing a *qui tam* complaint, held that this factual dispute was of no consequence.

complaint for lack of jurisdiction[50] and argued that the relator acquired and developed the information that formed the basis of his complaint during the course of his employment with the Air Force. The district court granted the Department of Justice's motion to dismiss on other grounds.[51] On appeal, the appellate court found that nothing in the plain language of § 3730(e)(4) bars every government employee from bringing a *qui tam* action. The court, therefore, declined to judicially create an exception. It specifically stated that the FCA bars government employees from bringing a *qui tam* action based upon publicly disclosed information when the employee is not an original source of the information.[52]

The Department of Justice suffered another setback in *United States v. CAC-Ramsay*.[53] In *CAC-Ramsay*, a former Medicare fraud investigator, upon retirement, filed a *qui tam* action against a health maintenance organization and two of its affiliated providers alleging that the organizations accepted substantial overpayments from Medicare. The court found that the FCA allows any person to bring a *qui tam* suit except four classes of persons specifically excluded by § 3730(e). The court noted that the relator filed suit after seeing no meaningful action taken by the government, which appears to be exactly what Congress intended regardless of whether the relator is a government employee.

The two most recent cases, United States *ex. rel Fine v. Chevron U.S.A. Inc.* and *United States ex. rel Fine v. University of California*, originated with the same relator, Harold R. Fine, and were decided jointly by the Ninth Circuit.[54] The Department of Energy employed Mr. Fine as an assistant manager of a regional audit office, and he was responsible for not only auditing government contractors but also supervising other auditors performing that function. The court found that Fine retired from his position in 1992 and that he was disgruntled because his supervisors either could not or would not take action against every perceived violation he brought to their attention.

From 1992 to 1993, Fine filed seven *qui tam* actions in various district courts throughout the western United States. Counsel for the University of California Board of Regents and Chevron moved to dismiss their suits in the United States District Court for Northern California, and the district court granted both motions.[55] On appeal, a panel of United States Court of Appeals Ninth Circuit judges reversed and remanded. An en banc court re-heard the cases de nova. In a seven to two vote, the court vacated the reversal and affirmed the district court's dismissals.[56] In writing the majority opinion, Judge Cynthia Holcomb Hall stated, in part, as follows:

> The statute provides that a relator seeking to avoid the bar against suits based on public disclosure must show both that he has a direct and independent knowledge of the information on which the allegations are based, and that he has voluntarily provided the information to the Government before filing an action.
>
> * * * *
>
> The district court is surely correct in its conclusion that Fine was no volunteer. He was a salaried government employee, compelled to disclose fraud by the very terms of his employment. He no more voluntarily provided the information to the government than we, as federal judges voluntarily hear arguments and draft dispositions.

Interestingly, the "linchpin" of Judge Hall's analysis regarding Fine's status as a volunteer closely tracks the reasoning in *LeBlanc*,[57] a United States Court of Appeals for the First Circuit decision. In *LeBlanc*, the court noted that the relator, LeBlanc, a quality assurance specialist, had a duty to uncover fraud as a condition of employment.

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[50] *Id.* at 1494-95. The Department of Justice argued that the FCA bars any suit by a government employee who based the action on information acquired in the course of government employment.

[51] *Id.* at 1495. The district court dismissed the action for failure to state a claim for which relief could be granted and did not address the jurisdiction issue raised by the Department of Justice.

[52] *Id.* at 1500.

[53] 744 F. Supp. 1158 (S.D. Fla. 1990).

[54] United States *ex. rel.* Fine v. Chevron U.S.A., No. 93-15012; United States *ex rel.* Fine v. University of California, No. 93-15728, 1995 U.S. App. LEXIS 35022 (9th Cir. Dec. 12, 1995).

[55] *Id.* at *3. The district court concluded that in the case against Chevron that "it makes no sense" to permit Mr. Fine to bring a *qui tam* action. In the case against the University of California, the Court issued a published opinion, *Fine v. University of California*. 821 F. Supp. 1356 (N.D. Cal. 1993) In that opinion, the district court held that Mr. Fine was not an original source and that inspector general auditors should be barred from bringing *qui tam* actions springing from inspector general audits.

[56] Although it was a seven to two vote, three judges wrote concurring opinions.

[57] LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990).

Concurring with Judge Hall's majority opinion, Judge Trott used a more powerful and probative analytical approach by focusing on legislative intent rather than on the meaning of the word "voluntary" in the statute. Trott observed that reading the *qui tam* provisions in conjunction with the complementary provisions of the Inspector General's Act shows that Congress did not intend current or retired inspector general employees to have standing as relators. In quoting from the government's "sensible" amicus brief, Trott stated that such a lawsuit would "give every government auditor a personal financial stake in matters that he pursues as part of his federal duties." Trott wondered, "Why would Congress silently permit auditors like Inspector Fine to use their salaried jobs to set up private lawsuits when such auditors are also subject to a myriad of legal duties and responsibilities, all of which command independence and freedom from personal involvement in their work?"[58] In the same vein, Trott found it "bizarre" that government employees cannot use "frequent flier miles" for personal use, but under the original panel's earlier decision, they can pursue lucrative *qui tam* suits.[59]

The cases outlined above illustrate the different conclusions that the federal courts at both the trial and appellate level have reached on this issue. The policy considerations, therefore, become far more important in the analysis of the issue.

Policy Considerations

Policy Considerations Against Government Relators

It took the Department of Justice five years to propose a legislative fix to the 1986 amendments to the FCA. In November 1991, the Department of Justice proposed amendments to the FCA to prohibit *qui tam* suits by government employees.[60] In my opinion, the Department of Justice's position on prohibiting government employee relators as a matter of public policy is correct with a caveat. At least seven policy reasons support prohibiting government employee relators.

First, government employees may have a strong incentive to rush to the courthouse when they have any information about a criminal or civil fraud investigation, which impairs the government's fraud fighting efforts. For example, the House Report states that "[t]he unsealing of the case sixty days after it is filed, as provided under the *qui tam* provisions, will alert the target of the investigation to the Government's inquiry, and thus impair the investigation and substantially lessen the chance of a criminal conviction or recovery."[61] Given the underlying congressional intent in the 1986 amendments to the FCA to strengthen the government's anti-fraud capabilities, it is counterintuitive to take actions that could hinder that effort. Judge Trott voiced the same concern when he concluded, "Permitting auditors to sue literally would destroy the government's anti-fraud and anti-waste programs."[62]

Second, permitting government employees to bring *qui tam* suits undermines their incentive to report all evidence of fraud to responsible officials and may encourage them to hoard information, so that they can profit from it later in a suit.[63] Judge Michael Hawkins, in concurring with the majority opinion in *Fine* considered, in part, this policy implication and stated:

> The policy implications which flow from concluding otherwise are frightening. Agents of the United States who are sworn to gather facts in a fair and neutral manner, would, like the small town traffic magistrates of a thankfully bygone era, have a personal financial stake in

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[58] United States *ex. rel.* Fine v. Chevron U.S.A., No. 93-15012; United States *ex rel.* Fine v. University of California, No. 93-15728, 1995 U.S. App. LEXIS 35022, at *8 (9th Cir. Dec. 12, 1995) (Judge Trott listed a series of regulations that prohibit or at least discourage government employees from developing a personal/financial involvement in their work. These include: (1) inspector general employees prohibition from using their public office for private gain, 5 C.F.R. § 2635.101(b)(7); (2) use of government property or government time for personal purposes, 5 C.F.R. §§ 2635.704, 2635.705; (3) trafficking "inside information" for personal advantage, 5 C.F.R. §§ 2635.101(b)(3); (4) participating in any government matter in which the government employee has a finical interest, 5 C.F.R. § 2635.501, 2635.502; and (5) holding of financial interests that may conflict with the impartial performance of government duties, 5 C.F.R. § 2635.403.).

[59] *Id.* Judge Trott invokes the reader's imagination by considering the possibility of Internal Revenue Service auditors filing *qui tam* suits against companies they just audited. Moreover, he states:

> Shades of the days leading up to the French Revolution of 1789 when taxes were collected by a private concern called the "Ferme Generale," or "Tax Farm." The first to be guillotined in the Place de la Revolution during the incarndine Reign of Terror were the hated private tax collectors who made a profit by collecting more from the public than the amount needed by the government.

[60] H. R. REP. No. 837, *supra* note 4, at 11.

[61] *Id.*

[62] *Fine*, LEXIS 35022, at *24.

[63] *Id.* at *29.

> the outcome of their efforts. Persons whose job it is to discover and report fraud to their supervisors would benefit from downplaying the importance of their discoveries . . . . It is difficult to imagine that Congress, through the enactment of these complementary measures, could have intended the creation of some sort of mad combination of the Sheriff of Nottingham and Inspector Clouseau.[64]

Third, government employee relators do not add to the government's knowledge of fraud because the information is already in the hands of the government under principles of agency. Therefore, if the information does not add any value to the government's effort to combat fraud, why, as a matter of public policy, reward someone for telling the government something it already knows? Critics of this position may argue that it ignores reality because, while the government may possess information as a whole, it is of no consequence unless an individual or organization that can take action on behalf of the government.

Fourth, permitting government employees to sue under the *qui tam* provisions of the FCA is a second reward for their investigative efforts.[65] The federal government pays government employees very well to perform certain functions. Why should a government employee be able to receive additional compensation associated with a *qui tam* suit simply because his job responsibilities fortuitously allow him to learn of the fraud? A likely consequence of permitting government employee relators under the present scheme will be that GS-09 auditor or investigator positions will become more lucrative than senior executive service positions.[66]

Fifth, the present scheme encourages employees to focus their investigative efforts on those jobs that have a high financial payoff. Arguably, a government employee relator may postpone investigative efforts to allow a potential recovery to become larger.[67]

Sixth, a conflict of interest arises if a government employee relator remains on the case after filing a *qui tam* action. Federal law provides that no government employee can serve in a post in which he has a conflict of interest.[68] Moreover, having personal and financial interests of government employees conflict with their public duties and responsibilities offends a number of ethical prohibitions. These include: (1) using government property or government time for personal purposes, (2) trafficking "inside information" for personal advantage, (3) participating in any government matter in which the employee has a financial interest, and holding financial interests that may conflict with impartial performance of government duties.[69] Critics may argue that if Congress sanctions the activity it would not be a violation of these prohibitions so long as the employee takes no action adverse to the government's interests.

Seventh, it is likely that government employees would mistrust and compete with each other. The mistrust and competition would likely lead to decreased efficiency because employees may be reluctant to share critical information regarding a case for fear that a fellow employee may use the information for personal gain to the financial detriment of the government employee who shared it.

Policy Considerations for Government Relators

A number of public policy arguments support government relators. First, proponents argue that the government, for any number of reasons, refuses to follow up on credible evidence of fraudulent behavior in many cases.[70] Arguably, the government frequently does not pursue allegations that could develop into significant fraud cases because of a "judgment by federal auditors, investigators, and attorneys that devote scarce resources to a questionable case may not be efficient."[71]

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[64] *Id.*

[65] Bullock, *supra* note 14, at 382.

[66] *The Federal Times*, February 1995. A general service 9 employee earns between $34,981 and $45,475 depending on their step level. A senior executive service employee earns between $99,673 and $120,470 depending on their level.

[67] Bullock, *supra* note 14, at 382.

[68] *Id.* at 383.

