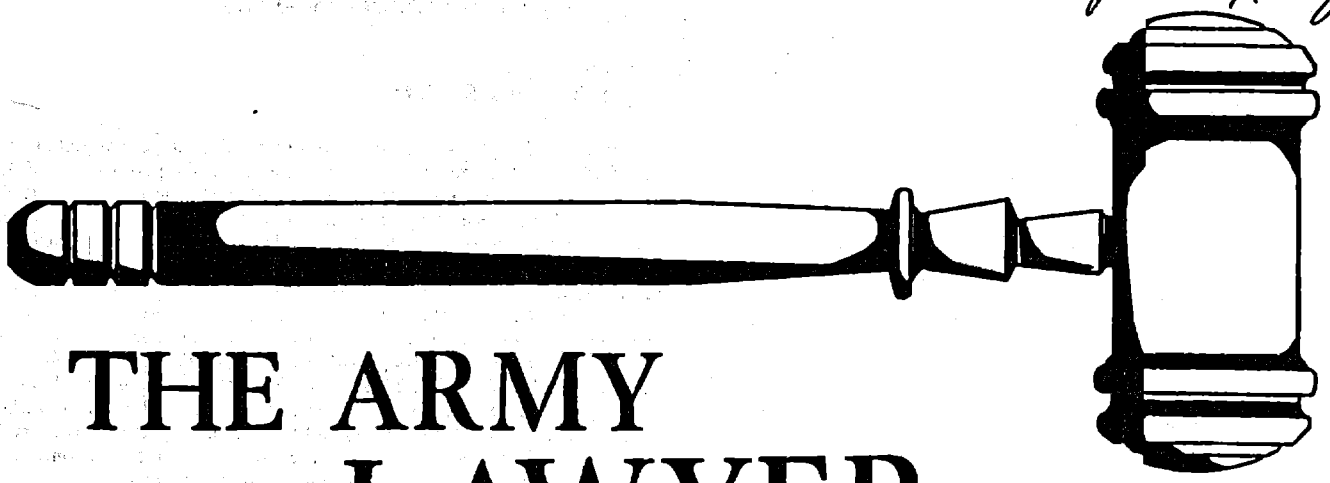
Capt O'Keeffe



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet
27–50–157

January 1986

Table of Contents

TJAG Policy Letter 85–6—Intelligence Law	3
TJAG Policy Letter 85–8—Supporting Reserve Component Commanders in UCMJ Action	4
TJAG Policy Letter 85–9—Army Legal Assistance Program	5
TJAG Policy Letter 85–10—Army Preventive Law Program	6
Grenada: A Claims Perspective	7
Questioning and Challenging the "Brutally" Honest Court Member: *Voir Dire* in Light of *Smart* and *Heriot*	17
A Primer on Nonresident Command and General Staff College Instruction	20
USALSA Report	23
TJAGSA Practice Notes	42
JAGC Automation Overview	51
Guard and Reserve Affairs Items	52
Enlisted Update	53
CLE News	53
Current Material of Interest	57

The Army Lawyer (ISSN 0364–1287)

Editor
Captain David R. Getz

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981) and the Uniform System of Military Citation (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903–1781.

By Order of the Secretary of the Army:

JOHN A. WICKHAM, Jr.
General, United States Army
Chief of Staff

Official:

MILDRED E. HEDBERG
Brigadier General, United States Army
The Adjutant General

Distribution. Special.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-AL

26 NOV 1985

SUBJECT: Intelligence Law - Policy Letter 85-6

STAFF AND COMMAND JUDGE ADVOCATES

1. Staff and command judge advocates must maintain close liaison with intelligence activities operating within their jurisdictions to ensure that intelligence personnel receive timely advice on the numerous statutes, executive orders, and regulations governing conduct of these activities.

2. Staff Judge Advocate, U.S. Army Intelligence and Security Command (INSCOM), has prepared training materials on several intelligence law topics and can conduct on-site training sessions. I encourage you to take advantage of this instruction. INSCOM attorneys also are available to assist on specific intelligence law questions.

3. Other steps that you should consider to facilitate effective liaison with local intelligence activities include--

a. Appointing a senior member of your office as the primary point of contact for intelligence liaison and advice.

b. Requesting command briefings on the organization and operations of local intelligence units.

c. Maintaining a current library of intelligence law materials, including AR 381-10, DOD 5240.1-R, Executive Orders 12333 and 12356, and other appropriate regulations in the 380 and 381 series.

d. Obtaining appropriate security billets and clearances for personnel providing legal advice on intelligence issues. Local intelligence units can assist you in determining required clearances.

William K. Suter

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-CL

13 DEC 1985

SUBJECT: Supporting Reserve Component Commanders in UCMJ Action - Policy Letter 85-8

STAFF AND COMMAND JUDGE ADVOCATES

1. The Total Force concept has significantly increased missions of the Reserve components, and led to the assignment of larger numbers of full-time soldiers, such as Active Guard/Reserve (AGR) personnel, to Reserve component units. As a result, Reserve component commanders have had to rely to a greater extent on legal offices of the supporting installation for maintenance of effective discipline within their units.

2. Support provided by staff and command judge advocates to Reserve component commands and legal staffs has been outstanding. Legislation now under consideration would allow Reserve component commanders greater UCMJ authority. If enacted, this legislation will call for even greater coordination and support.

3. Please review your procedures to ensure we continue to provide the best possible service in this area. In particular--

a. Give referred disciplinary matters as high a priority as those actions emanating from your own command.

b. Ensure expeditious handling and careful monitoring of these actions.

c. Keep Reserve component commanders and staff judge advocates advised as to the status of their actions.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LA

17 December 1985

SUBJECT: Army Legal Assistance Program - Policy Letter 85-9

COMMAND AND STAFF JUDGE ADVOCATES

1. Quality legal assistance for our soldiers and their families cannot be overemphasized. Some basic guidelines for achieving a successful Legal Assistance Program are:

a. Ensure adequate staffing. Policies that result in only new officers being assigned to legal assistance or limit the duration of the assignment to a short time should be avoided.

b. If possible, assign a member of the local bar to legal assistance.

c. In larger offices the Chief, Legal Assistance, should be a field grade officer or a senior captain who has completed the Graduate Course. This important job must be given the recognition that it deserves.

d. Ensure that the office has the necessary support, to include secretaries, notaries, and state-of-the-art office equipment to include computers.

e. Provide professional facilities and office furniture. Make the Legal Assistance Office the showplace of your office.

f. Budget for sufficient continuing legal education to enable attorneys to stay abreast of current developments, including local laws.

g. Encourage your office to take an energetic and innovative approach towards legal assistance, especially in the area of automation. I am continually impressed by the new ideas being generated by so many of our outstanding legal assistance officers.

2. In perhaps no other way does our Corps have as great an opportunity to help good soldiers and support the Army mission. It is imperative that we do the best job possible.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LA 17 December 1985

SUBJECT: Army Preventive Law Program - Policy Letter 85-10

STAFF AND COMMAND JUDGE ADVOCATES

1. Preventive law programs are established as a command responsibility under AR 600-14. To ensure that this responsibility is satisfied in a professional and proactive manner, staff and command judge advocates should--

a. Look for areas to promote local legislation favorable to soldiers.

b. Secure recognition by local bar associations of the need for free or reduced rate legal services for lower ranking soldiers.

c. Consider establishing an in-court representation program.

d. Assist Housing Referral Offices and Disciplinary Control Boards in securing fair treatment of military families by local landlords and businesses.

e. Identify businesses that take unfair advantage of soldiers and develop programs to help combat such practices.

f. Develop programs for informing soldiers. Work closely with the local Public Affairs Office to advertise services available through the Legal Assistance Office.

g. Develop an annual tax assistance program to assist soldiers and their families in the preparation of federal and state income tax returns.

h. Communicate regularly with the Chief, Legal Assistance Office, Office of The Judge Advocate General, to share innovative developments.

2. We have a wealth of legal talent and energy in our Corps. I encourage each judge advocate to work to take full advantage of these assets so that we render the best possible service to soldiers.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

Grenada—A Claims Perspective

Major Jeffrey L. Harris
U.S. Army Claims Service

Introduction

Would you accept a six-month TDY assignment to a foreign country which involved access to forty-five sandy beaches, boating and snorkeling on the Caribbean Sea, the wear of civilian clothes during the entire tour of duty, working directly for a United States Ambassador, lush island vegetation, "steel band" carnival competition, crab-races, duty-free shopping privileges, delightful year-round climate, kalaloo soup, and much more? I accepted the responsibility reluctantly! I was on my way to "The Isle of Spice" from the academic environment of the Graduate Course. Interspersed with the potential for almost unlimited leisure activities, however, were the responsibilities for administering a combat claims program in Grenada, West Indies. This article examines the role that the Headquarters, United States Army Claims Service (USARCS) and its claims officers and personnel played in Grenada. Specifically, it examines the actual presence and "hands-on" participation of the claims officers from mid-May 1984 until 3 November 1984 during the course of their responsibilities for the "combat" claims program. This article will highlight the unique nature of the problems, activities, and responsibilities that were encountered during the course of the program.

Background

Grenada is a small Caribbean island of 133 square miles,[1] about twice the size of Washington, D.C. It is volcanic with a central mountainous rain forest. The island enjoys a tropical climate, and its population of approximately 90,000 is mainly of black African descent. Grenada is affectionately known as the "Isle of Spice," and is famous for nutmeg, cocoa, and mace. The island consists of six parishes: St. George's, St. Andrew's, St. Patrick's, St Mark's, St. John's, and St. David's.[2]

In October 1983 Prime Minister Maurice Bishop and five members[3] of his cabinet were arrested and subsequently executed by elements of the People's Revolutionary Army, as a result of a power struggle within the government.[4] In the wake of the chaos and the breakdown of civil order that ensued, a joint U.S.-Caribbean force,[5] acting in response to an appeal from the Governor-General and to a request from the Organization of Eastern Caribbean States, landed in Grenada on 25 October to evacuate U.S. citizens whose safety was endangered and to help restore order. The joint mission was named Operation Urgent Fury. The combat operations were conducted between 25–27 October and resulted in the death of 19 U.S. service members.[6] The major areas of combat activity occurred at Pearls Airport, Grand Anse Beach, the Governor-General's house, Point Salines Airfield, True Blue Campus, Richmond Hill Prison, and Calivigny Barracks.

On 28 October 1983, the Army was given single-service responsibility by the Department of Defense to settle the claims that arose from the U.S. military operations. Claims operations in Grenada commenced on 30 October 1983 with the presence of judge advocates from the XVIII Airborne Corps. On 2 November, two one-member[7] and one three-member[8] foreign claims commissions were established. Shortly thereafter, a military[9] and a civilian attorney[10] were sent from the Foreign Claims Division, USARCS, Fort Meade, Maryland, to assist the commissions. The appointment and authority of the foreign claims commissions were governed by the Foreign Claims Act,[11] as implemented by Department of Defense Directive 5515.8[12] and AR 27–20, chapter 10. The Act authorized the administrative settlement of claims of inhabitants of a foreign country, or by a foreign country or a political subdivision thereof, against the United States for personal injury, death, or property damage, arising outside the United

---

[1] *See* figure 1.

[2] *See* Bureau of Public Affairs U.S. Dep't of State, Background Notes, Grenada 1 (Feb. 1984).

[3] Jacqueline Creft (Education); Unison Whiteman (External Affairs); Vincent Noel; Norris Bain (Housing); and Fitzroy Bain.

[4] For a discussion of the historical development of the Grenadian conflict, *see* Romig, *The Legal Basis for United States Military Action in Grenada*, The Army Lawyer, Apr. 1985, at 1.

[5] The force included units from the United States, Barbados, Jamaica and four member states of the Organization of Eastern Caribbean States: Antigua, Dominica, St. Lucia, and St. Kitts-Nevis.

[6] Released figures reflect twelve Army, four Navy, and three Marine casualties. Army Times, Nov. 5, 1984 at 42, col. 4.

[7] *See generally* Dep't of Army, Reg. No. 27–20, Legal Services—Claims, para. 10–19*a* (18 Sept. 1970) [hereinafter cited as AR 27–20]. One of the one-member commissions was composed of an officer of the Judge Advocate General's Corp, CPT Marc Warren, was designated as Foreign Claims Commission #402. The remaining one-member commission was composed of an officer with legal training and other experience as was considered adequate by the appointing authority to qualify her to analyze evidence, determine facts, and apply pertinent legal principles. This officer, MAJ Mary Wright, from the U.S. Army Institute for Military Assistance, had the authority to approve in full, in part, or disapprove claims presented in or amended to an amount not in excess of $500.00 U.S.

[8] *See generally* AR 27–20, para. 10–19*c*. This three-member commission consisted of LTC John Weber, MAJ Mary Wright and CPT Marc Warren. It was designated as Foreign Claims Commission #40.

[9] LTC Paul Seibold, Chief, Foreign and Maritime Claims Division.

[10] Jay Loane.

[11] 10 U.S.C. § 2734 (1982) (*as amended by* Pub. L. No. 98–564, 98 Stat. 2918 (1984)).

[12] Dep't of Defense Directive No. 5515.8, Single Service Assignment of Responsibility for Processing of Claims (Nov. 14, 1974).

States incident to non-combat activities of the Army.[13] This "combat exclusion" was the basis for the initial denial of a vast majority of claims filed in Grenada. When a policy decision was made to pay combat claims, as an exception to the statute, this first period of claims settlement became known as Phase I. It remains a viable program as non-combat related claims continue to be received and settled by the claims authorities at Fort Bragg, North Carolina.

In February 1984, the Department of State and the Agency for International Development (AID) began working with the USARCS to establish procedures for USARCS to settle combat damage claims in Grenada using AID funds. The Department of State and AID viewed this program as a means of demonstrating American goodwill on Grenada and as a complement to other AID-funded projects, such as completion of the Point Salines Airport.[14]

A Participating Agency Service Agreement (PASA) was eventually prepared by AID incorporating the basic agreement and understanding between AID, USARCS, and the Department of State. The PASA was approved in May. Under it, USARCS settled combat claims in Grenada, using its personnel, but utilizing AID funds for claims payments ($1,600,000.00) and administrative expenses ($200,000.00).

A claims letter of instruction (LOI) was prepared to govern the nature and extent of payments and to establish the procedures for claims adjudication. This seven-page document comprehensively covered the general areas of concern which were confronted during the claims operation. The LOI served to supplement the guidance found in AR 27–20. The LOI defined the manner in which a claim was to be presented, designated certain classes of people as proper party claimants, established payment ceilings for different types of claims, defined the classes of payable claims, specified fourteen grounds under which a claim would not be paid,[15] designated settlement authorities, and specified settlement procedures.

During the course of the claims operations, the LOI served as the definitive guidance on settling Grenadian claims. It was ideal in many cases because, although certain standards were set, there was enough flexibility in the document to permit the claims officers to adjust their adjudication to the facts in a particular circumstance.

Types of Claims

Personal Injury

Claims for personal injury were normally limited to the award of special damages as that term is customarily applied under general principles of American law. Consequently, compensation for personal injury claims was limited to incurred medical and hospital expenses, anticipated medical expenses, incurred or anticipated loss of earnings and services, and if appropriate in a particular case, diminution of earning capacity or employability. The LOI directed that compensation would not be made for those items which are normally considered general damages, such as mental or physical pain and suffering, inconvenience, mental anguish, loss of gratification or lifestyle which could not be measured definitely in terms of money, or any other damage which was imputable as the natural, necessary, and local consequence of the wrongful act and injury.[16] Compensation in any case could not exceed the equivalent of $25,000.00 U.S.[17]

---

[13] AR 27–20, para. 10–2*b*.

[14] The new airport was officially dedicated and opened for air traffic in October 1984.

[15] The LOI, para. 1–7, directed that a claim would not be allowed under this program which—

a. Is cognizable and payable under any existing claims statute or regulation.
b. Is purely contractual in nature or is for interference with contract rights.
c. Arises from private or domestic obligations.
d. Is based solely on compassionate grounds.
e. Is for death or injury of a member or employee of the Armed Forces of the United States or of the Caribbean peacekeeping forces, including nonappropriated fund employees.
f. Is for the personal injury or death of any employee for whom benefits are provided under workmen's compensation laws or regulations. If, in the opinion of at least two of the three designated local representatives of the contracting parties (see paragraphs 1–14*a* and *c, infra)* the claims should be considered payable in some amount, e.g., adequate compensation is not payable under applicable workmen's compensation laws, such payment may be made.
g. Is for taking of property as by technical trespass or overflight of aircraft; is of a type contemplated by the Fifth Amendment to the United States Constitution; or otherwise constitutes a taking. See paragraph 2*c*, AR 405–15, and paragraphs 13–8 and 13–11, AR 27–20.
h. Is for reimbursement for medical or burial services or any other goods or services furnished at the expense of the United States.
i. Is for rent, damage or other payments involving the acquisition, use, possession or disposition of real property or interests therein by and for the Armed Forces of the United States. Real estate claims founded on contract will normally be processed under AR 405–15 (See paragraph 13–11, AR 27–20).
j. Is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of this program (see, e.g., paragraph 1–4*b, supra*).
k. Is for damages caused by the imposition or establishment of a quarantine or curfew.
l. Results wholly from the negligence or fault of the claimant or his agent.
m. Arises from or out of an assault, battery, false arrest, false imprisonment, false detention, malicious prosecution, abuse of process, libel, slander, misrepresentation or deceit.
n. Is for damages caused by the fiscal operations of any agency of the United States.

[16] *See generally* AR 27–20, para. 10–19 and the LOI, para. 1–6*c*.

[17] LOI, para 1–6b(2). Even though the official Grenadian currency is the East Caribbean dollar, for ease of understanding, dollar amounts will be expressed in U.S. dollars.

Because of the amount of aerial ordnance which was dropped prior to and during the invasion, many claimants suffered from metallic fragments which had become imbedded in their bodies. The resulting puncture wounds, lacerations, and lesions caused, in all cases, some degree of cosmetic deformity to the skin. In many cases the shrapnel caused physical deformity, loss of limbs, and, in one case, the loss of an eye. Some of the metallic fragments caused superficial wounds, while others caused penetrating wounds that resulted in damage to underlying organs, tissue, and nerves. The lesions characteristically resulted in scars which thickened and elevated above the surrounding or adjacent skin surface. Most of the injuries were the cause of ongoing discomfort or pain.

A large portion of the personal injury claims[18] were well documented. Most were subject to visual verification. The claims personnel occasionally found themselves in the unsettling position of viewing the various wounds in an effort to substantiate the nature and extent of their injuries. Some of the injured parties were more than willing to show their wounds as if they were war badges! The claimants had usually received a physical examination or written diagnosis from a trained physician at General Hospital, St. George's, or from one of several practitioners. Some of the medical examinations contained gratuitous statements concerning the potential "value" of the injury or loss for claims purposes. For example, in one instance the doctor assessed the nature of shrapnel wounds and concluded "compensation of twenty five thousand dollars is recommended." Although appreciated, these recommendations had little impact on the amount of the final claims award.

Property Damage

The 775 claims for property damage[19] represented the lion's share of the more than 852 claims logged by the claims office. The property damage consisted largely of structural damage to dwellings and to the loss and destruction of contents. Many of the property damage claims also involved the loss of annual crops and domestic animals and fowl. During the course of the search operations conducted by the 82d Airborne Division, many doors and windows were forced open. A sizeable portion of the property damage claims included these items. Many more of the claims involved the damage to furniture and clothes which resulted from the blast effects of ordnance.

In determining compensation for damage to or destruction of property, the provisions of AR 27–20, para 2–17 were applied. If the property could be economically repaired, the allowable compensation was the actual or estimated net costs of repair needed to restore the property to substantially the same condition which existed immediately before the damage.[20] The measure of damages for lost or destroyed property was the value of the property immediately before the incident.

Claimants were required to substantiate the replacement cost with written estimates of replacement submitted on the stationery of a local business firm.[21] Claimants were also generally required to substantiate the loss by pictures or written statements from friends or relatives who could attest to the ownership or possession. In many cases the location of the loss itself indicated the nature and extent of the destruction inasmuch as some areas were the subject of extensive fire fighting and bombing.[22] In other cases, visual inspection of the site by claims personnel confirmed the loss.

Wrongful Death Claims

Claims based upon wrongful death were presented by the survivors, executors, or administrators of the deceased's estate. A majority of these claims were presented by the surviving spouse or children. A total of 28 wrongful death claims were presented for consideration.[23]

We imposed certain rules upon the death claims. Survivors had to substantiate their relationship to the deceased. A surviving spouse had to provide a copy of a marriage certificate, and children had to bring in birth or baptismal certificates. Most of the claimants were asked to provide a small estate letter of administration from the Supreme Court of Grenada. Each claimant had to provide a certified death certificate.

The LOI specified that in no event could a death claim payment exceed $25,000.00 U.S.[24] The claimants had the difficult and emotional problem of placing a dollar figure on the human aspects of a friend or loved one. The amount of requested compensation ultimately ranged from a high of $189,718.02 U.S. to a low of $929.00 U.S.[25]

Compensation was based upon what the decedent's life was worth to the survivors in a pecuniary sense.[26] This rule also embraced the present worth of the decedent's probable earnings during the probable duration of decedent's life. In assessing the valuation of the death claims, the claims personnel relied on the advice of a local barrister as to Grenadian law.

---

[18] Twenty claims involving only personal injury were submitted for consideration. These claims totalled $290,497.02. Personal injury was cited in conjunction with nineteen other property damage and wrongful death claims. J. Harris, Grenada Statistics (Nov. 1984) (unpublished notes) [hereinafter cited as J. Harris].

[19] These claims totalled $3,568,176.97 U.S. in requested compensation. J. Harris, *supra* note 17.

[20] AR 27–20, para. 2–17*a*.

[21] *Id.* at para. 2–17*d*.

[22] Many of the claims submitted were from the Parish of St. George's where most of the initial and extensive fighting occurred. A total of 774 claims originated from this parish alone.

[23] J. Harris, *supra* note 18.

[24] LOI, para. 1–6*b*(2).

[25] J. Harris, *supra* note 18.

[26] LOI, para 1–6*b*(2).

Sixteen death claims[27] were based on the bombing of the Richmond Hill Mental Hospital. Hostile fire was directed from the mental hospital and it was subsequently targeted by U.S. combat forces.[28] The hospital took a direct hit, resulting in the deaths of inmates and staff personnel. The destructive force of the armament resulted in a majority of the bodies being strewn about the hospital grounds and buried under considerable amounts of rubble.[29] No single body was recovered intact. Other bodies were in advanced stages of decomposition by the time the hospital rubble was searched. Unable to positively identify most of the bodies, the hospital administrators reported many of the deaths to local health officials based upon records of persons that remained unaccounted for. The deaths were later reflected in the Office of the Registrar-General of Births and Deaths for Grenada.[30] Death certificates were issued based upon these reports.

The mental hospital-related death claims were adjudicated fairly quickly. Unlike mental patients in the United States, those Grenadians committed to the mental hospital were generally committed for an indetermined period of time. The inmates were generally expected to spend the better part of their lives at the hospital, regardless of the prospects for any "cure" of their mental disease or defect.[31] Many of the inmates had no previous job skills, were elderly, and in average to poor physical health. Friends and relatives were responsible for food, clothes, and what few creature comforts the inmates enjoyed. Consequently, most of the inmates were of little "economic value" to their survivors. They were actually considered charges upon their estate. These considerations played a large role in determining the measure of damages to be paid for these wrongful death claims. Absent exigent circumstances, asylum related death payments were limited to $929.00 U.S.[32]

Extensive fire-fighting was conducted in and around homes and businesses throughout the island. This involved the bombing and damage to different homes which in turn resulted in the accidental deaths of non-combatants. This ultimately served as the basis for wrongful death claims. Characteristically, the claims for non-asylum related deaths involved larger demands with a corresponding increase in the amount of compensation provided to the survivors. Twelve claims in the amount of $369,469.76 U.S. were submitted for consideration and payment. Seven of these claims were paid in the amount of $45,675.51 U.S.[33]

The non-mental hospital-related deaths generally involved individuals who had been gainfully employed, were in good health and relatively young, and had surviving dependents. Recovering the remains of each of these deceased resulted in the separate consideration and payment of funeral related expenses.[34] Because of the potentially large amount of money involved, the claims officer recommended that the claimants seek a legal advocate to represent their interests. This approach removed the sometimes emotional aspect of the negotiations from the settlement process. It also placed a final settlement into the Grenadian courts in those few cases where surviving children fought among themselves for the claims award.

Claims Adjudication and Settlement

The Claims Form: SF 95

The claims office distributed the SF 95 (Claim for Damage, Injury, or Death) for use by potential claimants.[35] The front of the form contained 16 blocks which requested information concerning the time, date, location, and circumstances surrounding the loss. Insurance information was provided on the back of the form. Although eighty-five percent of the adult population was literate, problems frequently arose concerning the accurate completion of the claim form and the interpretation of the requested information. Nuances of the Grenadian way of life crept into the forms. For example, it was common for claimants to designate the location in block #7, Place of Accident, as being "1 mile north as the crow flies" without providing any further specific information on the incident location.

The majority of problems involved in the completion of block #11, where claimants were required to provide a description of the accident. Many of the forms simply did not reflect enough information to support a claim. Other forms failed to reflect a nexus to U.S. liability—that U.S. armed forces were directly responsible for the loss or damage. Because this nexus was a prerequisite for payment, the

---

[27] These claims totalled $107,333.38 U.S. in requested compensation. Compensation totalling $27,155.71 U.S. was eventually awarded. J. Harris, *supra* note 18.

[28] Interview with Richard Tierney, First Secretary, U.S. Embassy, in Grenada (June 1984).

[29] The Army entered into a contract with a local funeral home for the disposition of the remains. Because of the mass burials, death claims were not individually honored for what would have normally involved embalming, hearse, or other such related expenses. One individual in the asylum escaped the blast effects of the bombing but died from shock six days later. This claim for funeral related expenses was honored though it was classified as an asylum related death.

[30] The deaths were registered on 29 and 30 November 1983.

[31] The average age of an accidentally killed mental hospital patient was 53 years. The youngest inmate killed was 32-years-old, and the oldest was 86. The deceased inmates had spent an average of nine years and seven months in the hospital prior to the bombing. The shortest period of time spent in the hospital prior to the bombing was one day. The longest period of time spent in the hospital prior to the bombing was 35 years. J. Harris, *supra* note 18.

[32] The highest asylum related death claim was paid in the amount of $5,579.00 U.S. The deceased was an employee at the asylum and was survived by dependents. These factors justified the increased award.

In determining an appropriate award, local law and custom relating to elements of damage and compensation were applied. Because of the need for specialized advice on Grenadian law, the claims office sought the advice and guidance from Mr. E.C. Wilkinson, LLB, Barrister-at-Law and former Registrar of the Grenadian Supreme Court. His legal brief on local assessment of damages was instrumental in establishing a workable and appropriate policy.

[33] J. Harris, *supra* note 18.

[34] The typical funeral bill slightly exceeded $743.99 U.S. and included the following charges:
Coffin, $364.44 U.S.; Embalming, $316.10 U.S.; Hearse, $37.18 U.S.; Grave, $24.54 U.S.; Clothing, varied.

[35] *See* figure 2.

forms had to be carefully reviewed during the intake process to ensure that this information appeared on the face of the form or in accompanying papers. It was necessary for the claimant to show a direct link between the loss and U.S. combat activity because the claims office rejected all "causal connection" and "but for" arguments that some claimants attempted to pose. For example, a typical unsuccessful claim involved a member of the People's Revolutionary Army (PRA) or Cuban soldier who, in an attempt to escape the advancing U.S. soldiers, backed a jeep into a claimant's home or store. Had it not been for the U.S. activity, the claim alleged, the PRA or Cuban soldier would not have been fleeing and thus would not have backed the vehicle into claimant's property.

The claimants were required to affix their signature in block #15 of the form. Special attention was directed to this requirement because claims personnel were concerned that they paid the proper people. Occasionally the signature of the claimant found on the settlement voucher did not match the signature found on the claim form. When confronted with the discrepancy, the claimant would generally admit that a relative had authored the signature on the claim form. Many of the Grenadians were embarrassed to admit that they could not write or sign their own name. Because the settlement vouchers were signed in the presence of the claims officials, the discrepancies were noted immediately. Finally, in an effort to verify payment to the proper party claimant, the claimants had to produce a picture identification of some type before the AID disbursing official prepared a draft for payment. A passport or driver's license was generally required. Because most Grenadians, particularly the older people, had no form of picture identification, claims personnel sometimes had to relax this requirement.

Many of the forms reflected no sum certain or total amount of the requested compensation at block 10d. Many of the Grenadians seemed genuinely thankful to be receiving any compensation at all and left the completion of this block to the claims personnel. Brief periods of counselling with the claimant in an attempt to appreciate the full measure of the economic loss enabled the claimant to document block 10d in a fair manner.

Processing

In processing small claims, generally those under $558.00 U.S., the settlement officer would "vouch" for the individual's identity and the draft would be issued. This approach was supported by the fact that in a majority of cases the claims office's local hires would know the claimant or know of the claimant's family and vouch for the claimant's identity. In those cases where the dollar amount was large or where none of the local hires could vouch for the claimant's identity, the claimants were asked to either bring in a birth or baptismal certificate, produce a sworn statement from a Justice of Peace as to their identity, or bring in a reputable third party or witness to identify the claimant. The identifying third party or witness had to be known by the local hire or was required to produce a valid form of picture identification, generally a passport.

The claims regulation and the LOI placed a burden on the claimant to substantiate ownership or possession, loss or damage, and the value of the property.[36] This requirement provided unique challenges to the claims personnel. The average Grenadian kept few or no written records of the types or quantity of property possessed. Neighbors shared the common knowledge that a particular claimant owned a color TV, stereo system, or a certain number of goats or sheep, or that a particular person owned so many breadfruit trees. In cases of loss, claimants were frequently asked to bring in a third party or other disinterested witnesses to vouch for ownership. The problems with this approach are obvious. If a claimant wanted to present a fraudulent claim, he need only persuade a friend or other party to lie on his behalf. The claimant's demeanor or inconsistencies in the account of his loss would frequently alert the claims personnel to potentially fraudulent claims. Compensation for these potentially fraudulent or unsubstantiated claims was routinely denied. The Grenadians are extremely honest people, but a few fraudulent claims were probably honored.

Claimants were frequently unable to substantiate home and land ownership with a deed, abstract of title, quitclaim, or other legal instrument. Again, it was generally a matter of common knowledge that a particular claimant owned a home or possessed a certain tract of land for many years. The inability of most to produce any written document as evidence of ownership was compounded by the fact that under Grenadian practice there frequently were no estate proceedings; heirs simply divided the land among themselves.

Because most of the real property claims involved large amounts of money,[37] claimants presenting such claims were required to take extraordinary steps to substantiate home ownership. In addition to witness statements, copies of deeds were required when available. Statements from the land registry office that an unsuccessful file search was made to determine ownership were also sometimes required. In other cases the claimant was asked to prepare a sworn written statement as to ownership, before a justice of the peace.