[69] United States *ex. rel.* Fine v. Chevron U.S.A., No. 93-15012; United States *ex rel.* Fine v. University of California, No. 93-15728, 1995 U.S. App. LEXIS 35022, at *24 (9th Cir. Dec. 12, 1995).

[70] H. R. REP. No. 837, *supra* note 4, at 11.

[71] Bullock, *supra* note 14, at 386.

Second, a closely related argument is that the government does not pursue many cases due to resource and budget constraints.[72] Scarce resources will continue to limit the government's ability to effectively fight fraud. Government employee relators thus help the government by saving and making money. They help save money by dedicating significant private resources to bringing a case to a successful conclusion. Government employee relators make money for the government through recoupment from contractors.

Third, proponents of government relators argue that it is a "win-win" situation for the government employee relator and the government. Government employee relators have a greater incentive to aggressively pursue fraud because of the potential for substantial financial gain. The government wins because highly motivated relators greatly enhance efforts to combat fraud.[73]

Fourth, government employee relators may actually deter fraudulent conduct because contractors would soon realize they no longer could rely on the "ineptitude or malaise of government employees in ferreting out illegal activity."[74]

Proposed Solutions and a Recommendation

The sponsors of the 1986 FCA amendments simply did not contemplate the issue of government employees using information they learned in the course of their duties as the basis of lawsuits in their own names.[75] Federal courts that permitted government employee relator suits strictly focused on the literal language of the statute. These courts generally concluded that Congress removed a broad jurisdictional bar and replaced it with a more specific and less restrictive set of jurisdictional bars.[76]

Justice Antonin Scalia, in *Green v. Brock Laundry Machine Co.*[77], noted that, "We are confronted here with a statute which, if interpreted literally, produces an absurd result . . . I think it entirely appropriate to consult all public materials." Likewise, Justice Stephen Breyer noted the following:

> Blackstone himself, more than two hundred years ago, pointed out that a court need not follow the literal language of a statute where doing so would produce an absurd result. He said that if "collaterally . . . absurd consequences, manifestly contrary to common reason arise out of statutes, those statutes are, with regard to those collateral consequences, void."[78]

There is no question that the Supreme Court could settle this issue. Congress, however, needs to address it with a legislative revision to the FCA because the confusion arose from the unintended consequence of the specific language of the 1986 FCA amendments.[79]

In 1992, Congress introduced two bills intended, in part, to address the issue of government employee relators.[80] To date, Congress has not enacted either bill or any compromise legislation. The bill that originated in the House of Representatives, H.R. 4563, seeks to prevent government employees from filing *qui tam* suits based on information obtained during the course of their employment unless the government employee relators adhere to rigid notification guidelines.[81] House Resolution 4563 requires government employee relators to have disclosed the information at least twelve months prior to filing an action.[82] Further, it requires government employee relators to provide the inspector general of their agency with all relevant facts regarding the alleged fraud. It also requires government employee relators to submit written notice of the disclosure to their supervisor and the Attorney General.[83] Finally, the government has twelve months to file suit against the contractor. After the expi-

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[72] *Id.*

[73] *Id.*

[74] *Id.* (citing John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 672 n.6 (1986).

[75] H. R. REP. No. 837, supra note 4, at 8.

[76] 31 U.S.C. § 3730(e) (1995).

[77] 490 U.S. 504, 527 (1989).

[78] Hinshaw, *supra* note 11, at 29.

[79] H. R. REP. No. 837, supra note 4, at 11.

[80] S. 2785, 102 Cong., 2d Sess. (1992); H.R. 4563, 102 Cong., 2d Sess. (1992).

[81] Purcell, *supra* note 10, at 967.

[82] H.R. 4563, 102d Cong., 2d Sess. 2 (1992).

[83] *Id.*

ration of the twelve month period, a government employee relator may proceed with a *qui tam* action.[84]

Arguably, H.R. 4563 does not address the public policy concerns mentioned above. Government employee relators may still be compensated twice for the same work, may focus their investigative efforts on those jobs that have a high personal financial pay off, may have personal and financial conflicts of interest contrary to a myriad of federal regulations, and may mistrust and compete with other government employees because of the payoff of bringing a suit. House Resolution 4563 does not solve the problem, but it may breed a more sophisticated, patient government employee relator.

The second bill, which originated in the Senate, bans all *qui tam* suits brought by government employees who base their actions on information obtained during the course of their government employment.[85] Senate Bill 2785 (S. 2785) provides, in part, that, "[n]o court shall have jurisdiction over an action under subsection (b) of this section that is based, in whole or in part, upon information obtained in the course or scope of government employment."[86]

Both the House and Senate impose restrictions on suits initiated by government employees under the FCA.[87] The difference, however, between the two bills is significant. House Resolution 4563 requires only that the government employee relator notify an inspector general or other government official and then imposes a year waiting period.[88] Senate Bill 2785 creates a strict jurisdictional bar prohibiting all *qui tam* suits based on information learned by the government employee relator during the course of his employment.[89]

Both proposed solutions have critics. Some commentators are critical of the Senate's approach because "government employees do not possess split personalities, half government employee and half public citizen . . . If the government refuses to act on evidence of false claims known by a government employee, even if learned during the course of employment, the employee should be entitled to proceed in the initiation of a *qui tam* suit under the FCA."[90] Such critics would likely support the version introduced in the House. The problem with H.R. 4563 is that it does not adequately address the underlying public policy concerns regarding government employee relators. In a summary of all of the public policy concerns that would still exist, the House stated the following:

> They said that permitting such suits undermined the incentive for such employees to report all evidence of fraud to responsible government officials; that there were numerous avenues to encourage such reports; and that government employee cases do not add to the Government's knowledge of illegal behavior since the employee's information can be considered already in the hands of the Government under principles of agency. They argued that current employees of the Government would compete in a race to the court house, undermine government investigations that were not yet ripe, and obtain compensation in cases that the Government was pursuing with vigor.[91]

In my opinion, S. 2785 offers the best solution to the issue. First, it addresses all of the public policy concerns regarding government employee relators by prohibiting them from bringing an action based on information learned during the course of their employment. Second, it preserves the right of government employees, who learn of fraud outside of their employment, to bring a *qui tam* action.

Senator Thurmond is correct that diverting money from the public treasury to pay government employees to do what the government already pays them to do does not make sense as a matter of law and public policy. Congress can put this issue to rest by specifically excluding *qui tam* suits from government employee relators who base their action on information learned during the course of their employment.

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[84] *Id.*

[85] S. 2785, 102d Cong., 2d Sess. 3 (1992).

[86] *Id.*

[87] Purcell, *supra* note 10, at 972.

[88] H.R. 4563, 102d Cong., 2d Sess. 2 (1992).

[89] S. 2785, 102d Cong., 2d Sess. 3 (1992).

[90] Purcell, *supra* note 10, at 970.

[91] H. R. REP. No. 837, *supra* note 4, at 11.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Supreme Court Upholds Pretextual Searches: *United States v. Whren*

In *Michael A. Whren and James L. Brown v. United States (Whren),*[1] the United States Supreme Court upheld the temporary detention of a motorist based on a traffic violation even though the traffic violation was allegedly a pretext to cloak the real motivation for the detention—a search for evidence of another crime. Although the defendants claimed that the real reason for the detention was to search for drugs, a unanimous Court held that the detention was lawful under the Fourth Amendment.[2] The Court held that police officers' subjective intentions play no part in determining whether a Fourth Amendment intrusion is valid.[3] *Whren* may signal the Court's approval of pretextual searches, at least in the context of traffic stops, and it indicates that a search generally will not be unconstitutional simply because the police had ulterior motives.

In *Whren*, plain-clothed police officers were patrolling in an unmarked car in a drug area in the District of Columbia. Their suspicions were aroused when they observed a truck with temporary license plates and two youthful occupants who remained stopped at a stop sign for an unusually long time. When the police officers made a U-turn to head back to the truck, it suddenly turned to its right, without signaling, and sped off at an unreasonable rate of speed.[4]

The police officers followed the truck and pulled alongside it as it stopped behind other traffic at a red light. One of the police officers approached the truck and directed the driver, James Brown, to put the vehicle in park. The officer observed two large plastic bags of crack cocaine in the hands of the passenger, Michael Whren. Brown and Whren were arrested and several types of illegal drugs were discovered in the vehicle.[5]

At their trial for various federal drug offenses, Brown and Whren moved to suppress the drugs found in the vehicle.[6] They argued that the stop was not based on probable cause nor reasonable belief[7] that they were engaged in illegal drug activity. They also argued that the police officers' asserted ground for approaching the vehicle to warn the driver concerning traffic offenses was not valid and merely a pretext to search for contraband.[8] The district court denied the suppression motion holding that the traffic stop was proper. The defendants were subsequently convicted.[9] The appellate court affirmed the convictions[10] and the Supreme Court granted certiorari.

In affirming the defendants' convictions, Justice Scalia, writing for the unanimous Court, held that the traffic stop was proper because the police had probable cause to believe that traffic violations had occurred.[11] The defendants suggested that the appropriate test should not depend on whether there was probable cause to conduct the traffic stop, but whether a reasonable police officer would have made the stop based on probable cause.[12] The Supreme Court rejected this test noting that its sole purpose

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[1] No. 955841, 1996 LEXIS 3720, at *7 (S. Ct. June 10, 1996).

[2] U.S. CONST. amend. IV.

[3] *Whren*, LEXIS 3720, at *13.

[4] *Id.* at *4, *5.

[5] *Id.* at *5.

[6] *Id.* at *6.

[7] A traffic stop does not require probable cause; it may be based simply on reasonable belief that criminal activity is afoot. United States v. Cortez, 449 U.S. 411 (1981); Terry v. Ohio, 392 U.S. 1 (1986).

[8] *Whren*, LEXIS 3720, at *6.

[9] *Id.*

[10] United States v. Whren, 53 F.3d 371 (D.C. Cir. 1995).

[11] *Whren*, LEXIS 3720, at *7.

[12] *Id.* at *8.

is to prevent the police from searching for drugs or similar contraband under the guise of a traffic stop.[13] The Court pointed out that the validity of a traffic stop under the Fourth Amendment does not depend on the subjective motivations of the officers involved.[14]

The Supreme Court conceded that police officers' subjective intent may be relevant in some areas such as inventories.[15] The Court noted that an inventory or inspection will be held improper if its purpose is to discover evidence of a crime.[16] However, the Court refused to extend this doctrine to consideration of a police officer's subjective purpose in the context of traffic stops based on probable cause.[17] The Court pointed out that it had repeatedly held that an officer's subjective intent is irrelevant in most Fourth Amendment contexts.[18]

In *Whren*, the Supreme Court's rejection of the pretext test proposed by the defendants resolved a split among the federal circuits.[19] Other than inspections and inventories, *Whren* signals the inapplicability of the pretext test in federal practice concerning the Fourth Amendment. *Whren* also signals the inapplicability of the pretext test in military practice. While the Military Rules of Evidence do not incorporate the pretext test,[20] at least one military court has used language that suggests reliance on the doctrine.[21] Although the subjective intent of those conducting an examination is relevant in the areas of military inspections[22] and inventories,[23] *Whren* implies that it is generally not relevant in other Fourth Amendment contexts.

Whren is consistent with the trend of finding searches and seizures valid when they are based on two grounds, one proper

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[13] *Id.* at *14.

[14] *Id.* at *13.

[15] The Court noted that it had previously stated that "an inventory search must not be used as a ruse for general rummaging to discover incriminating evidence." *Id.* at *9 (footnote omitted) (quoting Florida v. Wells, 495 U.S. 1, 4 (1990).