Because of the unique manner in which personal property is acquired and maintained in Grenada, the regulatory guidance[38] concerning depreciation was abandoned during the adjudication process. Replacement cost is usually computed on the basis of a new item which is substantially similar to the item which was lost, damaged, or destroyed, less the appropriate percentage of depreciation shown in the

[36] *See* AR 27-20, para. 11-12b; LOI, para 1-3d.

[37] The real property claims generally involved the destruction of a residence. Major structural repair or replacement was involved in a majority of these claims. The claims officers sought the guidance from Mr. G.V. Nurse, construction engineer, for on-site inspections and estimates for restoration. Several of the property damage claims were based upon the structural damage which was caused by the shock effects of impacting missiles. Although the homes remained physically untouched by the munitions, those homes located in or near the impact areas suffered wall-cracks and weakened foundations.

[38] AR 27-20, para. 11-15.

depreciation guide to compensate for the age and length of time the item has been in use.[39] This rule was abandoned in Grenada. The rate of decrease in value of the common types of articles could not be accurately measured by the normal expected periods of useful life and serviceability. Because of the general nature[40] of personal property in Grenada and the unusually high prices for such items, it was considered inappropriate to utilize depreciation factors, as the value of these items had decreased immeasurably due to wear and tear, natural deterioration, obsolescence, or depletion. The failure to apply depreciation to the lost, damaged, or destroyed personal property provided a windfall to most Grenadian claimants. Funds were ultimately expended to replace old items which had been used for some time with current market items at the then-prevailing market price.

Disapproved Claims

Although the claims LOI outlined fourteen grounds[41] upon which a claim would not be allowed, the two areas which caused the most concern for the claims officers involved looting and political considerations.

Immediately following the assassination of Prime Minister Bishop and members of his cabinet, local Grenadians engaged in extensive and indiscriminate looting at unsecured private homes and business firms alike. Because of the widespread nature of the looting and the types of property taken, the equivalent of $1,500,127.00 U.S. worth of property was alleged to have been looted. The U.S. Government could not subsidize this civil disorder nor could it attempt to compensate for looting losses caused other than by U.S. armed forces. Consequently, the claims personnel adopted an early policy of not honoring claims based upon allegations of looting. Many claims were submitted which alleged looting as the sole basis of recovery. These claims were routinely denied. Letters of denial were ultimately addressed to 111 claimants based upon this policy. Many other claims alleged a loss of personal property due to looting together with the personal injury or wrongful death aspect of a claim. In such hybrid cases, the looting allegation was segregated from the remaining cognizable and potentially compensable part of the claim.

The LOI disallowed those claims that were not in the best interests of the United States, contrary to public policy, or otherwise contrary to the basic intent of the program. Likewise, claimants whose interests were considered inimical to the interests of the United States were excluded from consideration.[42] These provisions involved far-reaching practical and political considerations for the claims officers.

Claims were denied for those persons whose deaths, injury, or property loss or damage was incurred while in the course of engaging, encouraging, or abetting in resistance to the U.S. armed forces.[43] In a series of companion cases, a Catholic priest unsuccessfully attempted to secure compensation for four young boys who were engaged in combat against our forces. The boys, ranging in age from sixteen to nineteen years, were allegedly taken at gunpoint by a PRA soldier, provided with weapons, and driven to a site where they encountered U.S. soldiers. A fire fight ensued resulting in the death of the PRA soldier and two of the boys. The other two boys were seriously injured. Because of the unique nature[44] of the claims, a letter of denial, signed by the U.S. Ambassador to Grenada, was dispatched to the four claimants.

Settlement Action

The settlement officers[45] had the authority to approve in full, in part, or disapprove claims not in excess of $25,000 U.S. without prior in-country coordination. This meant that the claims officer had near *carte blanche* authority to deny or approve any claim for payment that did not exceed the $25,000.00 limitation. A clear majority of the claims presented were resolved within the jurisdictional authority of the settlement officer.

Any award deemed appropriate for settlement by a settlement officer which exceeded the equivalent of $25,000.00 U.S. but which did not exceed the equivalent of $100,000.00 U.S. could not be paid without in-country coordination with officials from the Department of State and AID.[46] In the few circumstances where this coordination was required, the settlement officer prepared a seven-paragraph memorandum of opinion.[47] The memorandum was then provided to a State Department official, usually the Ambassador or the Deputy Chief of Mission, and to a representative from AID for their review and comment. Each of these cases was individually discussed and resolved at regularly scheduled meetings set up for this purpose.

Any award deemed appropriate by a settlement officer which exceeded the equivalent of $100,000.00 U.S. first required in-country coordination with representatives from

---

[39] *Id.* at para. 11–15*a*(1).

[40] Personal property was extremely expensive to acquire for the average Grenadian. Once it was obtained, the property was held for inordinate periods of time. Personal property such as furniture and appliances were inadequate by U.S. standards, yet met the needs of the majority of Grenadians. The more affluent could afford to purchase quality items abroad and pay the often exorbitant import taxes.

[41] *See supra* note 15.

[42] LOI, para. 1–4*b*.

[43] Five claims were denied for political reasons. J. Harris, *supra* note 18. The deceased were all involved in action inimical to the interests of the United States just prior to their deaths.

[44] Notwithstanding the issue of voluntariness, the young boys were nevertheless engaged in firing upon U.S. forces in combat. This hostile activity could have potentially resulted in the injury to or death of an American soldier. This fact weighed heavily in our final decision to deny the claim.

[45] LTC Paul Seibold, Jay Loane, John Morton, MAJ Jeffrey Harris. Their authority was derived from the LOI, para. 1–8.

[46] LOI, para. 1–8*c*(4).

[47] The memorandum outlined the claimant's name and address, date and place of incident, amount and date of filing, type of claim, full factual background, opinion, and recommendation.

the Department of Justice and AID.[48] The file, with the in-country recommendation, would then be forwarded to the Commander, USARCS who could, after coordination with representatives of the Department of State and AID, approve the recommended award, or any lesser amount, or disapprove the claim.[49]

Publicity

The claims program received invaluable assistance from the United States Information Service (USIS) located in downtown St. George's. Prior to discussing the claims program with a reporter, the claims officer would routinely seek clearance from a U.S. Embassy staff official and the USIS representative.

At various stages of the program the claims office received radio publicity on the British Broadcasting Company, Radio Grenada, and Radio Antilles. Extensive newspaper coverage was provided in the island newspaper, *The Grenadian Voice.* Additional international coverage on some aspects of the claims program appeared in various newspapers and magazines.

The extensive nature of the publicity contributed to the program's success. Claimants were informed not only of the program's nature and existence but also of the time schedules and requirements for payment. The claims officers had to take great care, however, to ensure that the information provided in the interview was later accurately reported. For example, during the course of an interview with a local representative of the UPI, I related that "the largest sums were paid to those who suffered extensive damage to their property." The draft document which was presented to me for review prior to publication had been subjected to political editorializing which resulted in the statement being changed to read: "The largest sums were paid out to those people who suffered extensive damage to their property during the combat to topple a leftist junta that had seized power in a bloody coup in which Prime Minister Maurice Bishop and several others were killed."

On another occasion the claims officer presented an article on the combat claims program to USIS for publication in the island newspaper. A portion of the article addressed the politically sensitive area of types of claims that would not be paid. The prepared text reflected that "payment will not be made for losses resulting from looting. . . ." The text that actually appeared in print omitted the "not" so that the article read "payment will be made for losses resulting from looting. . . ." The hopes of several anxious claimants were destroyed once the error was explained, and the claims officer spent a few embarrassing moments explaining the error to the U.S. Ambassador and members of his staff.

Conclusion

The combat claims program in Grenada is now a unique chapter in the history of the U.S. Army Claims Service. The program was an extension of an already successful "good will" program administered by the Agency for International Development. Between 1 June and 4 November 1984, 852 claims were presented totalling $5,277,287.00 U.S. The claims personnel processed more than 1,300 claims inquiries and paid 649 claimants $1,858,307.25 U.S. In human terms, the program served to alleviate the suffering of hundreds of Grenadians who otherwise would not have received compensation for their combat-related losses. In this regard the program was a resounding success. The success of the program must also be measured by the impact that it had on the claims personnel. The claims operation provided unusual yet fulfilling learning experiences for the claims officers and personnel involved in the administration of the program. Should the need for such claims experience ever arise again, the Claims Service will stand ready to successfully meet the challenge. It has now been tested under the fires of the Grenada combat claims program.

---

[48] LOI, para. 1-8c(5).

[49] Fortunately, only one claim was subjected to this lengthy and time-consuming process. The claimant eventually received compensation totalling $272,213.02 U.S.

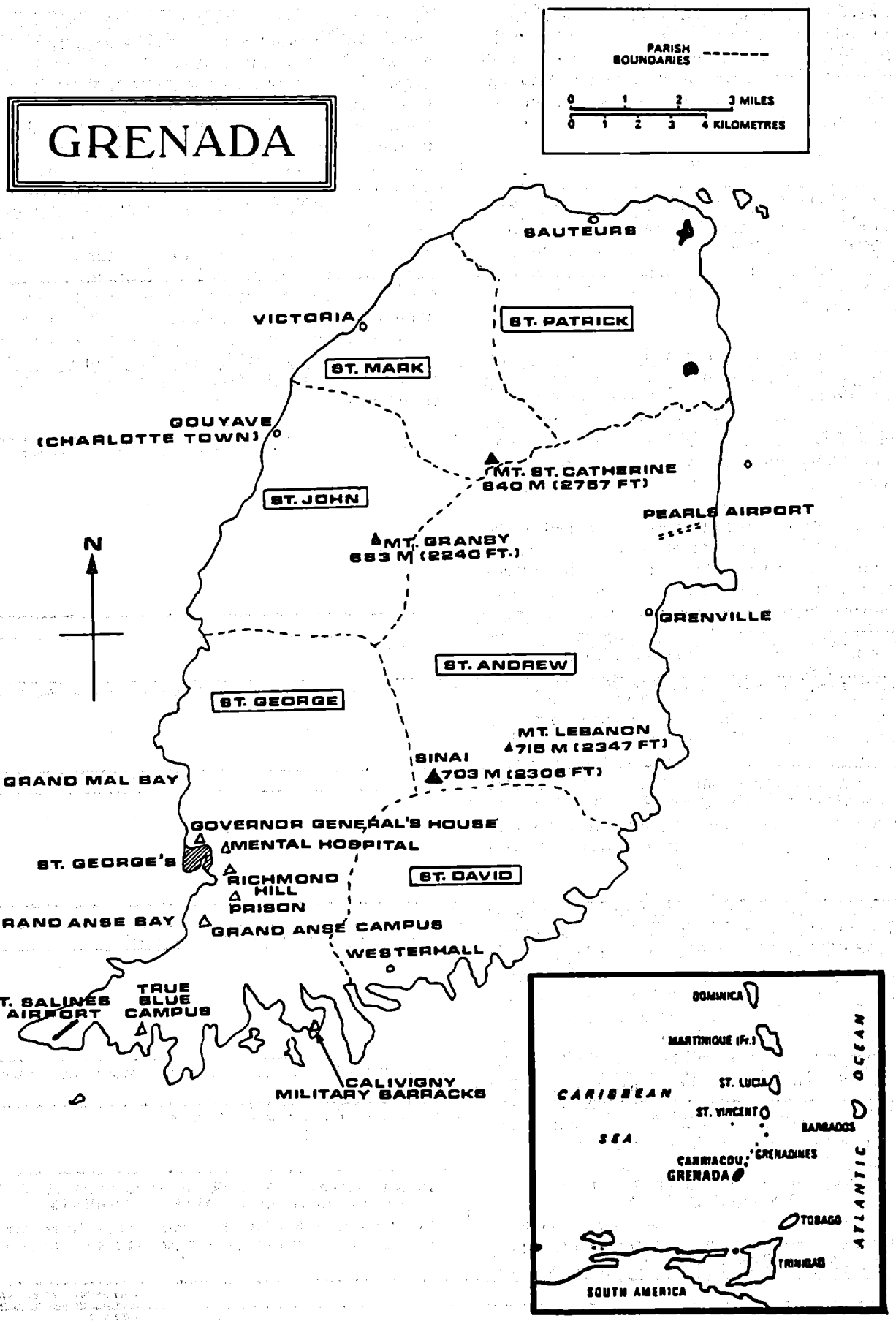


Figure 1. Map of Grenada

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Prepare in ink or typewriter. Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary.

FORM APPROVED OMB NO. 43-R0597

1. SUBMIT TO:	2. NAME AND ADDRESS OF CLAIMANT (*Number, street, city, State, and Zip Code*)

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. AGE	5. MARITAL STATUS	6. NAME AND ADDRESS OF SPOUSE, IF ANY (*Number, street, city, State, and Zip Code*)

7. PLACE OF ACCIDENT (*Give city or town and State; if outside city limits, indicate mileage or distance to nearest city or town*)	8. DATE AND DAY OF ACCIDENT	9. TIME (*A.M OR P.M*)

10. AMOUNT OF CLAIM (*in dollars*)

A. PROPERTY DAMAGE	B. PERSONAL INJURY	C. WRONGFUL DEATH	D. TOTAL

11. DESCRIPTION OF ACCIDENT (*State below, in detail, all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof*)

12. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (*Number, street, city, State, and Zip Code*)

BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE (*See instructions on reverse side for method of substantiating claim*)

13. PERSONAL INJURY

STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM

14. WITNESSES

NAME	ADDRESS (*Number, street, city, State, and Zip Code*)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

15. SIGNATURE OF CLAIMANT (*This signature should be used in all future correspondence*)	16. DATE OF CLAIM

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (*See R.S. §3490, 5438; 31 U.S.C. 231.*)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (*See 62 Stat. 698, 749; 18 U.S.C. 287, 1001.*)

95-106

STANDARD FORM 95 (Rev. 6-73) PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

Figure 2. Claim for damage, injury, or death

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 *et seq.*, 28 U.S.C. 2671 *et seq.*, 28 C.F.R. 14.3.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items—Insert the word NONE where applicable

Claims for damage to or for loss or destruction of property, or for personal injury, must be signed by the owner of the property damaged or lost or the injured person. If, by reason of death, other disability or for reasons deemed satisfactory by the Government, the foregoing requirement cannot be fulfilled, the claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing authority to act.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 10 of this form. Separate claims for personal injury and property damage are not acceptable.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

Any further instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid".

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

17. DO YOU CARRY ACCIDENT INSURANCE? ☐ YES, IF YES, GIVE NAME AND ADDRESS OF INSURANCE COMPANY (*Number, street, city, State, and Zip Code*) AND POLICY NUMBER. ☐ NO

18. HAVE YOU FILED CLAIM ON YOUR INSURANCE CARRIER IN THIS INSTANCE, AND IF SO, IS IT FULL COVERAGE OR DEDUCTIBLE?

19. IF DEDUCTIBLE, STATE AMOUNT

20. IF CLAIM HAS BEEN FILED WITH YOUR CARRIER, WHAT ACTION HAS YOUR INSURER TAKEN OR PROPOSES TO TAKE WITH REFERENCE TO YOUR CLAIM? (*It is necessary that you ascertain these facts*)

21. DO YOU CARRY PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE? ☐ YES, IF YES, GIVE NAME AND ADDRESS OF INSURANCE CARRIER (*Number, street, city, State, and Zip Code*) ☐ NO

STANDARD FORM 95 BACK (Rev. 6-78)

GPO : 1981 O - 341-526 (6617)

Figure 2. Claim for damage, injury, or death—Continued

Questioning and Challenging the "Brutally" Honest Court Member: *Voir Dire* in Light of *Smart* and *Heriot*

Major Thomas W. McShane
Instructor, Criminal Law Division, TJAGSA

Two recent opinions of the Court of Military Appeals addressed challenges for cause against court members based on their responses to questions posed during *voir dire.* The first of these, *United States v. Heriot,*[1] dealt with a member who displayed an inflexible attitude as to sentence. The second case, *United States v. Smart,*[2] concerned two members who admitted that their prior experiences as crime victims might affect their decisions in court. Because military judges and trial attorneys frequently encounter similar problems during *voir dire,* a closer look at *Heriot* and *Smart* should prove helpful in deciding how to treat the "brutally" honest court member.

United States v. Heriot

Heriot was tried before members for violations of Naval regulations alleging the wrongful possession, transfer, and sale of marihuana. He was convicted and sentenced to a bad-conduct discharge (BCD), confinement for three months, and reduction to E–1. During an extensive *voir dire,* one of the court members, CPT D, indicated that if the accused, a Marine staff sergeant, was convicted, his sentence should include at least a one grade reduction. CPT D explained that a Marine staff sergeant convicted of a drug offense should not retain his noncommissioned officer status. He maintained this position despite his belief that the sentence need not include either a punitive discharge or confinement.[3]

The individual military defense counsel challenged CPT D for cause because he was "fixed and inflexible in his attitude toward reduction."[4] The military judge denied the challenge and offered a fairly lengthy explanation for his action. Essentially, he said that the member's fixed attitude on such a minor aspect of sentencing was not unreasonable in light of the offenses charged. The military judge applied what he termed a "rule of reason" to deny the challenge, inviting appellate authorities to review his decision in the event of a conviction.[5] The Navy-Marine Court of Military Review did so and affirmed the conviction,[6] concluding that although CPT D did in fact have an inelastic attitude toward one portion of the sentence, the military judge under the circumstances did not clearly abuse his discretion in denying the challenge.[7] In dissent, Senior Judge Gladis stated that the law in the area was clear: the military judge must grant a challenge for cause against members who display an inelastic attitude toward sentencing, regardless of the precise nature of the predisposition. He added that while the majority opinion was convincing, only the Court of Military Appeals could discard its own rules.[8]

In its opinion, the Court of Military Appeals, per Chief Judge Everett, discussed the practical difficulties involved in asking hypothetical questions of court members on *voir dire,* and indicated that "we should encourage candor on the part of court members questioned during *voir dire.*"[9] On the other hand, the Chief Judge said, an accused is entitled to be tried by court members whose minds are open. A member who asserts that he or she will not consider certain sentences lacks an open mind and should be excused.[10]

The court held that the military judge erred in not excusing CPT D when challenged by the defense. Having said this, though, the court reasoned that just as an inflexible attitude toward sentence did not require that findings be set aside if the predisposition had no effect on the sentence actually adjudged, an inelastic attitude concerning a reduction of one grade was *de minimis* when the sentence adjudged included a BCD and three months confinement. Because the accused was not prejudiced by the military judge's decision, the court concluded the error was harmless, and the sentence was upheld.

In his opinion in *Heriot,* Chief Judge Everett offered one possible solution to the problem of the "brutally" honest court member, at least as regards sentencing. The military judge should give the member additional instructions, the court said, and ask clarifying questions before excusing a member for an inflexible attitude toward sentence. This reminder of the member's responsibility is designed to alert the member to the full implication of his or her answers, and may eliminate the necessity to excuse the member. The Chief Judge did not elaborate as to the content of these additional instructions except to say that the judge should tell the member that there is a separate sentencing phase of trial in the event of a conviction.[11]

---

[1] 21 M.J. 11 (C.M.A. 1985).

[2] 21 M.J. 15 (C.M.A. 1985).

[3] 21 M.J. at 12.

[4] *Id.*

[5] *Id.*

[6] 16 M.J. 825 (N.M.C.M.R. 1983).

[7] *See* United States v. Boyd, 7 M.J. 282 (C.M.A. 1979).

[8] 16 M.J. at 836 (Gladis, S.J., dissenting).

[9] 21 M.J. at 13.

[10] *Id.*

[11] *Id.*

The recommended procedure may very well accomplish its purpose. On the other hand, it consumes valuable court time and may require the military judge to excuse the remaining court members while he instructs the "wayward" member. One alternative is to expand the military judge's preliminary instructions to address inflexible attitudes and possible misconceptions about sentencing held by members.[12] Logically, such instructions should include at least a part of the sentencing instructions to address members' possible predispositions.[13] One recommended format for a preliminary instruction to members concerning inflexible sentencing attitudes, as per *Heriot*, is as follows:

(To be read after end of first paragraph on page 2–24 of the Military Judges' Benchbook.)

M.J.: Counsel may pose hypothetical questions to you during *voir dire*. Some of these questions will ask you about your attitude toward sentencing or toward a specific sentence (even though we will never reach this phase of the trial unless you find the accused guilty). You must answer all questions honestly and without elaboration. You will be questioned individually outside the presence of the other members if elaboration is required. Based upon your answers to these questions, I must determine whether there is any basis for a challenge for cause against you. Although I cannot instruct you on the precise range of punishments at this time, they will range from no punishment to confinement, reduction (and possible discharge). Just as you cannot have any preconceived idea as to an appropriate punishment if the accused is convicted, neither can you exclude any one of the possible sentences, including no punishment, from your considerations. In other words, you may not have a predisposition that a particular punishment, such as a reprimand, is inappropriate for this offense (these offenses). A court member who displays such an inflexible attitude toward a particular punishment must be excused.

Keep in mind that the sentencing phase of trial is separate and distinct from the findings phase. If the accused is found guilty, you will hear additional evidence regarding the accused to assist you in determining an appropriate punishment. Counsel will argue and I will instruct you on sentencing, including the punishments which are authorized. It is critical that until you have heard all the relevant evidence, received my instructions, and retired to the deliberation room to determine an appropriate sentence in full and free discussion with the other members, you keep an open mind and not harbor any preconceived notions concerning sentence. You must remain fair, impartial, and open-minded throughout this court-martial.

Preliminary instructions might also address other issues likely to arise in the case which might create confusion during *voir dire*. For example, when law enforcement officers or commanders are expected to testify, the members should be instructed that while they may believe some witnesses and disbelieve others, they must listen closely and consider the testimony of each witness without giving undue weight or credibility to the testimony solely because of the identity or status of the witness. Other possible preliminary instructions might include the reasonable doubt standard and the prosecution's burden with regard to affirmative defenses when raised by the accused. As with other instructions, counsel should consider tailoring their own preliminary instructions to the circumstances of the case and presenting them to the military judge.[14]

With respect to members who display an inflexible attitude toward sentencing on *voir dire*, the military judge may, in the exercise of his or her discretion, seek to rehabilitate the witness by giving an additional instruction as recommended in *Heriot*. The military judge may deny the challenge if the member then abandons the inflexible attitude. The member's answer, however, should be "clear and forthright."[15] If the member maintains his or her earlier opinion, or gives less than a convincing, unequivocal "yes" answer to the military judge's questions, the original challenge for cause should be granted.[16]

United States v. Smart

United States v. Smart, decided the same day as *Heriot*, concerned challenges for cause against two court members in the accused's trial for robbery. Following the accused's plea of guilty and entry of findings, the panel was sworn and questioned by counsel. On *voir dire*, two members, CPT H and SFC F, stated that they had been victims of robbery.[17]

Questioning of CPT H revealed that he had been the victim of two burglaries, rather than robbery. When asked whether these incidents would influence his decision on a sentence, CPT H answered that he was not certain, stating: "It's hard to say. I wouldn't say I positively could, because I'd have to hear the circumstances of the case, and they might trigger something from the past, and again it may not."[18]

Trial counsel's attempts to rehabilitate CPT H failed to elicit a clear statement from him that he could disregard his experiences. The military judge then asked CPT H if he could disregard outside influences and base his judgment solely on the facts presented in court and CPT H said: *"Totally disregard, I'd say, no."*[19] After CPT H told the trial

---

[12] Dep't of Army, Pam. No. 27–9, Military Judges' Benchbook, para. 2–24 (1 May 1982) (Cl, 15 Feb. 1985) [hereinafter cited as Benchbook].

[13] Benchbook, para. 2–37.

[14] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 802 [hereinafter cited as R.C.M.].

[15] *Heriot*, 21 M.J. at 14.

[16] *Id.*

[17] *Id.* at 16.

[18] *Id.*

[19] *Id.* at 17.

counsel that the still felt he could render a fair sentence, the military judge asked one last question:

> "MJ: Captain Harrison, will you be able to consider the entire range of punishments available to the court, all the way from no punishment at all, to the maximum punishment?
>
> MEMBER (CPT HARRISON): *No punishment, no, sir, I will not consider that one.*"[20]

Neither the trial counsel nor the military judge questioned CPT H further. The defense counsel wisely let well enough alone.

When questioned individually on *voir dire* about his experiences, SFC F explained that he grew up in a tough part of Chicago and was robbed several times. Asked how many times, SFC F estimated "about six or seven times."[21] In response to a question from the defense counsel, however, SFC F stated unequivocally that he "would consider what is happening now, not yesterday."[22] He said that he would consider the full range of punishments and could render a fair and just sentence in the case.

The defense challenged CPT H and SFC F for cause; the military judge denied both challenges. The defense exercised its peremptory challenge against another member. On appeal, the Army Court of Military Review affirmed the findings of guilty and the accused's sentence to a BCD, confinement for five years, total forfeitures, and reduction to the grade of E–1.[23] The Court of Military Appeals affirmed the finding of guilty in light of the accused's guilty plea, but set aside the sentence because the military judge erred in denying the challenges for cause.

In its opinion, written by the Chief Judge, the court summarized the law on challenges for cause. Essentially, the court said, members must have a fair and open mind and the proceeding must be free from "substantial doubt as to legality, fairness and impartiality."[24] The military judge should be liberal in ruling on challenges, although the appellate courts give broad latitude on this exercise of discretion.[25] Nevertheless, the court said, there are some circumstances when bias may be implied, despite assertions of impartiality by a member, especially when most people in the same position would be prejudiced.[26] Applying this rationale, denial of the challenge against SFC F, notwithstanding his sincere belief in his own impartiality, might cast doubt upon the legality, fairness and impartiality of the trial. The court appeared to say that while it may be difficult to fix a point at which bias must be presumed, a member in a robbery trial who has been a victim of six or seven robberies was clearly beyond that point and must be excused if the accused is to have a fair trial. The opinion noted, almost tongue-in-cheek, that victims' rights do not extend to having a member on a panel who has been similarly victimized.[27]

With respect to the challenge against CPT H, the court stated that his answers on *voir dire* required his excusal upon challenge by the defense. While his status as a victim of burglaries did not automatically disqualify him from sitting on the accused's panel for robbery, his statements that he could not disregard his experiences and would not consider all punishment alternatives clearly supported the challenge for cause.[28] The military judge may have committed a mistake counsel often made on cross-examination: asking one question too many. Once he did this, though, he should have asked further questions to rehabilitate CPT H. He might even have given the instructions suggested in *Heriot.*[29] The opinion concluded quite fairly that failure to grant the challenge under these circumstances without any explanation or rationale was an abuse of discretion and therefore error.[30]

Conclusion

Chief Judge Everett made an important teaching point in *Smart:* inconvenience alone is not a sufficient basis for denying a challenge for cause.[31] Even though granting a challenge for cause may reduce the court below a quorum or one-third enlisted members, that is not the concern of the military judge. Instead, his or her concern should be that the trial be free from "substantial doubt as to legality, fairness and impartiality."[32] Only court members with open and fair minds should be permitted to sit on courts-martial.[33]

---

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 16.

[24] *Id.* at 18 (quoting the Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 62*f* (13).

[25] *Id.* at 18–19.

[26] *Id.* at 19–20. In his concurring opinion, Judge Cox rejected "implied bias" as a rule of law. *Id.* at 21 (Cox, J., concurring). Implied bias has been reserved in the past for members having a special relationship with a party. *See* United States v. Inman, 20 M.J. 773 (A.C.M.R. 1985); United States v. Klingensmith, 17 M.J. 814 (A.C.M.R. 1984).

[27] *Id.* at 20.

[28] *Id.* at 19.

[29] *Heriot,* 21 M.J. at 13.

[30] *Smart,* 21 M.J. at 20.

[31] *Id.* at 21.

[32] R.C.M. 912 (f)(1)(N).

[33] This is especially true in light of the strict limitation on peremptory challenges in courts-martial. The Chief Judge has repeatedly urged the trial bench to liberally construe challenges for cause. *See* United States v. Miller, 19 M.J. 159 (C.M.A. 1985). Judge Cox would repose greater confidence in the discretion of the trial judge. *Miller,* 19 M.J. at 165 (Cox, J., dissenting).

Smart and *Heriot* should be read as a reminder that our court-martial process must remain fair and impartial in all respects. As in other matters, counsel and military judges should be aware of the appearance as well as the substance of fairness in their proceedings. At the same time, as *Heriot* illustrates, we must ensure that court members are not excused prematurely based on their honest responses to the sometimes vague hypothetical questions posed during *voir dire*. Ultimately, the military judge must balance the government's interests in a prompt and orderly proceeding against the accused's due process rights. Normally, there is room to accommodate both interests.

A Primer on Nonresident Command and General Staff College Instruction

Lieutenant Colonel Jonathan P. Tomes
Military Law Instructor, Command and General Staff College

A very important professional credential for any field grade officer is completion of the U.S. Army Command and General Staff College (CGSC) or its equivalent, such as the Armed Forces Staff College (AFSC). In these days of limited promotion opportunities, it is foolhardy not to have a staff college diploma or at least a fifty percent completion certificate in your file when it goes before a lieutenant colonel promotion board. A CGSC diploma, or at least substantial progress towards one, may be a *de facto*, if not yet a *de jure*, requirement for promotion to lieutenant colonel. In addition, a CGSC or other staff college diploma is critical for some key assignments. More importantly for you as a JAGC officer, CGSC will make you a better judge advocate by teaching you about your client's business.

Because relatively few JAGC officers can attend resident CGSC or AFSC, however, you ought to consider nonresident instruction for your professional development. The JAGC Personnel Policies Handbook, para. 7–6 (Oct. 1985), encourages officers not selected for resident staff college "to complete USACGSC either by the correspondence course or USAR nonresident school program." You should not avoid taking CGSC by a nonresident option out of fear that doing so would keep you from being selected for a resident staff college. If you pursued a nonresident option, or even earned a CGSC nonresident diploma, you would still be eligible for selection for the resident course or AFSC. Several recent resident CGSC selectees have already completed some or all of the course by correspondence. You may wonder why an officer would want to attend CGSC after having completed the course work. Perhaps the best answer is that people want different things from a staff college: some want a diploma, some want the knowledge behind the diploma, some want the "Leavenworth experience," and others want some combination of these objectives. No matter what you want from a staff college, one of the best ways to begin to achieve your objective may be to enroll in some form of nonresident instruction. Nonresident instruction can give you the staff college diploma, the knowledge behind the diploma, and a leg up to help you through the "Leavenworth experience" if the Army decides to send you to attend CGSC in person.

First, if what you want from a staff college is a diploma, you can earn a CGSC diploma—identical to the resident course CGSC diploma—through nonresident instruction in any of three ways:

—Correspondence course.

—USAR school instruction.

—Combination of correspondence course and USAR school instruction.