[16] *Id.* The Court noted that it had previously upheld a warrantless administrative inspection only after observing that it did not appear to be "a 'pretext' for obtaining evidence" of a crime. *Id.* (quoting New York v. Burger, 482 U.S. 691, 716-17, n.27 (1987)). The military has similar rules to determine the validity of administrative inspections and inventories. In the military, an inspection is defined as an examination "the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313(b) (1984) [hereinafter MCM]. Additionally, "[a]n examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings is not an inspection." *Id.* However, the military inspection rule contains a "subterfuge" provision that requires the government to prove that the purpose of the inspection was proper by clear and convincing evidence if certain triggers are met. The rule is triggered if the purpose of the examination is to locate weapons or contraband and (1) it immediately follows the report of a specific offense, or (2) specific individuals are targeted for examination, or (3) persons are subjected to substantially different intrusions during the examination. *Id.* An inventory in the military context also must have a primary administrative purpose. *Id.*, MIL. R. EVID. 313(c).

[17] *Whren*, LEXIS 3720, at *9, *10.

[18] The Court relied on *United States v. Villamonte-Marquez*. 462 U.S. 579, 584 n.3 (1983) (valid warrantless boarding of a vessel by customs officials was not invalidated by them following a tip that vessel was carrying marijuana). The Court also relied on *United States v. Robbinson*. 414 U.S. 218 (1973) (traffic violation arrest was not rendered invalid because it was allegedly a pretext for a narcotics search). *Whren*, LEXIS 3720, at *12.

[19] The United States Courts of Appeals for the Tenth and Eleventh Circuits adopted a pretext test equivalent to the one proposed by the defendants in *Whren*. These circuits held that a stop is valid only if, under the same circumstances, a reasonable officer would have made the stop in the absence of the invalid purpose. *See* United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986); United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1995) (overruled *Guzman* test). Several other circuits had rejected this test, finding that an alleged pretextual stop is valid so long as an officer could have stopped the car in question because of a suspected traffic violation. United States v. Scopo, 19 F.3d 782-84 (2d Cir. 1994); United States v. Hassan, 5 F.3d 726, 730 (4th Cir. 1993). *See* United States v. Whren, 53 F.3d 371 (D.C. Cir. 1995).

[20] *See* MCM, *supra* note 17, MIL. R. EVID. 311-317. Specifically, the military rule relating to investigatory stops does not include any language similar to the pretext test. *Id.* MIL. R. EVID. 314(f).

[21] In *United States v. Thompson*, the court found that military law enforcement officials properly assisted civilian law enforcement agents during a search of the accused's house. The Air Force court of appeals found that the civilian investigation was conducted in good faith and was "not simply a 'subterfuge' or 'pretext' search fabricated to mask the [military] agents' lack of probable cause to search for military property." 30 M.J. 570, 574 (A.F.C.M.R.).

[22] MCM, *supra* note 17, MIL. R. EVID. 313(b); United States v. Bickel, 30 M.J. 277 (C.M.A. 1990); United States v. Gardner, 41 M.J. 189 (C.M.A. 1994) (urinalysis inspection was a valid inspection and not an impermissible pretextual search).

[23] MCM, *supra* note 17, MIL. R. EVID. 313(c); United States v. Law, 17 M.J. 229 (C.M.A. 1984) (inventory of suitcase accused left behind when permanently changing station was not a pretext concealing an investigatory motive).

and the other improper. For example, the courts have upheld admission of evidence seized during searches tainted by police misconduct so long as there is an independent, lawful basis for the search[24] or the evidence would have inevitably been discovered.[25]

Arguably, *Whren* could be limited to the area of traffic stops and similar investigatory detentions. However, the Supreme Court's language in *Whren* suggests that its scope is broader.[26] For example, the subjective intent of military police officers and commanders should be irrelevant when they properly apprehend a soldier for one offense even though they suspect him or her of a much more serious offense. In such a case, the ulterior motive for the apprehension should not taint any statements or other evidence subsequently obtained from the soldier.[27]

Defense counsel should realize that *Whren* takes a potential weapon, the pretext test, away from them. Although *Whren* makes ulterior motives irrelevant in most search and seizure cases, defense counsel should remember that such motives are still relevant in cases involving inspections and inventories.

Trial counsel can use *Whren* to preclude unnecessary inquiries during search and seizure motions into the subjective motives of commanders and military police officers. *Whren* should enable trial counsel to focus the motion hearing on the objective validity of the search or seizure rather than the subjective intent of those conducting it.

Whren is another example of the reluctance of the Court to expand Fourth Amendment protections.[28] The unanimous decision in *Whren* is a sign of the Supreme Court's conservative approach to search and seizure issues. Major Masterton.

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[24] Murray v. United States, 487 U.S. 533 (1988); United States v. Camanga, 38 M.J. 249 (C.M.A. 1993) (court upheld admission of evidence seized following an arrest was based on both legally and illegally obtained information). In *Camanga*, the Court of Military Appeals pointed out that "the exclusionary rule would be carried to an extreme if an invalid reason to arrest canceled a valid one." *Id.* at 251-52.

[25] Nix v. Williams, 467 U.S. 431 (1984). *See also* MCM, *supra* note 17, MIL. R. EVID. 311(b)(2).

[26] In *Whren* the Court pointed out that: "Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." United States v. Whren, No. 955841, 1996 LEXIS 3720, at *11, *12 (S. Ct. June 1996).

[27] *See Camanga*, 38 M.J. at 251-52.

[28] *See generally* Major R. Peter Masterton, *Recent Developments in Search and Seizure Law*, ARMY LAW., Mar. 1996, at 50.

USALSA Report

United States Army Legal Service Agency

Clerk of Court Notes

Rates of Courts-Martial and Nonjudicial Punishment

The rates of courts-martial and nonjudicial punishment for the second quarter of fiscal year 1996 are shown below.

Rates per Thousand

Second Quarter Fiscal Year 1996; January-March 1996										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.40	(1.59)	0.39	(1.56)	0.37	(1.47)	0.54	(2.18)	0.00	(0.00)
BCDSPCM	0.22	(0.87)	0.21	(0.86)	0.19	(0.77)	0.27	(1.09)	0.42	(1.66)
SPCM	0.02	(0.09)	0.03	(0.12)	0.00	(0.00)	0.00	(0.00)	0.00	(0.00)
SCM	0.12	(0.49)	0.13	(0.54)	0.12	(0.47)	0.06	(0.23)	0.00	(0.00)
NJP	18.68	(74.74)	20.07	(80.30)	11.43	(45.71)	19.10	(76.40)	19.51	(78.05)

Note: Based on average strength of 489,754. Figures in parenthesis are the annualized rates per thousand.

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)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 3, number 10, dated July 1996, is reproduced below.

Rocky Mountain Arsenal CAMU Designation and HWIR

On 11 June 1996, the Colorado Department of Public Health and Environment designated the first Corrective Action Management Unit (CAMU) in Colorado at the Rocky Mountain Arsenal (RMA) to receive materials recovered from the basin that held the combined remains of Army chemical agent and Shell Oil Company pesticide production. The designation provides precedent for other installations seeking a cost-effective alternative to the costly and burdensome land disposal restriction treatment standards otherwise required prior to land filling cleanup waste.

Cleanup options for the contents of "Basin F," which were dried and removed to a large storage pile, included leaving the pile in place, excavating, or seeking CAMU designation. The first option was rejected by the state, as the pile would not meet general closure standards for the Resource Conservation and Recovery Act. The second option would require adding a slurry wall, excavating the pile, thermally treating to desorb the material or incinerating to meet land disposal restrictions, then land filling the material. This option was estimated to cost between 2.5 and 3 billion dollars. The CAMU option, which includes an on-site hazardous waste landfill, a staging area for the materials going into the landfill, and the Basin F waste pile drying unit, is currently expected to cost the installation 2 billion dollars. Thus, the CAMU designation has saved between 500 million and 1 billion dollars.

The RMA CAMU designation gives credibility to the DOD's expected opposition to the Environmental Protection Agency's (EPA) elimination of the CAMU rules as a part of the promulgation of the EPA Hazardous Waste Identification Rule for Contaminated Media (HWIR-Media) rule.[1] In that proposed rule, the EPA seeks to develop more flexible standards for wastes and contaminated media generated during cleanup activities by establishing a "bright line" for distinguishing hazardous contaminated media from non-hazardous contaminated media. The Army opposes the "bright line" approach as stated in the EPA's proposed HWIR-Media rule, instead favoring the flexibility and ease of implementation afforded by the industry-backed "unitary approach." The unitary approach would exempt all cleanup wastes and contaminated media from Subtitle C if they meet certain conditions set out in a site-specific Remedial Action Plan (RAP) approved by the EPA or an authorized state. Because there would likely be little substantive difference between a state-designated CAMU and a state-designated RAP, the Army favors either the unitary approach or the CAMU rule. In other words, retention of the CAMU rule is important only if the EPA ultimately promulgates the HWIR-Media rule using the bright line approach. Either the existing CAMU rules or the HWIR-Media rule unitary approach would afford facilities the cleanup incentive and flexibility that the EPA has listed as goals of the new rule[2]

The EPA has extended the comment period for the HWIR-Media rule to 28 August 1996.[3] Army comments should be sent by mail to Commander, Army Environmental Center (ATTN: SFIM-AECECC, Mr. Shakeshaft), Aberdeen Proving Ground, MD 21010-5401; by fax to DSN 584-3132 or (410) 671-3132; or by e-mail to rashakes@aec1.apgea.army.mil. Captain Anders and Captain Cook.

Executive Order 13007: Indian Sacred Sites

On 24 May 1996, the President issued an executive order regarding the protection and preservation of Indian religious practices and the accommodation of those practices.[4] The order states, in part, that each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

This mandate should be consistent with existing practice at each Army installation. Army policy, as specified in the Department of the Army Interim Policy on Native American Cultural Resources, dated 27 November 1995, requires compliance with the American Indian Religious Freedom Act of 1978 as amended[5]. The Army's Interim Policy further states, in part, that installation commanders should identify through use of existing materials and consultation with local Native American groups sites that are necessary to the exercise of traditional religions and shall provide access to military installations for the practice of traditional religions, rights and ceremonies. Installation commanders, however, may impose reasonable restrictions upon access to such sites on installations when the commander deems it necessary to protect the safety of the Native Americans, or to avoid interference with the military mission, or for other reasons of national security.

The Army's Interim Policy remains in effect for one year, or until publication of *Army Regulation 200-4, Cultural Resources Management*. *Army Regulation 200-4* (*AR 200-4*) will address access to sacred sites and incorporate the requirements of the newly published executive order. The proponent of *AR 200-4* estimates that the regulation will be published in October or November, 1996. Major Ayres.

Federal Audit Privilege Update

The debate over regulator use of the results of environmental audits continued recently in two forums. First, the Senate Judiciary Committee Subcommittee on Administrative Oversight and the Courts convened on 21 May 1996 to hear testimony on House Resolution 1047 (H.R. 1047) and Senate Bill 582 (S. 582). House Resolution 1047 and S. 582 would amend the rules of evidence to provide a privilege for such information, restrict the ability of the courts to compel testimony concerning audits without a company's consent, and immunize companies and individuals from penalties in cases where they voluntarily disclose violations of environmental laws. The primary issue raised at Senate Judiciary hearings was whether a privilege and immunity law would encourage or discourage compliance.