All three options require completing six phases in three years.

If you choose the correspondence option, you take twenty subcourses, each of which has from two to fourteen lessons and either graded or ungraded exercises. Graded exercises are sent to CGSC for evaluation, and you need to make a grade of seventy-five or above on them to take the subcourse examination. You must also then achieve a grade of seventy-five or higher on the subcourse examination to pass the subcourse. If you get a lower grade, you may retest twice. If you do not pass the subcourse on the final retake, not only do you fail the subcourse, but also, unhappily, the school will disenroll you. Most subcourse examinations are open-book, objective tests, however, so you can expect to be able to pass most subcourses the first time you take the subcourse examination. Because the correspondence course is a three-year program, you must complete two phases a year to remain in good standing. Only the Commandant, CGSC, can allow you to remain enrolled if you do not complete two phases each enrollment year. Fortunately, it is not difficult to complete two phases a year.

If you choose the USAR school three-year program of instruction, you can attend CGSC classes, taught by reserve component officers, at any of about 350 locations, both in the United States and overseas. You would take two of the required six phases of nonresident instruction each school year in ninety-six hours of instruction on evenings or weekends and about seventy hours of instruction in a two-week period during the summer. USAR school examinations on CGSC subjects are similar to correspondence course examinations, except that they are sometimes closed-book. As with the correspondence course option, you must score seventy-five percent or higher to pass USAR school examinations and to earn your CGSC diploma.

If you choose to combine the correspondence course and the USAR school instruction, you can transfer from one to the other and back again at the completion of any phase. For example, you could take phase I by correspondence,

phase II in a USAR school, and phases III through VI by correspondence to earn your CGSC diploma.

If you not only want to earn your CGSC diploma, but also want to make sure you learn what resident CGSC graduates must learn, you should know that the content of the nonresident courses comes from the same place as the content of the resident courses: resident CGSC instructors. If you mastered everything in every nonresident CGSC textbook, you would probably know more than some resident graduates of CGSC, at least about some things. In the nonresident program, you would have three years to absorb information and concepts that resident CGSC students must assimilate in just ten months.

If you are concerned that starting, and even completing, CGSC by a nonresident option would mean duplicating your efforts if later you were selected to attend CGSC, you need to know that the knowledge you would gain by studying a nonresident version of CGSC would make the resident course just that much easier. The information available in the nonresident course would be especially valuable for a JAGC officer selected to attend CGSC because JAGC officers do not necessarily have the background knowledge of tactics, logistics, and the like that an infantry officer attendee would have at the beginning of the CGSC resident course. Besides, the opportunities for professional growth available in the resident course, with its almost one thousand Army, sister service, and allied officer students, would make the "Leavenworth experience" worthwhile even if you learned nothing new in terms of course content.

So now you know how completing a nonresident CGSC course can help you with your Army career, and you have some idea of the nonresident options available to you, but how do you know which option is best for you? Well, it depends. Consider the options in terms of, for example, these variables: your current assignment, the availability of a USAR school in your vicinity, your study preferences, and how quickly you want to complete the course. If you do much traveling and thus would miss much USAR school instruction, if you would have to commute hundreds of miles roundtrip in, say, blizzards to attend USAR school classes, if you study better on your own, or if you want to earn a diploma in a year or two, the correspondence course may be the best option for you. If, on the other hand, you happened to luck into an assignment that has relatively regular hours and that usually leaves you some evening and weekend free time, if a USAR school is close by, if you prefer to learn in a structured academic environment (real classroom, set time, other students, real teacher, externally imposed deadlines), or if you want to earn your diploma relatively easily and painlessly over three years, USAR school instruction may be the best CGSC nonresident option for you. Or, you may want to switch between options. It is not important to your career or to selection boards which route you take to get your CGSC diploma. The important thing is that you get it!

Now that you have some idea about which nonresident CGSC option would be best for you, how do you sign up for it, and what else do you need to know about the nonresident program before you open that first textbook on your way to your CGSC diploma? First, signing up for either option is easy. If you, as a JAGC officer, are at least a captain, have between eight and eighteen years' commissioned service (seven to seventeen years for Reserve or National Guard officers), have completed the Graduate Course, and have demonstrated the potential for assignment to high-level staffs, you are eligible to enroll in either nonresident CGSC option.

To enroll in the correspondence course, request an information packet and enrollment application either by writing to USACGSC, ATTN: Registrar, ATZL-SWE-TM, Fort Leavenworth, KS 66027-6900, or by calling commercial (913) 684-5584, FTS 753-5584, or AUTOVON 552-5584. Then forward your completed enrollment application through command channels to the headquarters that has custody of your military personnel records jacket (MPRJ). That headquarters will first verify your eligibility and then forward your application to CGSC.

To enroll in USAR school instruction, contact the commandant of a USAR school close to you and request an enrollment application. Forward your completed enrollment application through command channels to the headquarters that has your MPRJ. That headquarters will first verify your eligibility and then forward your enrollment application through the USAR school to CGSC. You must enroll in a USAR school not later than 31 October for whatever academic year you want to receive credit.

What happens after you send your enrollment application through command channels? No matter which nonresident CGSC option you enroll in, both you and the keeper of your branch file will receive notice of your enrollment. You should also receive texts and specific information on reading assignments, practical exercises, examinations, and so forth. About this point in the process, you will probably begin studying. Then later, as soon as you have completed half of nonresident CGSC, the school's fifty percent completion certificate will go into your official military personnel file (OMPF), where it will be available for selection boards to consider.

So, you felt good about signing up for nonresident CGSC until you hit the word *studying* just now, right? You say it brought back memories of midnight oil, cramming for pop quizzes, and perhaps some other unpleasantries. First of all, take a moment to remember some of the good times you had in school. Now, take heart, even—perhaps especially—if you feel as if you've spent most of your life in school and dread signing up for yet another three years. CGSC may already be eager to give you constructive credit for some of the classes you have taken over the years, especially those you may have had at the Combined Arms and Services Staff School (CAS^3) and at the JAGC resident Graduate Course.

If you are a CAS^3 graduate and are enrolled in phase I of CGSC by correspondence, as opposed to a USAR school, you are eligible for constructive credit for the following subcourses: 271, force integration—training; 311, combined arms fundamentals; and 951/911, staff communications. If you want constructive credit from your CAS^3 work to count toward your CGSC diploma, however, you need to arrange for that credit quickly because it may not always be available. Over the next year or so, CGSC will first revise

its curriculum so that it does not overlap that of CAS[3], and then phase out CGSC credit for CAS[3] courses.

This is not the only constructive credit change in the works at CGSC for nonresident instruction, however. In September 1985, the Deputy Commandant, CGSC, issued blanket approval for all JAGC officers who have completed the JAGC resident Graduate Course and who are enrolled in the correspondence course (not a USAR school) for phase I to receive constructive credit for three subcourses: 915, military law; 951 (911 this academic year), staff communications; and 952, leadership. Of course, this credit was previously available as long as you were willing to write your own convincing justification for the school to give you credit for your Graduate Course work. That system seemed to waste considerable time, energy, and paper, so I wrote a blanket justification for all JAGC resident Graduate Course graduates, and the Deputy Commandant approved it. Now all you have to do to receive the approved constructive credit is to send in your request and a copy of your Graduate Course diploma, transcript, or certificate of completion to CGSC. You're welcome.

Now that you already have at least three subcourses out of the way, why not send off for your application to enroll in a CGSC nonresident course, finish the rest of them, and get your CGSC diploma? Yes, it is that simple.

USALSA Report

U.S. Army Legal Services Agency

Table of Contents

Trial Counsel Forum	**23**
In Search of the Automobile	**23**
Truthful Testimony: A Parallax View	**30**
The Advocate for Military Defense Counsel	**32**
Discovering and Removing the Biased Court Member	**32**
Trial Judiciary Notes	**38**
Clerk of Court Notes	**40**
All Services Appellate Military Judges' Conference	**41**
Upcoming USALSA CLE Seminars	**41**

Trial Counsel Forum

Trial Counsel Assistance Program

In Search of the Automobile

Major Ernest F. Peluso
Operations Officer, TCAP

Introduction

America is a nation on wheels. Our entire culture is devoted to a veneration of the automobile. Our economy, work habits, social enterprises, and personal lives are deeply influenced by and designed in light of the unparalleled mobility which vast numbers of motor vehicles achieve for us. Although some rugged individuals might long for a simpler, more technologically primitive era, most Americans believe that the benefits of a highly mobile society outweigh the ecological and sociological costs.

In one sense, the automobile has been a boon for law enforcement; lessening response time and increasing the effective area of protection, thereby decreasing the number of police officers required to patrol a specific area. On the other hand, the private vehicle has provided the criminal with a swift, reliable form of transportation, as well as an effective place to store or smuggle contraband, evidence of crime, and other nefarious instrumentalities.

Automobiles present special challenges to law enforcement personnel. Unique tactics and procedures are required to deal effectively with criminal behavior involving the use of motor vehicles. One of the thorniest problems which has arisen during the past sixty years is the effect of motorized transport upon the warrant requirement of the fourth amendment.[1] In response to this dilemma, the Supreme Court of the United States has carved out a number of specific exceptions which allow the government greater latitude when police officials intrude into motor vehicles and obtain evidence to be used in a criminal prosecution.

This article will survey the relevant decisions of the various courts which have addressed this special category. The focus will be upon vehicles which are not owned by the government. Generally, the courts do not recognize that a private individual can entertain an objectively reasonable expectation of privacy in government property.[2] The Military Rules of Evidence stipulate that under normal conditions a service member does not entertain a reasonable

[1] U.S. Const. amend. IV.

[2] Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); United States v. Poundstone, 22 C.M.A. 277, 46 C.M.R. 277 (1973); United States v. Weshenfelder, 20 C.M.A. 416, 43 C.M.R. 256 (1971).

expectation of privacy in government property unless it is issued for personal use (i.e., wall locker/foot locker).[3]

Additionally, this article recognizes that there are many circumstances involving automobiles where the police seek to obtain, and are often granted, consent to search from some person who has the authority to give it. "Consent" itself is a special category of the law of search and seizure[4] and will not be strongly emphasized. Army prosecutors should not forget, however, that agents of the government have saved the day on countless occasions by remembering that it almost never hurts to ask for consent.

Automobile Stops

A stop is an intense form of police interaction with a citizen. The individual who is stopped is normally not free to ignore police direction. This procedure is designed to be briefer than an arrest, continuing only as long as it is necessary to identify the subject and obtain an explanation for his suspicious behavior.[5] In *Terry v. Ohio*,[6] the classic case in this area, the Supreme Court ruled that it was not unreasonable for a policeman to stop an individual when he "observed unusual conduct which leads him to believe that criminal activity may be afoot."[7] The conclusions of the police must be based upon articulable facts and rational inferences which support a reasonable suspicion of criminal activity. Based upon the entire set of facts available at the time, or the "totality of circumstances," the police must have a "particularized and objective basis for suspecting the particular person stopped of criminal activity."[8]

In the military, any individual who is authorized to apprehend[9] may conduct a stop.[10] An automobile and its occupants may be stopped when police or military authorities suspect that the driver or any passenger has committed, is committing, or is about to commit a criminal offense.[11] A motor vehicle can be stopped for traffic offenses, registration violations, and obvious unsafe conditions.[12]

In addition to common traffic-related violations, automobile stops are routinely employed where general, more serious, criminal conduct is suspected and the vehicle is being utilized as a means of transportation. In *United States v. Hensley*,[13] the Supreme Court recently clarified the lawful parameters of an "auto stop," confirming the right of the government to stop a car containing an occupant who the police suspected had already committed an offense. The Court concluded that the investigatory stop of defendant's auto because the passenger met the description of a "wanted flyer" of another jurisdiction was constitutionally reasonable.[14]

The duration of the detention and the extent of the intrusion, if one occurs during the stop, are critical factors for the courts to consider in evaluating the efficacy of the procedure.[15] In another recent case, *United States v. Sharpe*,[16] Chief Justice Burger, writing for the Court, found that where a Drug Enforcement Administration (DEA) agent diligently pursued his investigation and no unnecessary delay was involved, a twenty minute detention of a suspect was reasonable under fourth amendment standards.

To arrive at his decision, Chief Justice Burger examined the justification for the detention at its inception and the relevant circumstances surrounding the interference. In this instance, a DEA agent observed two vehicles traveling in a suspicious manner and followed them for a considerable distance. After he attempted to make an investigatory stop, the vehicles separated and the agent had to radio for local police assistance. South Carolina officers stopped the second vehicle, a pickup truck with attached camper, and detained it and the driver until the agent could arrive upon the scene, approximately fifteen minutes later. Subsequently, the federal agent conducted a brief investigation, discerned the odor of marijuana, and uncovered several bales of contraband.[17]

In determining that the police had diligently pursued their investigation, the Court considered the unique role that the motor vehicles had played in this drama: "[A] court [deciding this issue] should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the courts should not indulge in unrealistic second guessing."[18]

Once an automobile has been stopped, the authorities may order occupants to leave the vehicle.[19] The driver and

---

[3] Mil. R. Evid. 314(d), 318(d)(3).

[4] Mil. R. Evid. 314(e). This article is concerned with intrusions into automobiles. In that regard, prosecutors should clearly understand that there are frequently several legal theories under which a search may be lawfully conducted. *See also* Mil. R. Evid. 316(d)(1).

[5] Florida v. Royer, 460 U.S. 491 (1983).

[6] 392 U.S. 1 (1968). *See also* Colorado v. Bannister 449 U.S. 1 (1980).

[7] 392 U.S. at 30.

[8] United States v. Cortez, 449 U.S. 411, 417–18 (1981).

[9] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 302(b) [hereinafter cited as R.C.M.].

[10] Mil. R. Evid. 314(f)(1).

[11] P. Gianelli, F. Gilligan, E. Imwinkelreid, F. Lederer, Criminal Evidence 242 (1979) [hereinafter cited as Criminal Evidence].

[12] *Id.*

[13] 105 S. Ct. 675 (1985).

[14] *Id.* at 682–83.

[15] Florida v. Royer, 460 U.S. 491 (1983); Terry v. Ohio, 392 U.S. 1 (1968).

[16] 105 S. Ct. 1568 (1985).

[17] *Id.* at 1570–72.

[18] *Id.* at 1576.

[19] Pennsylvania v. Mimms, 434 U.S. 106 (1977).

the passengers may be frisked at this point, if the police believe that they are armed.[20] The belief must be reasonable and based upon common sense and articulable facts. The frisk of the individuals is normally a pat down of exterior clothing, but there are exceptional circumstances which allow slightly more intrusive procedures.[21] The police may extend their intrusion into the passenger compartment of the auto, but they are limited to those areas in which a weapon may be hidden.[22] If, during the protective search, the agents discover evidence of crime or contraband, it may be seized and offered in evidence at a criminal prosecution.[23]

Search of an Automobile Incident to a Lawful Apprehension

When military officials, in the exercise of their police power, make an arrest or apprehension, the law allows them to conduct a search as an incident to that action.[24] The individual executing the apprehension must have the authority to apprehend[25] and the decision must be based upon probable cause.[26] The facts available to the arresting officer must provide reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it.[27]

Upon apprehension, the police or military authorities should take the subject into custody. The officials should notify the individual that the apprehension has occurred and that his liberty is inhibited.[28] At a minimum, it is necessary for the government agent to believe that he is making an apprehension and that the subject is not free to go.[29]

Once the apprehension does take place, the person of the subject may be thoroughly searched.[30] Additionally, the Supreme Court has determined that it is proper for government officials to search the area within the arrestee's immediate control in order to locate either weapons or easily destructible evidence.[31]

When a government official apprehends either the driver or an occupant of an automobile, he or she is permitted to conduct a thorough search of the passenger compartment and may intrude into and examine the contents of closed containers.[32] In *New York v. Belton,* the state police stopped an automobile for a speeding violation. The officer detected the odor of marijuana and ordered the occupants to leave the vehicle. They were placed under arrest and quickly searched. Subsequently, the arresting officer examined the interior of the auto and discovered a black leather jacket. In the pocket of the jacket he found a packet of cocaine.[33]

In affirming the lawful nature of this procedure, Justice Stewart stated that once the lawful custodial arrest of the occupant of a motor vehicle has been effected, the police, as a contemporaneous incident of that seizure, may search the passenger compartment of the vehicle and may examine the contents of any container found therein.[34]

In the search of an automobile incident to a lawful apprehension, the scope is more intrusive, and the focus is broader, than an examination which occurs as the result of an investigatory stop. The police may search for evidence and intrude into closed containers which could not logically hold a weapon.

Motor Vehicle Inventories[35]

An inventory is a form of warrantless intrusion conducted by government officials for the purpose of identifying the exact nature of property belonging to a particular individual. Inventories are utilized for a number of different reasons in both civilian and military environments.

Civilian police agencies often employ the inventory procedure to scrutinize the personal property of individuals who are placed in custodial arrest.[36] The justification for this form of intrusion is that these precautions protect the owner from loss or theft by the police, the examination protects the police agency from false claims for lost or stolen property, and both the police and the public are protected from containers with dangerous contents.[37]

Motor vehicles are frequently the focus of this form of administrative intrusion. The Supreme Court has reviewed and approved the inventory of an automobile seized under a

---

[20] Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968).

[21] Criminal Evidence, *supra* note 11, at 244.

[22] Michigan v. Long, 463 U.S. 1032 (1983); Mil. R. Evid. 314(f). 17 MJ 158, 163

[23] Texas v. Brown, 460 U.S. 730 (1983); Colorado v. Bannister, 449 U.S. 1 (1980); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[24] Mil. R. Evid. 314(g)(3).

[25] R.C.M. 302(b).

[26] R.C.M. 302(c).

[27] *Id.*

[28] United States v. Kinane, 1 M.J. 309 (C.M.A. 1976); United States v. Fisher, 5 M.J. 873 (A.C.M.R. 1978); R.C.M. 302(d).

[29] *Kinane,* 1 M.J. at 314.

[30] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

[31] Chimel v. California, 395 U.S. 752 (1969).

[32] New York v. Belton, 453 U.S. 454 (1981); Mil. R. Evid. 314(j)(2).

[33] 453 U.S. at 455–56.

[34] *Id.* at 460.

[35] For a comprehensive treatment of the law of inventory, *see* Anderson, *Inventory Searches,* 110 Mil. L. Rev. 95 (1985) [hereinafter cited as Anderson].

[36] Illinois v. Lafayette, 462 U.S. 640 (1983).

[37] South Dakota v. Opperman, 428 U.S. 364 (1976).

statutory forfeiture provision,[38] a car which was disabled along the road where the driver was incapacitated and unable to make appropriate arrangements,[39] and an auto which was seized and impounded for multiple parking violations.[40] Additionally, the Court sustained the lawfulness of an intrusion by a police officer into a vehicle which had just been inventoried in order to secure the window and thereby protect the interior.[41]

While the justifications described above are equally applicable to the military, there "is a need and an opportunity to inventory . . . far more frequently than in a [civilian] context."[42] Inventories are a part of military life and may occur for a myriad of reasons.[43] Because automobiles are present in large numbers on most Army installations, they are occasionally seized, impounded, and inventoried.[44]

In *United States v. Dulus*,[45] the Court of Military Appeals reviewed the inventory of an automobile which was legally parked on an installation. The owner had been placed in pretrial confinement awaiting a special court-martial. The unit commander was concerned because it was apparent that there were several high value items inside the car. To preclude a claim against the Air Force, the commander ordered that an inventory take place. During the administrative intrusion, evidence was uncovered that the court held to be admissible. Under the circumstances, the procedure used was reasonable and not in violation of the fourth amendment.

The permissible scope of a lawful inventory has not been precisely defined.

> If the Court has offered little in the way of specific guidance, it has unequivocally established its general philosophy. The Court has given a vote of confidence to police agencies. Police forces may develop their own standard procedures for protecting legitimate government interests, and unless those procedures are a mere pretext for a criminal investigation, the Court will not "second guess" the police. . . .[46]

Inspections

An inspection in the military[47] is an intrusive procedure which a command may utilize to peer into various places within the unit, including those areas where soldiers might have an objectively reasonable expectation of privacy. The primary purpose of an inspection must be administrative, that is, the examination must be for the purpose of determining "the [relative] security, military fitness or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle."[48]

Normally, the inspection process impacts only upon the military unit, its physical plant, the indigenous equipment and the personnel. There are many scenarios, however, where the private automobile of a soldier might be within the lawful scope of a military inspection. The most common occurrence which reflects the interaction of a military inspection and the private motor vehicle is the gate inspection.[49]

The Army has promulgated two regulations[50] which implement the authority of the post commander to order an administrative examination of personnel and vehicles at ingress and egress points to a military installation.[51] The regulations address the problems which security personnel encounter during these intrusive procedures. It is recognized that military and civilian personnel and their motor vehicles will be affected by a gate inspection, and specific procedures have been designed to deal effectively with the various circumstances that the military police are likely to encounter in conducting these intrusions.[52]

In accordance with his or her authority as post commander, the officer who orders the inspection at the gate of the installation may define the scope of the intrusion in a manner which is reasonably consistent with the lawful goals of an administrative examination.[53] The subordinates who implement the commander's directives must scrupulously abide by the parameters of the inspection without exercising

---

[38] Cooper v. California, 386 U.S. 58 (1967).

[39] Cady v. Dombrowski, 413 U.S. 433 (1973).

[40] South Dakota v. Opperman, 428 U.S. 364 (1976).

[41] Harris v. United States, 390 U.S. 234 (1968).

[42] Anderson, *supra* note 35, at 106.

[43] United States v. Barnett, 18 M.J. 166 (C.M.A. 1984); United States v. Law, 17 M.J. 229 (C.M.A. 1984).

[44] United States v. Kazmierczak, 37 C.M.R. 214 (1967).

[45] 16 M.J. 324 (C.M.A. 1973).

[46] Anderson, *supra* note 35, at 105–106.

[47] Although inspections occur most frequently in the military, there are circumstances where civilian authorities employs this administrative procedure. *See* United States v. Beswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonade Catering Corp. v. United States, 397 U.S. 72 (1970).

[48] Mil. R. Evid. 313(b); Dep't of Army, Reg. No. 210–10, Installations-Administration, para. 2–23 (12 Sept. 1977) (I01, 6 May 1985) [hereinafter cited as AR 210–10].

[49] Mil. R. Evid. 314(c); AR 210–10, para. 2–23*d*(1).

[50] AR 210–10; Dep't of Army, Reg. No. 190–22, Military Police—Searches, Seizures, and Disposition of Property (1 Jan. 1983).

[51] United States v. Alleyne, 13 M.J. 331 (C.M.A. 1982); United States v. Holsworth, 7 M.J. 184 (C.M.A. 1979); United States v. Harris, 5 M.J. 44 (C.M.A. 1978).

[52] AR 210–10, para. 2–23*c*(3).

[53] AR 210–10, para. 2–23*c*(2).

any personal discretion unless circumstances intervene[54] which permit other action.

An installation commander, therefore, has authority to order an inspection of automobiles as they are about to enter or leave the military enclave. He or she can require that all personnel, civilian and military, cooperate.[55] The inspection itself can be very intrusive. Evidence of crime or contraband which is discovered during a lawful administrative examination is admissible at a court-martial or other criminal prosecution.

Gate intrusions are not the only inspection process where private automobiles might be examined. Virtually every Army unit in the continental United States has a parking lot for privately owned vehicles. The cars, trucks, boats, and recreational vehicles which can usually be found within these units are often used for informal storage of personal property and military equipment. In an appropriate factual context, a commander conducting a 100% health and welfare inspection of his or her unit might decide to include the motor vehicles owned by soldiers parked in the lot within the physical jurisdiction of the command.[56] This decision would be reasonable when the intimate relationship between the soldier's private vehicle and the health, safety, welfare, and morale of the unit is considered.[57]

"Classic" Automobile Exception

The automobile exception to the warrant requirement of the fourth amendment to the Constitution is not a recent innovation. Over sixty years ago, in *Carroll v. United States,*[58] the Supreme Court formally recognized that the mobility of motor vehicles, coupled with a reduced privacy expectation, justified special treatment when police intrude into a car's interior to obtain evidence.[59]

In *Carroll,* the Court reviewed the activities of two revenue agents who stopped and then searched an auto which they believed was transporting alcohol in violation of the National Prohibition Act.[60] The search was very intrusive and the agents discovered the contraband under the upholstery of one of the seats. Chief Justice Taft, writing for the majority, reasoned that searching a car, ship, wagon, or other vehicle presented problems for the police significantly different than those encountered when searching fixed objects like homes and stores.[61] In response to these unique difficulties, the majority sanctioned the warrantless intrusion by government officers into motor vehicles so long as there was probable cause to believe that evidence of crime or contraband could be found therein.[62]

This special category of warrantless intrusion is significantly different from an "auto stop," a search of an automobile incident to the apprehension of one of the occupants, an administrative inventory, or a military inspection process. The other exceptions are based upon specific criteria (*e.g.,* probable cause to apprehend an occupant) and the intrusion into the vehicle is usually a secondary, albeit logical, consideration.

Under the "classic" automobile exception to the warrant requirement, the focus of official scrutiny is upon the vehicle itself, and the police or military authorities must have a reason to believe that evidence or contraband is located inside.[63] The probable cause in question is measured by an objective standard and is identical in quality and quantity to the information that a neutral and detached magistrate would require to issue a warrant.[64]

Perhaps the most important decision in this area is *United States v. Ross,* in which the Supreme Court reviewed the procedures followed by District of Columbia police after they received a tip that Ross was selling heroin from his automobile. Acting upon this information, the police stopped the defendant's maroon Malibu, placed him under apprehension, searched the interior of the passenger compartment, and then opened the trunk and the containers therein.[65] Arguably, the trunk of the Malibu was outside the scope of a search incident to a lawful apprehension and its search would have had to be justified under some other theory.

Justice Stevens, however, declared that when the appropriate probable cause is present, the police may conduct a search of a vehicle in as thorough a manner as a magistrate could authorize in a warrant.[66] The warrantless procedure can focus upon the entire vehicle, including any compartment or container where the contraband logically might be. In arriving at this decision, the Court was forced to review

---

[54] During the inspection, the subordinates who execute the procedure must be very careful to follow the instructions and stay within the parameters imposed by the commander. If during the inspection, however, contraband is located within the vehicle, an apprehension (detention of civilian personnel) and a search incident thereto can be made. The search incident to the lawful apprehension can be more intrusive than the inspection. *See supra* note 32.

[55] AR 210–10, para. 2–23*c*.

[56] Mil. R. Evid. 313(b).

[57] At the unit level, soldiers frequently use the trunk space of their automobiles to store and safeguard equipment which they cannot conveniently display in their rooms in the barracks. This often occurs despite the best efforts of the unit cadre to prevent this practice. In fact, in certain training environments like Officer Candidate School, the candidates literally live out of their car trunks and attempt to maintain "perfect" rooms for official inspections.

[58] 267 U.S. 132 (1925).

[59] *Id.* at 147–50.

[60] The National Prohibition Act, 42 Stat. 223, (1924).

[61] 267 U.S. at 150.

[62] *Id.* at 155.

[63] *See* Mil. R. Evid. 315(f)(2) and 315(g)(3).

[64] United States v. Ross, 456 U.S. 798 (1982).

[65] *Id.* at 800–01.

[66] *Id.*

the previous precedent of *Robbins v. California,*[67] and to reject the holding of that plurality opinion.[68]

Therefore, when government officials encounter motor vehicles in a public place and obtain information which gives them probable cause to believe that evidence or contraband is located inside the vehicle, they may search without obtaining a warrant from a magistrate or an authorization from a commander.[69] Note that the probable cause can arise from information obtained during a preliminary procedure such as an auto stop or an inventory, or it may originate from an independent source, *e.g.*, an informant or a victim.[70]

Once the probable cause to search the vehicle exists, it remains a viable justification for a warrantless intrusion even if the police impound the vehicle and search it later.[71] Government officials are not required to execute the auto exception in the field; they can wait until the car, truck, or recreational vehicle has been driven or towed to the station house or impoundment lot and conduct the intrusion there.[72] In an earlier case, *Chambers v. Maroney,*[73] the Court recognized that there was little real significance, from a fourth amendment perspective, between immobilization of an automobile to obtain a warrant to search and an immediate search without a warrant. Moreover, the Court has long held that this type of exception is viable even where the government could have obtained a warrant. After all, the test is not whether there are more reasonable procedures available, but whether the method utilized was reasonable.

In 1985, the Supreme Court decided two major cases which impact directly upon the automobile exception. The first, *United States v. Johns,*[74] reviewed a customs seizure in which federal agents stopped a truck which they had probable cause to believe contained packages of contraband. They impounded the truck, unloaded the packages, stored the smaller items for three days, and then, without a warrant, opened the packages. The Court ruled that although the customs officials had the right to conduct an immediate search, they were not required to do so. The three day wait and the warrantless intrusion were reasonable under the circumstances.

Caution should be exercised when dealing with movable objects,[75] such as packages and luggage, *within* an auto. While it is true that the auto exception allows a search of the entire automobile, including compartments and containers that logically can hold contraband or evidence, the initial discovery of the containers should be as a result of the search itself. For example, in two major cases the Supreme Court would not allow the police to justify the search of a large footlocker[76] or a suitcase[77] on the grounds that they were found within the trunk of an auto. These cases are clearly distinguishable from the other major precedent under the automobile exception, however, because they involved "movable objects" which the police had probable cause to search before they were placed in the motor vehicles. The leading decisions, *Ross, Chambers,* and *Carroll,* strongly suggest that if the police encounter the containers or luggage for the *first time* during the auto search which may contain the object of the search, they may intrude and examine their contents.

The other major case decided in 1985, *California v. Carney,*[78] extended the automobile exception to include recreational vehicles. In this instance, the DEA had placed the respondent's Dodge motor home under surveillance suspecting that Carney was distributing marijuana to young people in exchange for sexual favors. After observing a "transaction," the agents questioned a youth, confirmed their suspicions, and entered the motor home without a warrant to search it. The agents then transported the vehicle to the police station, conducted a warrantless search, and seized additional evidence.

The Supreme Court conceded that this type of vehicle did possess some of the attributes of a home. Nonetheless, due to its mobility and the reduced expectation of privacy that results from traveling on the highways, the Court found that the motor home clearly fell within the automobile exception.

In arriving at this decision, the Court considered other relevant factors. Chief Justice Burger, who authored the lead opinion, could not ignore the role that motor homes could play in the illicit drug trade. Further, the fact that the motor vehicle was parked in a public place seemed to have a definite impact in evaluating the appropriate privacy interest.

This last point is critical because, as in the case of movable objects, the police should exercise caution in applying

---

[67] 453 U.S. 420 (1981).

[68] 456 U.S. at 824.

[69] California v. Carney, 105 S. Ct. 2066 (1985); United States v. Ross, 456 U.S. 798 (1982); Michigan v. Thomas 458 U.S. 259 (1982); Texas v. White, 423 U.S. 67 (1975); Carroll v. United States, 267 U.S. 132 (1925); United States v. Switzer, 17 M.J. 540 (A.C.M.R. 1983).