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[1] Requirements for Management of Hazardous Contaminated Media (HWIR-Media), 61 Fed. Reg. 18,780 (1996).

[2] *See id.* at 18,785-7.

[3] Requirements for Management of Hazardous Contaminated Media; Proposed Rule-Notice of Extension of Comment Period, 61 Fed. Reg. 33,881 (1996).

[4] Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996).

[5] 42 U.S.C. §§ 1996-1996a (1994).

On behalf of the EPA, Steven Herman, Assistant Administrator of the EPA's Office of Enforcement and Compliance Assurance, testified in opposition to the legislation. Mr. Herman argued that the EPA's new audit policy provided adequate protection for the regulated community and that "providing an evidentiary privilege would allow companies to throw up roadblocks to government investigations, conceal evidence of criminal misconduct, and . . . cripple environmental law enforcement and the public's right to know." Mr. Herman was referring to the EPA's Policy Statement on Incentives for Self-Policing,[6] which provides that the EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity, but that it may "seek information relative to identifying violations or determining violations or determining liability or extent of harm" if the Agency has independent reason to believe that a violation has occurred.[7] Mr. Herman noted that the audit policy permits the EPA to excuse the gravity-based portion of an assessed civil penalty for companies who voluntarily disclose and correct the violations and satisfy several other criteria, "[n]or will [the corporation] be subjected to any threat of criminal prosecution, so long as the corporation has not engaged in egregious misconduct."[8]

Proponents of the legislation argue that companies are presently discouraged from conducting audits for fear that the information will be used against them. Because most violations are never detected by state or federal inspection, industry argues that entities who conduct audits and report violations in effect penalize themselves. An audit privilege and immunity law would encourage more companies to audit their environmental compliance posture, which would free the EPA and the states to focus their enforcement resources on truly bad actors.

Other opponents of audit privilege and immunity legislation, including the Department of Justice and several public interest groups, opine that the threat of enforcement, not the offer of immunity, encourages regulated entities to conduct environmental audits. They cite a 1995 survey by Price Waterhouse that found seventy-five percent of the 369 companies who responded already conduct audits in the absence of a privilege/immunity law and one third of those that don't plan to do so. Fueling the controversy is the current disagreement between the Republican-led Congress, which generally supports environmental self-audit laws, and the Clinton Administration, which adamantly opposes them. Although hearings have been held on both bills, it is unlikely that the Republican congressional leadership, wary about being perceived as "anti-environment," will schedule any action on either bill before the November elections.

A second debate on audit issues was hosted by the District of Columbia Bar on 7 May 1996, and concerned the pros and cons of the new EPA policy.[9] The debate featured Steve Solow, Assistant Bureau Chief of the Justice Department's Environmental Crimes Section, to advance the merits of the policy, and Davis Aufhauser, a partner at the firm of Williams and Connolly, to present its shortcomings. Much of the debate concerned the policy's criminal aspects. Mr. Solow attacked the myths about audit information being seized as the basis for individual and corporate criminal prosecutions, backed the policy's limitation of immunity to businesses, and touted the policy's elimination of the gravity component of a civil penalty as representing "a dramatic change in EPA policy [that] will have a positive effect in encouraging compliance.[10] Mr. Aufhauser criticized the EPA and the Department of Justice for limiting the policy to corporations and agencies, leaving individuals exposed while the parent company is protected. "You might have gotten it backward," he said, contending that the reverse would have achieved a whistleblower effect, providing greater overall deterrent effect while affording protections to those who need it most.[11] Mr. Aufhauser also criticized the civil enforcement aspects as "unspectacular," claiming, "[t]here's nothing new. It's the same policy as before."[12]

Despite Mr. Herman and Mr. Solow's suggestions that the EPA policy will bring about a synergistic relationship between the EPA and the regulated community, one recent settlement reveals how the EPA may seek undue credit for use of its audit policy during negotiations. In *CENEX Inc.*,[13] the Montana-based petroleum refinery was fined $425,000 for late filing of twenty-five chemical inventory update reports. The company qualified for the audit policy's seventy-five percent reduction of the gravity portion of the penalty because the late report filings were disclosed voluntarily, the filings were made within sixty days after discovery, there was no immediate danger, filing the re-

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[6] 60 Fed. Reg. 66,706 (1995).

[7] *Id.* at 66,711.

[8] *Id.*

[9] *See* 3 *EPA Enforcement Manual* 9 (June 1996).

[10] *Id.* at 2.

[11] *Id.* at 8.

[12] *Id.*

[13] EPA TSCA-94-H-10 (consent order 19 April 1996).

ports prevented a repeat of the violation, and the company was cooperative. The fine was eventually lowered to $106,250, and chief EPA attorney Carl Eichenwald reported that the reduction was a result of applying the audit policy.[14] Opposing the EPA, CENEX Inc.'s chief attorney David Veer pointed out that naturally occurring substances such as butane and propane need not be reported under existing regulations, and that the EPA's adjustment of the fine was simply a "recognition that its legal position as to the reportability of the chemicals was weak."[15] This case suggests that the EPA may erroneously credit its penalty policy with a downward penalty adjustment as a good faith settlement gesture when it is merely an acknowledgment that its legal position is insupportable.

Another trend to watch is the enactment of several state audit privilege laws. As of June 1996, eighteen states have enacted legislation establishing varying degrees of environmental audit privileges. About half of these state audit laws offer immunity from both civil and criminal penalties to persons and entities voluntarily reporting violations detected in such audits provided that the violations are promptly corrected. Similar legislation is pending in another twenty-six states.

The progression of state audit legislation is an interesting field to monitor because it may pit states considering audit legislation against the EPA, which opposes the audit bills. The EPA Region X, for example, threatened Idaho with disapproval of its Title V air operating permit program unless Idaho either changed its immunity law or demonstrated why the program would not undercut the state's enforcement authority.[16] The EPA Region I has made a similar announcement to New Hampshire.[17] Interestingly, the EPA's Region I recently launched a pilot project seemingly at odds with the region's strict oversight policy articulated to New Hampshire. On 6 May 1996, Region I unveiled its "StarTrack" project, which would privatize regulatory oversight. Region I offered eight companies in Region I with strong compliance performance records reduced reporting obligations, no routine inspections and limited amnesty, in exchange for which the companies agreed to third party environmental compliance audits and public availability of the findings.[18]

In policy guidance issued by the Office of Enforcement and Compliance Assurance on 5 April 1995, Mr. Herman emphasized that the EPA has "consistently opposed blanket amnesties . . . as well as audit privileges that shield evidence of violations from regulators and jeopardize the public's right-to-know about noncompliance."[19] The guidance was not absolute, however, providing only that "a State Title V program should not be approved if State law provides immunity from civil penalties for repeat violations, violations of previous court or administrative orders, violations resulting in serious harm or risk of harm, or violations resulting in substantial economic benefit to the violator."[20] The EPA's resolve in acting on these warnings and its treatment of permit programs in other media remain to be seen. Before attempting to take advantage of such legislation enacted in your state, remember that currently, the enactment of statutory privilege in a state does not preclude federal enforcement action. But in *Harmon Electronics, Inc.* recently argued on 1 May 1996 before the Environmental Appeals Board, Harmon questioned the EPA's authority to over file under the Resource Conservation and Recovery Act when a state agency has already taken enforcement action on the same issue.[21] The *Harmon* decision is expected by the end of the year.

Significantly, the House of Representatives has given the EPA direction in its Fiscal Year 1997 funding legislation (Appropriations Bill for the Departments of Veterans Affairs, Housing and Urban Development and Related Agencies—H.R. 3666) regarding state environmental audit laws. Report language for H.R. 3666, which passed the House and now awaits Senate markup, instructs the EPA to work with states to allow implementation of self-audit laws. While not binding, this language gives the EPA a clear understanding of congressional interest in this issue. Even if the Senate passes its Veterans Administration and Housing and Urban Development Appropriations bill without similar language, it is not uncommon in such situations for the final bill to retain the House's instruction. Captain Anders and Mr. Krilla.

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[14] 10 *Toxics Law Reporter* 49, at 1443 (May 15, 1996).

[15] *Id.*

[16] 17 *Inside EPA* 11, at 6 (March 15, 1996).

[17] *Id.*

[18] 17 *Inside EPA* 19, at 17 (May 10, 1996).

[19] *See*, Memorandum, from Assistant Administrator, OECA, to Regional Counsel, Region X, subject: Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements (5 Apr. 1995) at 2.

[20] *Id.* at 4.

[21] Harmon Electronics Inc., EPA EAB, RCRA No. 94-4 (1 May 1996).

Unexploded Ordnance Issues

The Department of Defense (DOD) is developing a range rule to address unexploded ordnance (UXO) and other constituents on closed, transferring, and transferred ranges. After months of discussions with the EPA and other federal agencies (*e.g.*, the Department of Energy, the Department of Interior, and the United States Department of Agriculture), the DOD forwarded the proposed rule to the Office of Management and Budget (OMB) on 11 July 1996.

The DOD is optimistic that the rule will be proposed in the *Federal Register* in August. The public will then have sixty days in which to provide comments. During the public comment period, the DOD will sponsor four Public Involvement Forums at which DOD representatives will provide information and answer questions. Although the DOD had planned to promulgate the rule by 2 December 1996, the EPA's deadline for promulgating their military munitions rule and the lengthy pre-proposal period has made that goal impossible. As a result, the DOD is asking that the EPA not finalize that portion of the EPA military munitions rule that deals with closed and transferred ranges. The DOD plans to publish a final range rule in mid-1997.

Installation environmental law specialists (ELSs) should contact their major Army command (MACOM) ELS regarding any ongoing or planned response activities involving UXO. The MACOM ELSs can assess these activities to ensure consistency with current Department of Army policy pending promulgation of the DOD range rule. Lieutenant Colonel Bell and Ms. Fedel.

Integrated Contingency Plan Guidance

The EPA, as chair of the National Response Team (NRT), recently announced the availability of NRT's Integrated Contingency Plan ("one-plan") Guidance, which is intended to be used by facilities in the development of emergency response plans to respond to releases of oil and other hazardous substances.

Currently, your installation may be subject to the release reporting and emergency response provisions of some or all of the following federal regulations:

* EPA's Oil Pollution Prevention Regulation (40 CFR part 112.7(d), 112.20-.21);
* Minerals Management Service's Facility Response Plan Regulation (30 CFR part 254);
* Research and Special Programs Administration's Pipeline Response Plan Regulation (49 CFR part 194);
* United States Coast Guard Facility Response Plan Regulation (33 CFR part 154 Subpart F);
* EPA's Risk Management Programs Regulation (40 CFR part 68);
* Occupational Safety and Health Administration's (OSHA) Emergency Action Plan Regulation (29 CFR 1910.38(a));
* OSHA's Process Safety Standard (29 CFR 1910.119);
* OSHA's Hazardous Waste Operations and Emergency Response (HAZWOPER) Regulation (29 CFR 1910.120);
* EPA's Resource Conservation and Recovery Act Contingency Planning Requirements (40 CFR part 264, Subpart D, 40 CFR 265, Subpart D, 40 CFR 279.52); and
* Other applicable state and local emergency planning guidance.

The "one-plan" guidance provides a mechanism for consolidating multiple plans that your installation may have prepared, or may be required to prepare, into one functional emergency response plan. Installation ELSs should coordinate with your environmental program manager to determine which regulations apply to your installation and if the "one-plan" Guidance could be of use. Captain Anders.