[70] *California v. Carney;* United States v. *Ross.*

[71] *California v. Carney;* United States v. Johns, 105 S. Ct. 881 (1985); *Michigan v. Thomas; United States v. Ross; Texas v. White;* Chambers v. Maroney, 399 U.S. 42 (1970).

[72] *Michigan v. Thomas.*

[73] 399 U.S. 42 (1970).

[74] 105 S. Ct. 881 (1985).

[75] Despite the many similarities between movable objects and automobiles, there appears to be a preference for warranted detentions and searches where the police focus is upon a movable object such as luggage or a footlocker. *See also* United States v. Place, 462 U.S. 696 (1983); United States v. VanLeeuwen, 397 U.S. 249 (1970).

[76] United States v. Chadwick, 433 U.S. 1 (1977).

[77] Arkansas v. Sanders, 442 U.S. 763 (1979).

[78] 105 S. Ct. 2066 (1985).

the automobile exception to a vehicle which is situated on private property and not likely to be moved. In *Coolidge v. New Hampshire,*[79] a case which is admittedly quite old by current standards, Justice Stewart refused to apply the automobile exception to the search of a car parked next to its owner's house where there was no objective indicia that the vehicle would have been moved or the evidence destroyed.

Conclusion

Millions of automobiles cross and recross our nation daily. A large part of our population spends a significant portion of their lives in motor vehicles performing a vast number of functions. A significant proportion of law enforcement contacts between the police and ordinary citizens occur in a context where autos play a role. As a military counsel you will see scores of arrests, searches, and evidentiary seizures involving the privately owned vehicles of soldiers. It is important to the efficient administration of the military justice system that you understand the array of rules which impact upon the ability of the police to intrude into vehicles to obtain evidence for use in criminal prosecutions.

[79] 403 U.S. 443 (1981).

Truthful Testimony: A Parallax View

In prosecutions for rape, sodomy, and sexual assault, the victim's testimony frequently provides virtually the only evidence of the crime alleged. Trial counsel have increasingly begun to rely on expert testimony to bolster the credibility of the victim by educating the court members concerning such ideas as "rape trauma syndrome" or "sexually abused child syndrome." Two recent cases, however, point out the pitfalls in such an approach and reveal the need for trial counsel to properly assess how to proceed at trial when trying to establish whether a victim of rape or another sexual assault is testifying truthfully.

In one recent case, *United States v. Tomlinson,*[1] the Army Court of Military Review set aside a conviction of rape because the military judge admitted, over defense objection, rebuttal evidence in the form of expert testimony that the victim was suffering from a post-traumatic stress disorder consistent with "rape trauma syndrome."[2] In *Tomlinson,* the Army court found that although the trial counsel had called an expert to testify whether the alleged victim of rape had manifested symptoms consistent with "rape trauma syndrome," the effect of the expert's testimony "constituted an implied opinion that [the victim] had spoken the truth when she testified that [the accused] had raped her."[3] In applying the restrictions of Mil. R. Evid. 403[4] to this testimony, the Army court found that the expert's testimony "gave rise to a clear danger that the court members would consider his testimony dispositive on the issue of consent."[5] In this regard, the court held that:

> To allow an "expert" to offer his opinion on the resolution of a credibility dispute goes too far, and it makes no difference whether the opinion is express or follows inferentially from the expert's diagnosis of a psychological condition suffered by the witness whose credibility is at issue. The court members must decide whether a witness is telling the truth. *Expert insights into human nature are permissible, but lie detector evidence—whether human or mechanical—is not.* Otherwise, trial could degenerate into a battle of experts expressing opinions on the veracity of various witnesses.[6]

Most recently, in the case of *United States v. Cameron,*[7] the Court of Military Appeals also rejected similar expert testimony. In *Cameron,* the accused was convicted of carnally knowing his adopted twelve-year-old daughter. This conviction was obtained despite the fact that the defense introduced six witnesses who collectively testified that the victim possessed neither a reputation nor character for truthfulness. In addition to the testimony of the victim, the prosecution introduced the testimony of an Army Community Services social worker who testified, in rebuttal, that the victim was "truthful." Although the social worker's testimony bore the earmarks of expert testimony, the trial judge held, on objection by the defense, that the social worker's testimony was admissible as "an opinion as to credibility . . . in general."[8] The Court of Military Appeals rejected the admissibility of the social worker's testimony under both Mil. R. Evid. 608(a)[9] and Mil. R. Evid. 702.[10]

The court, basing its opinion in large part on the holding in *Tomlinson,* stated:

> The reception of [the social worker's] testimony that she believed [the victim] is subject to . . . condemnation. In this, instance, the witness was saying more than that in her opinion the witness was a person of truthful character. Instead, taken in context, her testimony constituted an assertion that this expert believed that [the victim] had told the truth about the incident with [the accused].[11]

While these opinions seem to reject the admissibility of expert testimony concerning "rape trauma syndrome" or "sexually abused child syndrome,"[12] they do not. Instead, both cases demonstrate trial counsel's failure to establish a

---

[1] 20 M.J. 897 (A.C.M.R. 1985).

[2] For a full discussion of *Tomlinson, see* Child, *Effective Use of Rape Trauma Syndrome,* The Army Lawyer, Oct. 1985, at 11 [hereinafter cited as Child].

[3] 20 M.J. at 901.

[4] Mil. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[5] 20 M.J. at 902.

[6] *Id.* (emphasis added).

[7] 21 M.J. 59 (C.M.A. 1985).

[8] *Id.* at 61.

[9] Mil. R. Evid. 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truth character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

[10] Mil. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[11] 21 M.J. at 65.

[12] For a discussion of "sexually abused child syndrome" *see* Thwing, *Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases, Part II,* The Army Lawyer, June 1985, at 46.

clear foundation for the testimony that was ultimately deemed prejudicial.

To establish a clear foundation for the admissibility of these forms of testimony, trial counsel must understand whether the testimony is being offered to establish the character or reputation of the victim for truthfulness or whether the testimony is offered to corroborate the truth of the victim's allegation.

The holdings in both *Cameron* and *Tomlinson* make clear that expert testimony introduced to establish that a victim of a sex offense is believable is inadmissible, especially where the foundation for the expert testimony is wanting, where the scientific basis for the opinion is meager, and where the expert opinion has minimal value "but substantial potential for misleading the factfinder." [13] Indeed, if this were not the case, there would be no other way to reconcile the holding in *Cameron* with the Court of Military Appeals' holding in *United States v. Snipes.* [14] In *Snipes,* the accused was charged with committing indecent, lewd, and lascivious acts on his adopted daughter. The thrust of the defense case was an attack on the victim's truthfulness. A defense expert, a clinical psychologist qualified in child psychology, testified that even though he had spent considerable time interviewing the victim, he did not "know if she's telling the truth or not." [15] In rebuttal, the government introduced the testimony of three expert witnesses. The qualifications of each of the witnesses were clearly established on the record. Each expert had extensive experience in the area of child abuse. Each had considerable contact with the victim, the victim's family, and others who knew the victim. One of the experts testified that there could be no other explanation for the victim's personality except sexual abuse. Two of the other experts testified that they believed the victim had made truthful statements. One of the experts testified that: "I have not known of any cases where a child has accused a parent of incest where it has not been so." [16] The Court of Military Appeals, in construing the application of Mil. R. Evid. 702, 703, and 704, to the testimony of the experts, held that the respective testimonies of each expert was admissible:

> When these rules are read in combination, the conclusion is inescapable that they are intended to broaden the admissibility of expert testimony, and the essential limiting parameter is whether the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." [17]

Although the *Tomlinson* opinion seems to ignore the holding in *Snipes,* it does not. Rather, the Army court in *Tomlinson* determined that the expert testimony concerning "rape trauma syndrome," while admissible for some purposes, was not admissible for the purpose of establishing the credibility of the victim. The Army court maintained that use of expert testimony to establish whether a witness is telling the truth is analogous to "lie detector" evidence. [18] This holding arose because the court believed that the trial counsel introduced the expert testimony to establish lack of consent. Thus, although the court found that evidence of "rape trauma syndrome" may have *specific* relevancy to issues such as "lapses or inconsistencies in recollection" of the victim and, therefore, be admissible, use of such testimony which had only *general* relevancy relating to the "believability" of the victim was inadmissible. TCAP recently provided trial counsel with the following advice concerning *Tomlinson*-like issues:

> To show that your offer is *specifically* relevant, you must listen very carefully to the defense's cross-examination and to the accused's testimony and highlight those areas for which specific rebuttal, by expert testimony, is necessary. Voir dire of members as to their lack of experience and training concerning rape can be useful in showing that expert testimony will aid the members. [19]

Accordingly, the matter of establishing the truthfulness of victims of crimes such as rape, forceful sodomy, or sexual assault at trial is a matter of patient planning. Trial counsel must understand the purpose for which he or she intends to offer evidence in support of the credibility of the victim. If the evidence is expert testimony intended to articulate such factors as "sexually abused child syndrome" or "post traumatic stress disorder," then trial counsel must establish the need for this evidence during *voir dire* of the court members or the military judge. It is vital that trial counsel present the expert's qualifications on the record and demonstrate why the expert can testify regarding these factors. Trial counsel must also be prepared to establish *on the record* the specific relevant basis for such testimony. As to each of these requirements, trial counsel must be able to articulate the Military Rule of Evidence which gives the form and basis for the admissibility of this evidence. If the victim of an offense such as rape or sexual assault has undergone a "slashing cross-examination" or the defense has introduced evidence which has called the credibility of the victim into question, trial counsel must understand whether he or she intends to bolster the victim's credibility under Mil. R. Evid. 608(a), or whether expert testimony is necessary to establish some aspect of the allegation called into question. It should be clear from an analysis of *Snipes, Tomlinson,* and *Cameron* that trial counsel cannot depend upon appellate courts to guess the theory trial counsel was relying upon to establish the truthfulness of the victim.

---

[13] *Cameron,* 21 M.J. at 66.

[14] 18 M.J. 172 (C.M.A. 1984).

[15] *Id.* at 177.

[16] *Id.*

[17] *Id.* at 178.

[18] 20 M.J. at 902.

[19] Child, *supra* note 2, at 14 (emphasis added).

Discovering and Removing the Biased Court Member

Captain Bernard P. Ingold
Defense Appellate Division

Introduction

One of the paramount responsibilities of the defense counsel is to implement his or her client's right to be tried by an impartial panel. To effectively discharge this responsibility, counsel must obtain information about prospective court members' attitudes and beliefs, and exercise sound judgment in making challenges. The purpose of this article is to provide trial defense counsel with practical advice and information to help him or her obtain an impartial court-martial panel for the military client. This article will explore procedures for obtaining information about members with a primary focus on conducting effective *voir dire*. The article includes a discussion of the basic standards of court member impartiality in military practice and concludes with comments on preserving and litigating challenge for cause issues on appeal.

Conducting a Thorough Pretrial Investigation

One of the advantages the military defense counsel has over his or her civilian counterpart is that the military lawyer knows before trial exactly who the prospective court members will be. Counsel should use this advantage to investigate the background of each member selected by the convening authority. If the court-martial panel has just been selected, defense counsel should consider requesting the trial counsel to submit questionaires to prospective members.[1] The trial counsel must, upon request, submit a questionaire to the members requesting information in eleven categories, including the members' educational history, military background, and prior participation in the case.[2] The defense may, in addition, request the military judge to authorize additional questions not specifically delineated in the rule.[3]

Each completed questionaire should be reviewed thoroughly for information which might have some bearing on the case. For example, if the prospective member is from the same unit as the accused, it is possible that he or she has heard about the case. The questionaire responses which may impact on the exercise of challenges should obviously be developed during *voir dire*. Counsel, however, should not defeat the benefit of using the questionaire—to expedite the *voir dire* process—by asking questions which unnecessarily repeat information already on the completed questionaires.[4]

The unique military practice of detailing the same court-martial panel to try a series of cases provides counsel with a valuable opportunity to learn about prospective members' values, personalities, and impartiality. Counsel should review the results of trials in which the same panel detailed to his or her case has sat and consult the defense counsel who tried those cases for insight into each member's attitudes and possible impartiality. Counsel should also review the *voir dire* proceedings in prior cases for information pertinent to his or her case. The questions which were submitted by the members in these cases can also be a good source for discovering the existence of potential bias.[5]

Using *Voir Dire* Effectively

Objectives of voir dire

There are three major objectives to be accomplished during *voir dire*.[6] The first, and probably the most important, objective is to elicit enough information to make sound decisions in exercising challenges for cause and peremptory challenges. It is virtually impossible to make effective use of challenges without having some knowledge about each of the prospective members. In light of this fact, the Court of Military Appeals has expressed the view that the complete failure to conduct *voir dire* in a serious case is unacceptable trial strategy and can be a basis for supporting an appellate claim of inadequate representation.[7]

A second objective of *voir dire* is to educate the members concerning the nature of the case and the legal principles involved from a defense perspective. *Voir dire* examination can be used by counsel to pass information on to the members which may affect their attitudes toward the issues they must later decide. Questions explaining such fundamental legal concepts as presumption of innocence and reasonable doubt in simple straightforward language often can be more effective than the military judge's recitation of the law. After carefully explaining the basic legal principles involved in the case, the defense counsel should obtain each member's

---

[1] Manual for Courts Martial, United States, 1984, Rule for Courts-Martial 912(a)1 [hereinafter cited as R.C.M.].

[2] *Id.*

[3] *Id.*

[4] R.C.M. 912(a)1 discussion.

[5] For example, a court member's question to a noncommissioned officer asking why he testifying on behalf of an accused when the accused has been convicted of drugs suggests a possible inelastic sentencing attitude toward drug offenders.

[6] One article discussing the major objectives of *voir dire* is Holdaway, *Voir Dire—A Neglected Tool of Advocacy*, 40 Mil. L. Rev. 1 (1968) [hereinafter cited as Holdaway]. *See also* F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials § 78 (1971).

[7] United States v. McMahan, 6 C.M.A. 709, 21 C.M.R. 31 (1956).

agreement to apply these propositions during their deliberations. The *voir dire* process can also be used by counsel to make the members aware of damaging evidence which he or she expects will be introduced against the client at trial, thereby lessening the impact. This effectively suggests to the members that the defense is not interested in hiding any facts and is only seeking a fair and impartial trial.

The final objective of *voir dire* is to develop rapport with the court members. *Voir dire* is usually counsel's first contact with the court members and can be used to make a favorable "first impression." Counsel should be friendly and sincere and assume a role that is natural. The defense counsel who is able to put the members at ease and who displays an honest and sincere conviction in the cause he or she is advocating has taken an important step toward achieving a favorable result for the client.

There are times when sound reasons exist for not conducting an extensive *voir dire.* If counsel has tried a case before the same panel, he or she should avoid exploring the same areas covered in previous cases, unless laying the ground for making a challenge. In every case, the careful selection and phrasing of each *voir dire* question is essential to avoid asking unnecessary or embarrassing questions. While *voir dire* is an important procedure, if conducted without adequate reflection, it can have the unfortunate effect of alienating the members against counsel and the client. For this reason, each *voir dire* question should be designed to accomplish some specific purpose.

One of the biggest mistakes a defense attorney can make is to let a court member reveal damaging information about the case or the client to the other members during *voir dire.* Counsel must closely monitor each member's responses and request individual *voir dire* of those members suspected of having prejudicial knowledge or information. Individual *voir dire* should also be used to cover sensitive subjects or any areas which could be embarrassing to a member.