CERCLA Ruling Endangers Retroactive Liability Scheme

In a curious decision issued 20 May 1996, the United States District Court for the Southern District of Alabama ruled that the retroactive liability scheme in CERCLA was unenforceable because there is insufficient evidence of congressional intent to apply the law retroactively.[22] The court also ruled that the local nature of the health risk and contamination, with waste generated solely within the state of Alabama, did not warrant federal regulation but was instead a matter for local regulation. The court's ruling in *United States v. Olin Corporation* would obviously change dramatically the way CERCLA has been interpreted and implemented. The Department of Justice is seeking expedited consideration of an appeal. Mr. Nixon.

Final Take

The EPA published an updated National Priorities List (NPL) on 17 June 1996.[23] The list, which has a total of 1073 sites, includes 154 federal facilities. The Army has 37 sites currently on the NPL.

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[22] United States v. Olin Corp., 42 ERC 1673, No. 95-0526-BH-S, (S.D.AL. 1996).

[23] National Priorities List for Uncontrolled Hazardous Waste Sites, 61 Fed. Reg. 30,510 (1996).

Claims Report

United States Army Claims Service

Tort Claims Note

Overflight Claims[1]

The air is a public highway and aircraft may traverse that highway at any altitude. However, aircraft interfering with a landowner's use and enjoyment of the land can create the basis for compensable damages. These principles were first enunciated by the United States Supreme Court in 1946 in *United States v. Causby*.[2] The Supreme Court revisited the overflight issue in 1972 in *Laird v. Nelms*, a case concerning sonic speed flights of California-based United States Air Force planes over North Carolina. The Court held that the allegation that liability under the Federal Tort Claims Act (FTCA) could be based on ultrahazardous acts or strict liability was not acceptable because the FTCA permits recovery only if there has been negligence or some "other form of misfeasance or nonfeasance on the part of the [g]overnment".[3]

Since *Causby* and *Laird*, when negligent government overflight conduct has caused damages, the courts have applied the discretionary function exclusion to preclude liability.[4] These decisions relied on testimony from the pilot that the flight had been conducted under United States Air Force regulations establishing minimum safe altitudes.[5] When courts were presented with testimony either from an eyewitness or an expert that the flight in question was not conducted at the altitude claimed by the government, the courts held the government liable.[6] The requirement that an FTCA claim must be based on a tort under the law of the jurisdiction in which the tort occurred was not discussed.[7] An FTCA claim for violation or failure to follow a federal rule or regulation is not compensable unless state law recognizes a private cause of action.[8]

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[1] This note is an amplification and clarification of the Note from the Field, *Of Ostriches and Other Ratites—A Claims Saga*, written by Captain Brian H. Nomi. ARMY LAW., Apr. 1996, at 43.

[2] 328 U.S. 256 (1946), involved an airport built in 1928 in Greensboro, North Carolina. In 1934, a 2.8-acre farm was built approximately half a mile from the end of the runway. In 1942, the United States Army Air Corps started flying heavy bombers at the airport following a Civil Aeronautics Administration approved glide path 83 feet above the farm. The Court held that there was a taking and remanded the case to the United States Court of Claims to determine whether the taking constituted a permanent or temporary easement. The Court cited as authority *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), in which firing from an Army fort across the plaintiff's land was held to constitute a servitude.

[3] 406 U.S. 797, 799 (1972), cited as authority *Dalehite v. United States*, 346 U.S. 15 (1953), the principal case interpreting the discretionary function exclusion in the Federal Tort Claims Act (28 U.S.C. 2680(a)). The dissent in *Laird* cited *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953) which applied a South Carolina statute to hold a pilot liable for engaging in ultrahazardous activities to interpret a similar North Carolina statute that imposed absolute liability on the government for property damage caused by a plane crashing near government airfields.

[4] Abraham v. United States, 465 F.2d 881 (5th Cir. 1972) (Miss.); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970) (Wash.); Ward v. United States, 331 F. Supp. 369 (W.D. Pa. 1971); McMurray v. United States, 286 F. Supp. 701 (S.D. Mo. 1968); Schwartz v. United States, 38 F.R.D. 164 (D.N.D. 1965); Huslander v. United States, 234 F. Supp. 1004 (W.D.N.Y. 1964).

[5] DEP'T OF AIR FORCE, REG. 55-34, (No longer in effect).

[6] Leisy v. United States, 102 F. Supp. 789 (D. Minn. 1952) (United States Navy plane over mink ranch at 150 feet); Wildwood Mink Ranch v. United States, 218 F. Supp. 67 (D. Minn. 1963) (United States Navy plane over mink ranch at less than 1000 feet); United States v. Gravelle, 407 F.2d 964 (10th Cir. 1969) (test over Oklahoma City by flying over 1250 flights above sonic speed between 21,000 to 50,000 feet altitude. The government's claim was that foundation damage would not be caused because ground shock of 2.0 inches per second was required and each flight only produced 1.0 inch per second of ground shock. In rejecting the government's evidence, the court accepted the plaintiff's expert testimony based on inspection of the buildings.); Peterson v. United States, 673 F.2d 237 (8th Cir. 1982) (Where one out of fifteen B-52s was flying outside of the flight corridor, the court believed the eyewitness testimony as to altitude being below 500 feet over the pilot's contrary testimony.); Musick v. United States, 768 F. Supp. 183 (W.D. Va. 1991) (The government asserted that a wind velocity of 100 to 110 miles per hour was necessary to cause a large limb to break off a hickory tree, but the court rejected this position and assessed liability based on eyewitness testimony that an RF-4 reconnaissance plane flew at tree-top level, which violated squadron policy not to go below 300 feet); Greenhalgh v. United States, 82 F.3d 422 (9th Cir. 1996) (In Idaho state court, the government pilots' testimony that plane complied with *Air Force Regulation 55-34* minimum altitude of 30,000 and conflicting expert testimony as to the altitude required to cause a scaffold to collapse was insufficient to rebut plaintiff's expert who stated that aircraft at 25,000 feet moving at sonic speed would cause the collapse).

[7] Indian Towing Co., Inc. v. United States, 350 U.S. 61 (1955)

[8] United States v. S.A. Empresa de Viacao Aerea Riograndense (Varig Airlines), 467 U.S. 797 (1984).

Federal case law[9] shows that regardless of the correct interpretation of the Supreme Court cases of *Causby* and *Nelms*, a federal court is more likely to hold the government liable for injury and damage caused by an overflight below minimum safe altitude levels established by regulation or standard operating procedure. The Army has adopted the Federal Aviation Administration regulation on minimum safe altitudes, which sets a limit of 1000 feet in congested areas and 500 feet in uncongested areas.[10] These limits do not apply during takeoff or landing or to helicopters operating at lower altitudes if there is no hazard to persons or property on the surface. Additionally, "Fly Neighborly" programs established on all Army posts require selection of routes that prevent flying at low altitudes over communities or commercial ventures such as livestock or poultry operations regardless of the date of establishment of the operation. Nap of the earth (NOE) training flights provide an example in which routes are carefully selected.

The United States Army Claims Service (USARCS) long ago adopted a policy to consider and pay compensable overflight claims under the noncombat activity provision of the Military Claims Act (MCA).[11] Relatively few claims have resulted in payment of substantial sums under this policy. These claims involved a stampede of cattle contained in a corral near Fort Rucker as a result of an off-course aircraft during NOE training; a tree top overflight on whelping day at a mink farm between Yakima Proving Grounds and Fort Lewis; and a Special Forces low-level flight over a cattle barn in Western Nebraska. Other claims raised the specter of deliberate, but denied, conduct by the pilot. For example, a low-flying helicopter circling repeatedly over horseback riders resulting in severe injuries to a rider thrown from a horse in northern Michigan and a repeatedly circling helicopter chasing cattle, crushing the cattle owner against a fence near Fort Campbell, indicated willful misconduct.

In the 1950s and 1960s, large scale off-post maneuvers generated numerous claims for damages to domestic fowl. These claims have decreased because these maneuvers are no longer held and poultry are now generally raised in air conditioned soundproof housing. Within the past several years, the USARCs has adjudicated an estimated six claims for damage to exotic birds allegedly caused by overflights.[12] These claims should be categorized with claims for damage to domestic fowl, that is, claims based on flights meeting the minimum safe altitude. No scientific study supports the belief that exotic birds are more sensitive to noise than domestic fowl or are damaged by overflights at or above the minimum safe altitude.[13]

As indicated above, helicopter flights are not subject to the minimum safe altitude requirements of 500 and 1000 feet and may fly lower.[14] Studies as to the effect of helicopter noise have not established a minimum safe altitude at which the noise level should have little or no effect on domestic animals. Claims personnel must judge the effect of noise by other means. Obviously, the larger the helicopter or the lower the altitude, the greater the noise becomes. For example, a large helicopter flying at 400 feet would create a sound of between eighty-four and ninety-two perceived noise decibel units (PNdb), a sound roughly equal to that of a power mower. A medium helicopter at the same altitude would create a sound of between seventy-nine and eighty-seven PNdb, a sound roughly equal to that of a truck or city bus fifty feet away. A light helicopter would create between seventy-two and eighty-two PNdb, a sound roughly equal to an automobile fifty feet away. An approaching overflight sound peaking at eighty PNdb would last for about twenty seconds. It would start at fifty-eight PNdb and rise to eighty PNdb in ten seconds. It would then decline to fifty-five PNdb in another ten seconds. The noise level would sound like a power mower lasting about one second or like a truck or city bus for several seconds. In a quiet neighborhood, the sound would probably be audible the entire twenty seconds whereas near a freeway or a city center the sound would be masked by other sounds and audible for only several seconds.[15]

Other factors affecting perceived noise include the topography, wind direction, cloud conditions, aircraft speed and direction, and frequent noises in the vicinity. When NOE training is involved, flying as much as 300 to 400 yards off of the selected

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[9] *See supra* note 6 cases cited therein.

[10] 14 C.F.R. 91.123; DEP'T OF ARMY, REG. 95-1, ARMY AVIATION: FLIGHT REGULATIONS, Appendix B (30 May 1990).

[11] 10 U.S.C. § 2733 (1995). This policy also applies to the Army National Guard Claims Act, 32 U.S.C. § 715, and the Foreign Claims Act, 10 U.S.C. § 2734.

[12] This type of claim is described in *The Army Lawyer* note referred to in note 1. The method of investigating overflight claims is well established and should be followed for exotic bird damage. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 3-8d(4)(f) (1 Aug. 1995); DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989).

[13] A survey of literature concerning domestic fowl damage was made by Armstrong Laboratory, Brooks Air Force Base, and is on file at USARCS.

[14] Safe flying altitude may be determined by the height of an obstruction to navigation. A height of 500 feet above ground level determines whether an object is an obstruction. *But see* 14 C.F.R. 77.23 (1995) (exception for around airports). Below that altitude *Federal Aviation Agency Advisory Circular AC 70/7460* states: "Any temporary or permanent object, including all appurtenances, that exceeds an overall height of 200 feet (61m) above ground level (AGL) or exceeds any obstruction standard contained in *FAR* part 77, subpart C, should normally be marked or lighted. However, a Federal Aviation Administration aeronautical study may reveal that the absence of marking or lighting will not impair aviation.

[15] Helicopter Association International Study, Sept. 1983 (unpublished) (on file with USARCS).

route may make the difference between payment and denial. Careful investigation will increase the likelihood of a fair disposition of the matter.

Installations operating aircraft should have a 24-hour hotline in place to receive complaints about low-flying aircraft. Receipt of such complaints should result in the claims personnel interviewing the complainant and other witnesses as soon as possible to identify the aircraft and determine the altitude. Claims personnel should use an experienced aviator and silhouette charts[16] in the interviews.

In founded claims involving Army aircraft, an Army veterinarian should inspect alleged damage to fowl and livestock without delay. If the claims judge advocate determines that an Army aircraft is not involved, the claimant should be informed to contact other services and agencies including state and local authorities.

The route of the suspected aircraft may be established through flight records. Interviews of aviation personnel, including the crew of the suspected aircraft, may also establish whether the craft flew over the claimant's property at a low altitude. In such interviews, claims personnel frequently encounter poor memories or evasive answers. Ultimately, the responsible claims officer must use sound judgment in determining location and altitude based on the entire investigation.

Evaluation of damages should be based on established principles applicable to destruction of or damage to property, that is, market value at the time of loss compared to market value after loss. Such value can be established by national publications. This includes animals that have a special value for breeding purposes. Separate allowance for anticipated progeny is not normally authorized but is included in the fair market value. If the claimant contends that a formerly productive bird has stopped laying eggs, the claim should be established by both the production records and a veterinarian's opinion. If production loss is proven, calculate compensation by comparing market value. Damage to eggs in a nest is extremely doubtful without direct (eyewitness) proof that the egg was damaged (trampled) during a below minimum safe altitude overflight. Assuming an egg is fertile, addling of eggs due to a temporary absence of the bird is very doubtful. Proof by necropsy should be required.

In conclusion, Army policy is to pay claims under the MCA for damages or injuries caused by overflights below minimum safe altitudes when established by timely and proper investigation and scientific analysis. The fact that the exotic bird industry is relatively new does not mean either the type of investigation or method of evaluation should be changed. Mr. Rouse.

Standard of Care in Medical Malpractice Cases

For liability to attach to the United States in medical malpractice claims, all the following elements must be present: duty, breach of duty, proximate cause, and damages. This note discusses the elements of duty, breach of duty, and proximate cause in the medical malpractice context.

(1) Duty. With respect to the so-called "learned professions," for example law, medicine, and religion, the only duty at common law was a general one to do no harm. Although a state statute may state in general terms that either a national or local standard will be applied in a particular case, the statute usually does not define the specific duty of care owed in a case of professional malpractice. To establish the nature and extent of the duty owed by the United States in cases of professional negligence, one must refer to the standards of the respective profession rather than to state statutes or common law standards. As generally expressed in most state court decisions, the standard of care is that practiced by a reasonably prudent practitioner with the same or similar qualifications under the same or similar circumstances.

Determining the specific standard in medical malpractice cases is usually made by referring to medical texts, journal articles, and published medical specialty standards (*e.g.*, the standards published by the Joint Commission on Accreditation of Hospitals). The applicable standard also may be determined by the testimony of medical professionals in the same general medical practice (or in the same specialty or subspecialty, as appropriate). Additionally, courts have held that hospital internal regulations are relevant in considering the scope of the duty of care owed by a hospital to a patient—although the regulations do not create the duty, they may define it.[17]

(2) Breach of Duty. Under common law, medical malpractice liability arises only in the context of the physician/patient relationship. State statutes routinely broaden the scope of potential liability to include nonphysician health care providers (HCP) such as opticians, pharmacists, midwives, and paramedics. Additionally, state case law has expanded liability to medical settings beyond traditional health care provider/patient relationships. For example, while it is not the general rule, a radiologist was held liable for failure to warn the plaintiff about an abnormality discovered in an X-ray during a pre-employment physical.[18]

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[16] Dep't of Army, Field Manual 44-80, Visual Aircraft Recognition (20 Jul. 1993).

[17] *See, e.g.*, Keir v. United States, 853 F.2d 398 (6th Cir. 1988).

[18] Daly v. United States, 946 F.2d 1467 (9th Cir. 1991) (applying Washington state law).

An HCP is not a guarantor of a good result. Generally speaking, if the HCP exercises reasonable medical judgment under the circumstances, the HCP will not be held liable for a breach of duty of care if subsequent events indicate the HCP made an erroneous diagnosis. An HCP's care must be judged based on the facts known at the time, rather than "twenty-twenty hindsight."

Most medical malpractice cases require a written opinion or oral testimony by a qualified medical professional in the same general practice or specialty as the defendant HCP to establish breach of a medical standard of care. Exceptions involve "common knowledge" (*e.g.*, basic hygiene measures) and *res ipsa loquitur*. *Res ipsa* is a rule of circumstantial evidence that is rebuttable presumption and lifts the burden of proving a breach from the claimant to the defendant. The doctrine applies only when the following elements are present: exclusive control by the defendant of the instrumentality that caused the injury; the incident would not have occurred in the absence of negligence; and the victim committed no contributory negligence. An example of *res ipsa* in the medical malpractice context is a case in which a surgeon fails to remove a surgical sponge or other foreign object from the surgical site before closing. Liability under the res ipsa doctrine cannot be imposed on multiple tortfeasors in the absence of joint responsibility.[19]

In medical malpractice cases, a bad result or adverse outcome is not sufficient evidence of breach of duty (standard of care). However, a bad result in conjunction with poor or missing documentation of appropriate care or a decredentialed HCP could necessitate a compromise administrative settlement to avoid substantial risk of an adverse court judgment.[20] A difference of medical opinion or practice is not sufficient evidence to establish a breach of the standard of care. An expert's opinion should be based on appropriate references to medical literature and not merely on what his own practice is in a particular case. As a practical matter, the claims attorney should conduct a claimant interview in all medical malpractice cases, during which the attorney should attempt to obtain not only the claimant's version of the facts, but also the claimant's theory of liability and the specific instances that he or she believes evidence a breach of the standard of care.

Further, during the administrative stage, it is not prudent to request that the claimant submit an expert opinion in support of the allegations before conducting an initial inquiry into whether there is governmental liability exposure in the case. If an initial investigation by the claims office indicates that a breach of the standard of care occurred (*i.e.*, a "pay case"), then it is wiser to refrain from requesting such an opinion. The claimant will be spared the unnecessary expense of obtaining an opinion. Also, in certain cases, it may be easier to negotiate a reasonable settlement without an expert opinion. However, as a general matter, before taking final action to deny a claim, a formal request for an expert opinion in support of the allegations should be prepared and sent to the claimant by certified mail.

(3) Causation. Deviation from applicable standards of performance or care must be the proximate cause of the damage or injury sustained.

a. Traditional Test. The traditional tort test requires the plaintiff to prove injury by a preponderance of the evidence. The plaintiff must show that, "more likely than not," the injury was caused by a breach owed to the plaintiff by the defendant or the plaintiff cannot recover any damages.[21]

b. Loss of Chance. In the context of medical malpractice cases, some state jurisdictions have relaxed the traditional test of proximate causation in which the plaintiff must show that there was a "reasonable medical probability," or a greater than 50% chance, that the HCP's negligence caused the injury or death. In those jurisdictions, courts have allowed the plaintiff to prevail upon a showing that "some chance of survival" or "substantial possibility of survival" existed but for the defendant's breach of standard of care.[22] Not all states have adopted the loss of chance theory of causation and it is important to thoroughly research the state law cases to determine whether or not loss of chance applies. Additionally, states vary regarding the effect of finding that the plaintiff experienced a loss of chance of survival as a result of the defendant's negligent act. In some states, the plaintiff is entitled to recover the full measure of damages. In other states, the plaintiff can only recover damages proportionate to the percentage of the lost chance.[23] Ms. Byczek.

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[19] *See* UNITED STATES ARMY CLAIMS SERVICE, FEDERAL TORT CLAIMS ACT HANDBOOK, para. iib4a(2)(c) (9 Feb. 1995) [hereinafter FTCA HANDBOOK].

[20] *See, e.g.*, Welsh v. United States, 844 F.2d 1239 (6th Cir. 1987) (finding of adverse presumption against government for destruction of critical evidence); Sweet Sisters of Providence in Washington, 881 P.2d 304 (Alaska, 1994) (negligence per se for hospital and HCPs for failure to maintain or to retain nursing records in medical malpractice claim).

[21] *See* FTCA HANDBOOK, *supra* note 3, § iib4a(3)(a).

[22] *See id.* para. iib4a(3)(b).

[23] For example, 30% loss of chance results in a recovery of 30% of the total awardable damages.

Personnel Claims Note

The Importance of Repair Estimates for Electronic Items

On three occasions in *The Army Lawyer*, the United States Army Claims Service (USARCS) has discussed internal damage to electronic items. In May 1993, USARCS provided guidance on how to perfect carrier liability when there was no external damage.[24] In January 1994, USARCS discussed the importance of establishing tender of electronic items in good condition.[25] Finally, in September 1994, USARCS revisited the need to establish the tender of the item in good condition, principally by obtaining convincing written personal statements from the claimant that the electronic item worked prior to tender.[26]

Continuing with the development of substantiation for internal damage to electronic items, field claims offices must make sure that the claimant understands the importance of obtaining credible repair estimates from reliable electronic repair firms. The USARCS has successfully established carrier liability at the Comptroller General level on three occasions in cases where there was not obvious external damage because the repair estimate was detailed, credible, and convincing. In *Allied Intermodal*, "the repairman noted that the malfunction was due to the fact that the 'shadow mask' of the picture tube had come loose inside the television" and "[h]e said this would only occur if the set were dropped or stress were applied to the face of the tube."[27] In *Department of the Army Reconsideration*, the issue was damage to a VCR. The Comptroller General held: "Moreover, the VCR did not work after delivery because a normally sturdy internal component (a printed circuit card) was physically broken. The record shows that such damage is consistent with the item having been dropped."[28] In *Caryle Van Lines*, "[t]he repairman indicated the malfunction was caused by a broken main current board due to mishandling or dropping . . . [w]hile there was not external damage, the type of damage sustained was consistent with the item having been dropped."[29]

A repair estimate indicating that the damage was due to rough handling is not sufficient. It must adequately describe the damage and explain why the repair person believed that the damage occurred in transit. It must be detailed and convincing or the item may not be payable. The following questions are the types of questions that should be answered by the repair person on the estimate of repair.

1. Is this the type of damage that occurred in transit? Why?
2. Are there loose components in the set?
3. Can loose parts be heard?
4. Was there a cracked circuit board?
5. Did the solder points come loose or break during shipment due to rough handling?
6. Were electronic parts misaligned due to improper handling or inadequate packing for shipment?
7. How is this damage different from normal wear and tear?

The repair estimate must be sufficiently detailed to convince the carrier, and later the Comptroller General, that such damage occurred in shipment. If a claims examiner is not convinced, or has further questions about the damaged item, contact the repair firm, ask probing questions, and record the information obtained on the chronology sheet. Be sure to date, record the name of the person spoken to, and the claims examiner's name on the chronology sheet. The chronology sheet is often included in the General Accounting Office administrative reports. Ms. Schultz.

Affirmative Claims Note

Quarterly Reports

Field claims offices submit to the United States Army Claims Service (USARCS) quarterly reports reflecting their affirmative claims activities. These statistics were reported on either DA Form 2938-R (Affirmative Claims Report) or on a report generated by the Affirmative Claims Management Program.

The USARCS recently reviewed all the claims forms currently maintained by the Department of the Army and the Department of Defense and determined that DA Form 2938-R is now obsolete and should be deleted from the Army's inventory. Field claims offices should discontinue use of this form.

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[24] Claims Report, Personnel Claims Note, *Internal Damage to Electronic Items*, ARMY LAW., May 1993, at 50.

[25] Claims Report, Personnel Claims Note, *Internal Damage to Electronic Items—Revisited*, ARMY LAW., Jan. 1994, at 40.

[26] Claims Report, Personnel Claims Note, *Return to Internal Damage to Electronic Items*, ARMY LAW., Sept. 1994, at 48.

[27] Allied Intermodal Forwarding, B-258665, April 6, 1995.

[28] Department of the Army Reconsideration, B-255777.2, May 9, 1994.

[29] Caryle Van Lines, Inc., B-257884, Jan. 25, 1995.

The Affirmative Claims Management Program has the capability to generate a quarterly report. Therefore, field claims offices will submit their quarterly statistics on the computer generated report. Major Park.

1995 Affirmative Claims Report

In fiscal year 1995, Army claims offices collected $12,094,786 in medical care recovery claims. Of that amount, claims personnel deposited $7,041,601 into the operation and maintenance accounts of military treatment facilities (MTF). The totals for this year's medical care recoveries and MTF deposits showed an increase over the past two years. Additionally, claims offices collected $11,713 to cover the cost of repairing or replacing damaged or lost government property.

To equitably reward large and small claims offices for their achievements in pursuing affirmative claims, the USARCS utilizes a two tiered recognition system. The USARCS recognizes the top offices in total medical care recovery as well as the top offices in total property damage recovery. A new category introduced this year is for offices that deposited the most money into the operations and maintenance accounts of MTFs. Additionally, the USARCS recognizes the offices that demonstrated the most improvement in their medical care recovery program or in their property damage recovery program.

The United States Army Claims Service, Europe, receives special recognition as the top office in total affirmative claims recovery. Additionally, the United States Armed Forces Claims Service, Korea, receives special recognition for total property damage recovery.

The Judge Advocate General issued certificates of excellence to those offices that demonstrated superior achievement in the five award categories with a letter of acknowledgment to each respective post commander. These offices are listed in order of achievement. Ms. Jedlinski.

1. Total Medical Care Recovery.
   a. United States Army Armor Center and Fort Knox.
   b. III Corps and Fort Hood.
   c. XVIII Airborne Corps and Fort Bragg.
   d. Brooke Army Medical Center, Fort Sam Houston.
   e. 101st Airborne Division (Air Assault) and Fort Campbell.
2. Total Deposits to Military Treatment Facility Accounts.
   a. III Corps and Fort Hood.
   b. 101st Airborne Division (Air Assault) and Fort Campbell.
   c. United States Army Armor Center and Fort Knox.
   d. Brooke Army Medical Center, Fort Sam Houston.
   e. United States Army Field Artillery Center and Fort Sill.
3. Total Property Damage Recovery.
   a. United States Army Field Artillery Center and Fort Sill.
   b. United States Army Armor Center and Fort Knox.
   c. Joint Readiness Training Center and Fort Polk.
   d. Carlisle Barracks.
   e. United States Army Garrison, Fort Riley.
4. Medical Care Recovery Program, Most Improved.
   a. 10th Mountain Division (Light) and Fort Drum.
   b. United States Army Missile Command, Redstone Arsenal.
   c. Madigan Army Medical Center.
   d. United States Military Academy, West Point.
   e. XVIII Airborne Corps and Fort Bragg.
5. Property Damage Recovery Program, Most Improved.
   a. Carlisle Barracks.
   b. United States Army, Fort McCoy.
   c. United States Army Garrison, Fort Ritchie.
   d. United States Army Missile Command, Redstone Arsenal.
   e. United States Army, Fort Belvoir.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

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

The following is a current 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 all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend 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 Juan Rivera, 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.

Academic Year 1996-1997 On-Site CLE Training

The Academic Year 1997 On-Site is fast approaching with the onset of the 90th Regional Support Command's Dallas, Texas conference scheduled for 20 - 22 September at the Bristol Suites Hotel. This promises to be a splendid kick-off which will be followed by conferences at sixteen additional sites across the country.

On-Site instruction provides an excellent opportunity for practitioners to obtain CLE credit while receiving instruction in a variety of legal topics. In addition to instruction provided by professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to hear career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army. Many On-Sites feature distinguished guests from the local community.

Army Regulation 27-1, paragraph 10-10, requires United States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other United States Army Reserve units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army Judge Advocates, National Guard Judge Advocates and Department of Defense civilian attorneys also are strongly encouraged to attend and take advantage of this valuable program. Major Storey.

Personnel Changes

Major Eric Storey has moved on to a new assignment and his replacement as Chief, Unit Training and Liaison, will be Major Juan Rivera, ready for duty on or about 15 September 1996. If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380. Major Storey.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,
Director ..... tromeyto@otjag.army.mil

COL Keith Hamack,
USAR Advisor ..... hamackke@otjag.army.mil

LTC Peter Menk,
ARNG Advisor ..... menkpete@otjag.army.mil

Dr. Mark Foley,
Personnel Actions ..... foleymar@otjag.army.mil

MAJ Juan Rivera,
Unit Liaison Officer ..... riveraju@otjag.army.mil

Mrs. Debra Parker,
Automation Assistant ..... parkerde@otjag.army.mil

Ms. Sandra Foster,
IMA Assistant ..... fostersa@otjag.army.mil

Mrs. Margaret Grogan,
Secretary ..... groganma@otjag.army.mil

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, ACADEMIC YEAR 1996-1997

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
20-22 Sept. Note: 2.5 days	Dallas, TX 90th RSC Bristol Suites 2222 Stemmons Freeway Dallas, TX 75207	MAJ Linda L. Sheffield 4500 Carter Creek Suite 103 Bryan, TX 77802 (409) 846-1773, FAX 1719
2-3 Nov.	Bloomington, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th Street Bloomington, MN 55425	LTC Donald Betzold 6160 Summit Drive, #425 Brooklyn Center, MN 55430 (612) 566-8800
9-10 Nov.	Willow Grove, PA 153d LSO/99th RSC Willow Grove Naval Air Station Reserve Pgms Bldg. 601 Willow Grove, PA 19090	LTC Donald Moser 153d LSO Willow Grove USAR Center Woodlawn & Division Avenues Willow Grove, PA 19090 (215) 925-5800
16-17 Nov.	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	LTC Myron J. Berman 77th RSC Building 637 Fort Totten, NY 11359 (718) 352-5703
4-5 Jan. 97	Long Beach, CA 78th MSO	LTC Andrew Bettwy 10541 Calle Lee, Ste 101 Los Alamitos, CA 90720 (714) 229-3700
1-2 Feb.	Seattle, WA 6th MSO	MAJ Frank Chmelik Chmelik & Associates 1500 Railroad Avenue Bellingham, WA 98225 (360) 671-1796
8-9 Feb.	Columbus, OH 9th MSO Clarion Hotel 7007 N High Street Columbus, OH 43085 (614) 436-0700	LTC Timothy J. Donnelly 9th MSO 765 Taylor Station Road Blacklick, OH 43004 (419) 625-8373
22-23 Feb.	Salt Lake City, UT 87th MSO	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, ACADEMIC YEAR 1996-1997

DATE	CITY, HOST UNIT AND TRAINING SITE	ACTION OFFICER
22-23 Feb.	Denver, CO 87th MSO	LTC David L. Shakes 3255 Wade Circle Colorado Springs, CO 80917 (719) 596-3326
22-23 Feb.	Indianapolis, IN IN ARNG Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
1-2 Mar.	Charleston, SC 12th LSO	COL Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 727-4523
8-9 Mar.	Washington, DC 10th MSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th MSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
15-16 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 95402-5589 (707) 544-5858
22-23 Mar.	Rolling Meadows, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	MAJ Ronald C. Riley 18525 Poplar Avenue Homewood, IL 60430 (312) 443-4550
4-6 Apr.	Jacksonville, FL 174th MSO/FL ARNG	LTC Henry T. Swann P.O. Box 1008 St. Augustine, FL 32085 (904) 823-0131
26-27 Apr.	Newport, RI 94th RSC Naval Justice School at Naval Education & Tng Ctr 360 Eliott Street Newport, RI 02841	MAJ Katherine Bigler HQ, 94th RSC ATTN: AFRC-AMA-JA 695 Sherman Avenue Fort Devens, MA 01433 (508) 796-6332, FAX 2018
3-4 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf St Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304

NCO Professional Development: Building Blocks for Promotion

Sergeant Major Howard Scarborough
Headquarters, First United States Army
Fort Gillem, Georgia

Introduction

While serving as the Office of The Judge Advocate General Liaison to the Personnel Command (PERSCOM), I received a call from a soldier concerning the master sergeant (E8) promotion list. This soldier was already serving as a chief legal noncommissioned office (CLNCO) and had an impeccable reputation for taking care of people and business. He was upset that he had been passed over for promotion. To make matters worse, he thought he was far better qualified than one of the individuals who was selected for promotion. I offered to check both records and get back to him.

After comparing the records, I found that the soldier who was selected for promotion had an excellent fiche. He had completed several of the Judge Advocate General's Corps (JAGC) correspondence courses and was enrolled in college. The file of the soldier who had been passed over did not indicate whether he had completed any of the JAGC correspondence courses or whether he was enrolled in college. The soldier who made that phone call mistakenly thought promotions were based solely on taking care of people and business. He is not alone. Duty performance is important but it constitutes only the foundation for noncommissioned officer (NCO) career development.

This article reviews some of the key factors in promotion to the senior NCO ranks. It is not intended to serve as a comprehensive discussion of the entire promotion process. Rather, it focuses on what one sergeant major thinks are the most important, and often most overlooked, aspects of the NCO promotion process.

Two Promotion Systems—One Focus

Promotion to grades private (E2) through staff sergeant (E6) is an extremely structured and goal oriented system. Young soldiers are promoted by reaching standards associated with time in grade and service or by achieving the magical number of promotion points. These factors are quantifiable—the soldier always knows exactly where he or she stands and has a means of identifying their weak areas. By reviewing the promotion worksheet, they can see the quickest most efficient means of accumulating promotion points. This results in the completion of more correspondence courses or greater emphasis on personal physical training (PT).

Unfortunately, after promotion to staff sergeant, many NCOs fail to recognize the key factors in the Department of Army (DA) level promotion process. No points are awarded and a promotion candidate has no opportunity to impress a promotion board with an infinite knowledge of military subjects. On paper, it appears that the promotion system undergoes a drastic change between E6 and E7. In practice, very little changes.

The factors important when striving for E5 or E6 are just as important when trying to make E7, E8, or E9. College education, correspondence courses, knowledge of common tasks, and the Army Physical Fitness Test (APFT) remain key factors in the promotion process. The method of communication is the greatest change between a local promotion board and a DA board. The most valuable tool for communicating information to a DA promotion board is the Noncommissioned Officer Evaluation Report (NCOER).

The NCOER

The most important document viewed by the promotion board is the NCOER. A discussion of NCOERs in this context may seem unusual because, after all, the individual being considered for promotion does not prepare the NCOER. However, performance input from the rated NCO should be a vital factor in NCOER preparation.

Many well meaning raters put in bullets like "Best NCO I ever worked with" or "Outstanding duty performance during this rating period." These bullets (you could call them blanks) may convey that the rater thinks highly of the rated NCO but they do not convey the type of information needed by the promotion board. Promotion boards are looking for facts, not generalizations. One way to ensure quality bullets on your NCOER is to keep a record of facts, figures, and significant accomplishments during the rating period. This ensures that the rater has the information needed to prepare factual and effective bullets.

Another mistake made by many raters is that they try to include too much information on the NCOER. It is not necessary, nor is it desirable, to have three bullets in every block. There is absolutely nothing wrong with having a couple of blank success blocks on an NCOER. The NCOER was designed to preclude NCOs from getting an EXCELLENCE in every block. The NCOER covers such a wide spectrum of responsibilities that it is virtually impossible to rate most NCOs in every block, much less give them an excellence rating on any aspect. Confront the board members with the most important facts! The facts are all that they need to see.

Promotion boards indicate that the senior rater's block is the most important on the NCOER. Unfortunately, many senior raters resort to general bullets (blanks) because the rater has already commented on the most important points. There is absolutely nothing wrong with the senior rater restating the strongest points made by the rater. This is desirable because it focuses the

board's attention on the NCO's primary accomplishments and keeps the emphasis on the facts.

Prior to finalizing the NCOER, the rated NCO should ask to have it reviewed by the CLNCO or a mentor. Granted, the rater must first approve of this, but approval should rarely be withheld because review by another NCO is a valuable method of ensuring that all bullets are strong and focused.

Correspondence Courses

For approximately fifteen years, the Judge Advocate General's Corps Sergeant Major, Team PERSCOM, and many of the CLNCOs have stressed the importance of JAGC correspondence courses. Despite persistent emphasis, during a recent conference I overheard several soldiers discussing the possibility of dropping out of the Military Paralegal Program due to academic problems. At the same conference, I also learned that less than fifty soldiers have completed the Military Paralegal Program. These facts lead me to believe that the message we have been preaching for so long is still not getting through.

Noncommissioned officers tempted to drop correspondence courses fail to focus on promotion as a primary motivator in their professional development. Promise a soldier a trip to Charlottesville on completion of the Law for Legal NCO Correspondence Course and see how long it takes to get a completion certificate back. Unfortunately, after the trip to Charlottesville, many NCOs never enroll or complete another correspondence course. Why? Because they do not recognize the connection between promotion to E7, E8, or E9 and the JAGC correspondence courses. Because the DA promotion boards do not operate on a point system does not negate the importance of JAGC correspondence courses in the promotion process.

Evidently, many Legal NCOs do not realize that the key factors in promotion to E5 or E6 are also the key factors in promotion to E7, E8, or E9. Education, both military and civilian, is a crucial factor in all NCO promotions. Promotion boards are briefed on the role these courses play in the professional development of JAGC NCOs. Team PERSCOM also considers completion of these courses when making selections for high priority assignments.

Many NCOs view JAGC correspondence courses as too difficult and time consuming. Even though these courses require much time and effort, they are not beyond the ability of Legal NCOs. It is only natural that the educational requirements associated with promotion to E7 be more difficult than those associated with promotion to E5.

As a result of their difficulty, failure of JAGC subcourses is not uncommon (some would call it inherent). Unfortunately, receipt of a failure notice causes many NCOs to lose interest and drop the course. Correspondence subcourse failure indicates one thing—more time and effort is needed. A subcourse failure notice should never be construed as an indication that a Legal NCO is not capable of passing the course. Remember, the answers are in the book—but they are not verbatim and they are not in chronological order.

A college degree, especially an associate degree, also is critical to the promotion process. Promotion board members view legal NCOs as having time to attend college (this is based, in part, on the number of your contemporaries who have college degrees). Earning a college degree takes a lot of time, effort, and money but it pays huge dividends. A committed NCO cannot accept any excuses on this point—there are no substitutes for a college degree.

A college decree also is a critical factor in the quality of life after the Army. In civilian life, college degrees serve as a ticket or shortcut to management positions. They open doors that you could not hope to enter otherwise. Civilian life may seem light years away now, but if you do not start planning today you will find yourself scrambling to complete your degree as you near retirement. The final months before separation are hectic enough without having to tie up time with college.

Tests

Army tests is another overlooked career building block. I know that the Skill Development Test (SDT) is dead; however, other annual or semiannual tests have just as much impact on your professional development. The Common Task Test (CTT) and the APFT both provide legal NCOs with a chance to show that they are capable of excellent performance outside the office.

While stationed at Fort Campbell, I served as a grader at a CTT station. Several soldiers came to my point and immediately requested a "NO GO." When I asked why, they stated that they had already passed enough stations to get a "GO" on the CTT. They saw no reason to waste any more time. What they were really wasting was an opportunity to get a solid bullet on their NCOER: "Scored 100% on the Common Task Test."

When soldiers seeking promotion to E5 or E6 appear before a promotion board they are given the opportunity to display their knowledge of military subjects. When seeking promotion to E7, E8, and E9 this opportunity is limited to a couple of bullets on an NCOER. Bullets concerning performance on the CTT tell a promotion board a lot about a soldier's commitment to duty. Granted, you have to spend more time preparing for the test and you won't get home as early on test day, but bullets of this type serve as great discriminators in the promotion process.

The APFT is another neglected building block. Most soldiers seem content to score in the 225 range. However, if you want to send a strong bullet to the promotion board, you should be training to score at least 290 on the APFT. This entitles you to an excellent rating in the PT block on your NCOER. This score serves as further proof that you are better qualified for promotion than your contemporaries.

The reason many soldiers do not do better on the APFT is that they believe scoring 290 requires several hours of dedicated effort in the gym each day. This is not true, especially if your unit has a well-rounded PT program. If you are willing to dedicate an extra ten minutes before or after PT to do pushups and sit-ups, you will eventually max those events.

One of the greatest hindrances to a personal PT program is disappointment. There will be days when you will do seventy repetitions and there will be days when you struggle to do twenty-five—do not worry about it! Just keep working. You will eventually reach your goal. Also, have someone periodically check your form, especially on the pushups. It is easy for bad form to become habit without realizing it.

Overcoming Disappointment

The difference between success and failure often is based on response to disappointment. One soldier fails a subcourse and gives up. Another fails a subcourse, puts more time and effort into it, and ultimately completes the correspondence course.

One of the greatest disappointments in the life of any soldier is a promotion pass over. As you recover from this disappointment, you should consider that you have eight to nine months to prepare for the next board. You should immediately assess your record and select some realistic short term goals. There is plenty of time to complete a JAGC correspondence course if you really dedicate yourself to it. You may not be able to complete a college degree but you can complete twelve to eighteen semester hours. You may not be able to max the APFT but you can raise your score by fifteen to twenty points. Accomplishing these goals will prove to the board that you are determined to be promoted.

Parting Shot

The old adage "you miss 100% of the shots you don't take" definitely applies to the promotion process. Many good NCOs miss promotions because they do not believe that they have much of a chance. My advice is not to worry about the things you cannot control like selection rates and the quality of the competition. Earning a promotion hinges on maintaining focus on improving the areas that you do control (education, CTT, APFT).

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are 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

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

For further information on civilian courses in your area, please contact the one of the institutions listed below:

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

UT: The University of Texas
School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially

Jurisdiction	Reporting Month
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer.*

Current Material of Interest

1. TJAGSA Materials Available Through the Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. 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 for registration as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 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 A305239	Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).
AD B164534	Notarial Guide, JA-268-92 (136 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).
AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A297426	Wills Guide, JA-262-95 (517 pgs).
*AD A308640	Family Law Guide, JA 263-96 (544 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 A308341	The Law of Federal Employment, JA-210-96 (330 pgs).
*AD A291106	The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD 302312	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 St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181

(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 St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Seiers Forms, Usage and Procedures (1 June 1988).*

(b) Units not organized under a PAC. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO63114-6181.

(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 Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(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 Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) ROTC Elements. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

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

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

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

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6847.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

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

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS Online Information Service, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 134.11.74.3 or Domain Names laawsbbs@otjag.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: OIS Sysop
9016 Black Rd., Ste 102
Fort Belvoir, VA 22060-6208

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novelle LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 134.11.74.3
Host Name = laawsbbs@otjag.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

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

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995.
ALAW.ZIP	June 1990	*The Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	January 1996	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	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.

FILE NAME	UPLOADED	DESCRIPTION
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1994.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FOIA.2.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
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	January 1996	Defensive Federal Litigation, August 1995.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.ZIP	May 1996	Law of Federal Labor-Management Relations, May 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations--Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, Volumes I and II, September 1995.
JA235.ZIP	January 1996	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	January 1996	Federal Tort Claims Act, August 1994.
JA260.ZIP	January 1996	Soldiers' & Sailors' Civil Relief Act, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	January 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses Protection Act Outline and References, November 1992.
JA275.ZIP	August 1993	Model Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.ZIP	January 1996	15-6 Investigations, November 1992 in ASCII text.
JA301.ZIP	January 1996	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.

FILE NAME	UPLOADED	DESCRIPTION
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA5082.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95	January 1996	Operational Law Deskbook 1995.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.

FILE NAME	UPLOADED	DESCRIPTION
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	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, VA 22903-1781.

Requests must be accompanied by one 5 ¼ inch or 3 ½ inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

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

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

5. The Army Lawyer on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and*

"ZIP" extension files must reside in the same directory after downloading. For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP APR96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Above in paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

6. Articles

The following information may be useful to judge advocates:

Michael S. Greve, *Sexual Harassment: Telling the Other Victims' Story*, 23 No. Ky. L. Rev. 515

Roederick White, Sr., *Constitutional Ethics: Lawyer Solicitation of Clients Recent Development*, 23 S.U. L. Rev 307 (1996).

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. Addresses for TJAGSA personnel are available by e-mail at tjagsa@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. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 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:

U.S. Army Legal Services Agency
Law Library, Room 203
ATTN: Melissa Knowles
Nassif Building
5611 Columbia Pike
Falls Church, VA 22041-5013
POC Melissa Knowles
COM (703) 681-9608

* Code of Virginia 1950 Annotated, Volume 11 1995 Replacement Volume

* District of Columbia Code Annotated 1981 edition, Volume 4, 1995 Replacement Title 6—Health and Safety

* District of Columbia Code Annotated 1981 edition, Volume 4A 1995 Replacement Title 7—Highways, Streets, Bridges; Title 8-Parts and Playgrounds, etc.

* District of Columbia Court Rules Annotated 1995 edition, Volume 1, Court Reporter Rules

* District of Columbia Court Rules Annotated 1995 edition, Volume 2, Superior Court-Family Division to Federal Rules

* District of Columbia Code Annotated 1981 edition, Volume 12, 1995 Replacement Index

* District of Columbia Code Annotated 1981 edition 1995 Cumulative Supplement (Pocket Parts) for Volumes 1, 2, 2A, 3, 3A, 5, 5A, 6, 7, 7A, 8, 9, 10, and 11

* United States Supreme Court Reports 2d, Lawyers Edition Interim Volume 114, 1994

* United States Supreme Court Reports 2d, Lawyers Edition Interim Volume 115, 1994

* United States Supreme Court Digest 1996 Pocket Parts Complete Set (West Pub. Co.)

* West's Federal Practice Digest 4th December 1994, Part 1, Supplementing 1995 Pocket Parts (2 paper copies)

Office of the Division Counsel
U.S. Army Corps of Engineers
South Pacific Division
630 Sansome Street, Room 1216
San Francisco, CA 94111-2206
POC Fran Russel
COM (415) 705-1445

* Board of Contract Appeals Decisions (CCH) Volumes 69-1 through 95-2

* Federal Reporter, Fed 2nd (West Publishing) Volumes 300 through 719

*U.S. Government Printing Office: 1996 — 404-577/40006

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