Voir dire can often be a tedious stage of the trial proceedings. To keep the members' attention, counsel should vary the subject matter of questioning and alternate questions among all of the members. The questions should be simple and free of ambiguity. Some questions should be directed toward the group and others should be asked of individual members. The members should be encouraged to volunteer information and given an opportunity to develop answers beyond a simple "yes" or "no" whenever feasible.

Scope of voir dire

Trial judges have traditionally possessed wide discretion in controlling the scope of *voir dire* questioning and establishing the method and manner in which it will be conducted.[8] Because of the limited number of peremptory challenges available in military practice, however, the Court of Military Appeals has encouraged trial judges to grant considerable leeway to counsel when they are conducting *voir dire.*[9] To comply with this liberal approach, a military judge may not entirely restrict counsel from questioning the members concerning common principles of law[10] or summarily deny a defense request to reopen *voir dire* examination.[11] The primary limitation on the scope of *voir dire* is that the questioning must relate to a possible ground for challenge.[12]

Standards for juror impartiality in the military

In military practice, challenges for cause must be based on one of fourteen grounds.[13] The first thirteen enumerate automatic disqualifications based on the member's competency or prior participation in the case.[14] A party may waive a challenge on any of the thirteen enumerated grounds except a challenge based on competency under the Code.[15] In the interest of justice, the military judge may excuse a member for which a challenge would lie even though no challenge has been asserted.[16] The remaining ground for challenge is a challenge against any member who "[s]hould not sit in the interest of having the trial free from substantial doubt as to legality, fairness or impartiality."[17] Counsel must affirmatively assert a challenge against a member for cause based on this provision. The party asserting the challenge has the burden of establishing the existence of actual prejudice or facts which support a contention of bias or prejudice.[18]

The concept of implied bias may be used to support a challenge for cause if most people in the same position as the challenged court member would be suspected of being prejudiced.[19] Counsel might rely on this concept when a court member disclaims impartiality despite facts which are highly suggestive of bias. Although the concept of implied bias is recognized in military practice, it will not be applied

---

[8] *See generally* I.F. Busch, Law and Tactics in Jury Trial § 84 (1979); 47 Am. Jur. 2d *Juries* § 200 (2d ed. 1969).

[9] United States v. Tippitt, 9 M.J. 106 (C.M.A. 1980); United States v. Parker, 6 C.M.A. 274, 19 C.M.R. 400 (1955); United States v. Thomas 18 M.J. 545 (A.C.M.R. 1984). *CF.* R.C.M. 912(d).

[10] United States v. Sutton, 15 C.M.A. 531, 36 C.M.R. 29 (1965); United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984)

[11] United States v. McMillion, 16 M.J. 658 (A.C.M.R. 1983)

[12] United States v. Tippett, 9 M.J. 106 (C.M.A. 1980); United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984).

[13] R.C.M. 912(f)(1)(A)–(N).

[14] R.C.M. 912(f)(1)(A)–(M).

[15] R.C.M. 912(4). *See also* Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (1982) [hereinafter cited as UCMJ]. The defense may waive the requirement that enlisted members be from a unit other than the accused, however.

[16] R.C.M. 912(f)4.

[17] R.C.M. 912(f)(1)(N).

[18] United States v. Dennis, 339 U.S. 162 (1950); United States v. Harris, 11 M.J. 589 (A.F.C.M.R. 1981).

[19] United States v. Smart, 21 M.J. 15,20 (C.M.A. 1985) (citing Taylor v. United States, 386 F. Supp. 132 (E.D. Pa. 1974), *aff'd,* 521 F. 2d 1399 (3d Cir. 1975)).

"indiscriminately."[20] A challenge for cause based on a theory of implied bias will succeed under limited circumstances only.

Particular areas of inquiry

The defense counsel should strive in every case to eliminate as many biased or prejudiced court members as possible. A careful, probing *voir dire* designed to discover every member who is not "mentally free to render an impartial findings and sentence based on the law and the evidence,"[21] is an essential ingredient to a fair trial. This section discusses many of the areas defense counsel should consider developing during *voir dire* to implement the accused's right to be tried by an impartial panel of court members.

Prior participation. A court member may be subject to challenge for cause by virtue of his or her prior participation in a case even though he or she does not fall within one of the examples enumerated in R.C.M. 912(f)(1). If a prospective member's participation in the case is such as to cast substantial doubt on his or her ability to impartially perform duties as a court member, he or she should be challenged for cause. Additionally, any member who has participated in a closely related case should be questioned concerning his or her involvement in that case and challenged if appropriate. For example, counsel may discover that a particular member has sat previously in a case arising out of the same circumstances for which the accused is facing trial. Although the law is not settled in state courts, the trend in the military is that a member who has sat in a closely related case involving the same facts and issues is subject to challenge for cause.[22] Similarly, a member may be disqualified if he or she has investigated or forwarded charges with recommendations for trial by court-martial in a closely related case.[23] A sustainable challenge may exist even though the investigation was informal or unrelated to the prosecution of the case.[24] For example, a court member who has certified personnel documents for the prosecution can be challenged on the basis that he or she is acting as a witness for the government.[25]

Voir dire should be designed to ascertain whether any court member has conducted an investigation of any kind into the facts or circumstances which gave rise to the case. Even though court members have a duty to disclose their prior participation in a case, defense counsel's failure to act at trial will constitute waiver under most circumstances. This is particularly so if the defense knows or could have discovered the prior participation through the exercise of reasonable diligence.[26]

Prior personal experiences. The background and experience of court members and their families will have a tremendous influence not only on their character and beliefs, but also on their attitudes toward other people and toward matters that may be raised at trial. For this reason, the past experiences of each court member should be thoroughly examined and considered with a view to determining the influence it might have on the outcome of the case. A member is unlikely to be objective if the member of a person in his or her family has been a victim of an offense which the accused is alleged to have committed. This fact alone will not generally constitute ground for a challenge for cause if the member provides assurances that the experience will not affect his or her impartiality.[27] In some cases, however, a court member's experience may have been so traumatic that he or she should be removed despite assertions of impartiality.[28]

Prior knowledge and pretrial publicity. Court members who have gained knowledge about the facts of a case through investigative reports, witness statements, newspaper accounts, or other sources may have a fixed preconception about the guilt or innocence of the accused. It has consistently been held, however, that a court member's prior knowledge of the facts and circumstances of the accused's misconduct does not necessarily constitute grounds for a challenge.[29] Thus, a court member is not automatically disqualified even though he or she has read a military police serious incident report,[30] a Criminal Investigation Division report,[31] or an Article 32 investigating officer's report[32] about the case before trial. Further, a court member's mere awareness of an accused's prior court-martial convictions, instances of misconduct, or unfavorable personnel actions does not constitute a *per se* ground for challenge.[33] On the other hand, a challenge for cause should be sustained against any court member who, because of prior knowledge of the case or of the accused, has

---

[20] *Id.* at 20. *See also* Smith v. Phillips, 455 U.S. 209 (1982); United States v. Porter, 17 M.J. 377 (C.M.A. 1984).

[21] United States v. Parker, 6 C.M.A. 274, 284–85, 19 C.M.R. 400, 410–11 (1955).

[22] *See* Evirett v. United States 281 F. 2d 429 (5th Cir. 1960); United States v. Barnes, 12 M.J. 956 (A.F.C.M.R. 1982); United States v. Dawkins, 2 M.J. 898 (A.C.M.R. 1976). For a discussion of the rule in state cases, *see* 47 Am. Jur. 2d. Juries §§ 272 and 273 (2d ed. 1969).

[23] United States v. Strawbridge, 21 C.M.R. 482 (A.B.R. 1956).

[24] United States v. Dyche, 8 C.M.A. 430, 24 C.M.R. 240 (1957); United States v. Bound, 1 C.M.A. 224, 2 C.M.R. 130 (1952).

[25] United States v. Polcyn, 14 C.M.R. 694 (A.B.R. 1954), *petition denied,* 15 M.J. 431 (1955); United States v. Justice, 14 C.M.R. 669 (A.B.R. 1954); United States v. Morris, 9 C.M.R. 786 (A.F.B.R. 1953); United States v. Beeks, 9 C.M.R. 743 (A.F.B.R. 1953).

[26] United States v. Strawbridge, 21 C.M.R. 482 (A.B.R. 1956).

[27] United States v. Porter, 17 M.J. 377 (C.M.A. 1984).

[28] United States v. Smart, 21 M.J. 15 (C.M.A. 1985).

[29] United States v. Talbott, 12 C.M.A. 446, 31 C.M.R. 32 (1961); United States v. Edwards 4 C.M.A. 78, 6 C.M.R. 78 (1952); United States v. Shaffer, 2 C.M.A. 75, 6 C.M.R. 75 (1952).

[30] United States v. Stewart, 2 C.M.A. 78, 6 C.M.R. 78 (1952).

[31] United States v. Edwards, 4 C.M.A. 299, 15 C.M.R. 299 (1954).

[32] United States v. Cavender, 17 C.M.R. 938 (A.B.R. 1954), *petition denied,* 20 C.M.R. 398 (1955); United States v. Burns, 12 C.M.R. 567 (A.B.R. 1953).

[33] United States v. Watson, 15 M.J. 784 (A.C.M.R. 1983); United States v. Bell, 3 M.J. 1010 (A.C.M.R. 1977), *petition denied,* 4 M.J. 128 (C.M.A. 1978); United States v. Lowman, 1 M.J. 1149 (N.C.M.R. 1977), *petition denied,* M.J. 258 (C.M.A. 1977); United States v. Avner, 27 C.M.R. 805 (A.B.R. 1959).

formed the opinion that the accused is guilty, or if a lingering doubt concerning impartiality remains.[34]

If the case which is being tried has been publicized in the press, counsel should attempt to discover if any of the court members has formed a fixed opinion concerning the client's guilt. Even though pretrial publicity is a significant source of preconceived opinions among court members, mere exposure to publicity is not grounds for challenge if the court member maintains he or she can still be impartial.[35] It will be extremely difficult to obtain excusal of a court member on this ground if the member retains only a vague or general recollection of the publicity concerning the incident.[36] Moreover, the Supreme Court has held that even if a juror has a preconceived impression of an accused's guilt or innocence based on widespread publicity, the juror is not subject to challenge for cause if he can lay aside his opinion and render a verdict only on the evidence presented.[37]

Bias toward the prosecution. Most court members will disclaim any bias for the prosecution if questioned generally about their predispositions. Defense counsel might, however, be able to raise the existence of such a bias establishing that the member has an official or personal interest in the outcome or is acquainted with the victim, prosecution witnesses, or trial counsel. Generally, a court member who merely has a personal relationship with the victim,[38] a government witness,[39] or the trial counsel[40] is not subject to automatic disqualification. Defense counsel must therefore elicit sufficient facts from which an actual bias might be inferred or from which an implied bias can be presumed.[41] This could be shown, for example, by establishing that the member's relationship with a trial participant is so close that it is obvious he or she would give more weight to the participant's testimony than that of others.

It also may be possible to disqualify a potential court member by showing that he or she has some official interest in the outcome by virtue of his or her military duties or because he or she has been influenced by his superiors. The nature of military service requires soldiers to serve in a number of duty positions and perform a variety of functions that could bear on their competency as court members. One such area that has been the subject of appellate litigation is court members who perform military police duties. The Army Court of Military Review has held that the provost marshal of the installation where the trial takes place is disqualified *per se* from serving as a court member.[42] The Army court also warned that individuals assigned to military police duties should not be appointed as court members. Any prospective member performing these duties should be challenged for cause on the theory of implied bias even if no actual bias can be shown. Similarly, a court member who works for the prosecutor should be excused to avoid the appearance of evil.[43]

A court member who holds an official position in a unit or organization that has been the victim of an offense may also be challenged on the theory of implied bias.[44] Mere membership in a club or fund that was a victim of a larceny probably will be too remote to warrant a sustainable challenge, unless it can be shown that the member has a direct personal interest in the fund or is responsible for its administration.[45] A defense counsel may also be able to show a prosecution bias by adducing facts which establish that the court member actively participates in an organization or committee which seeks to prevent certain types of crimes, such as child or drug abuse.[46]

Command influence. A soldier's contact or relationship with the convening authority or commander may suggest prosecution bias and serve as a basis for a challenge for cause. A court member is not necessarily disqualified merely because he or she is rated by the convening authority or works for him in a close staff relationship.[47] It has been held, however, that a court member who has discussed the case with the convening authority should be excused upon a challenge.[48] A court member who has heard remarks by the convening authority which reflected his or her belief in the accused's guilt or which announced a policy against certain types of offenses is also subject to challenge for

---

[34] United States v. Talbott, 12 C.M.A. 446, 31 C.M.R. 32 (1961). *See also* United States v. Fry, 7 C.M.A. 682, 23 C.M.R. 146 (1957); United States v. Dawkins, 2 M.J. 898 (A.C.M.R. 1976)

[35] Murphy v. Florida, 421 U.S. 749 (1975); United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982), *rev'd on other grounds,* 16 M.J. 359 (C.M.A. 1984).

[36] *See, e.g., United States v. Matthews. See also* Irvin v. Dowd, 366 U.S. 717 (1960); W. Jordan, *Jury Selection* § 5.07 (1980).

[37] *See, e.g.,* Murphy v. Florida, 421 U.S. 749 (1975); Irwin v. Dowd, 399 U.S. 717 (1960). If the publicity is incorrect or inflammatory, the trial court has a duty to inquire beyond a juror's own assessment of impartiality. Graham v. Mabry, 654 F.2d 603 (8th Cir. 1981).

[38] United States v. Harris, 13 M.J. 288 (C.M.A. 1982).

[39] United States v. Pollack, 9 M.J. 577 (A.F.C.M.R. 1980).

[40] United States v. Porter, 17 M.J. 377 (C.M.A. 1984); United States v. Baker, 2 M.J. 773 (A.C.M.R. 1976); United States v. Miller, 26 C.M.R. 570 (A.B.R. 1958); United States v. Jeffery, 12 C.M.R. 337 (A.B.R. 1953).

[41] United States v. Reed, 2 M.J. 972 (A.C.M.R. 1972); United States v. Baker, 2 M.J. 773 (A.C.M.R. 1976); United States v. Miller, 26 C.M.R. 570 (A.B.R. 1958).

[42] United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). *See also* United States v. Brown, 13 M.J. 890 (A.C.M.R.), *petition denied,* 14 M.J. 283 (C.M.A. 1982); United States v. Hedges, 11 C.M.A. 642, 29 C.M.R. 458 (1960).

[43] United States v. Hampton, 50 C.M.R. 232 (A.C.M.R. 1975).

[44] United States v. Harvey, 22 C.M.R. 415 (A.B.R. 1957).

[45] United States v. Gibbs, 12 C.M.R. 454 (A.B.R.), *petition denied,* 13 C.M.R. 142 (1953); United States Bergin, 7 C.M.R. 501 (A.B.R. 1952).

[46] *See generally* United States v. Allsup, 566 F.2d 68 (9th Cir. 1971); United States v. Harris, 13 M.J. 288 (C.M.A. 1982); United States v. Olsen, 11 C.M.A. 286, 29 C.M.R. 102 (1960).

[47] United States v. Ambalada, 1 M.J. 1132 (N.C.M.R.), *petition denied,* 3 M.J. 165 (1977); United States v. Adams, 36 C.M.R. 718 (A.B.R. 1966), *petition denied,* 37 C.M.R. 470 (C.M.A. 1966).

[48] United States v. Ennis, 15 M.J. 970 (A.C.M.R. 1983).

cause.[49] Similarly, members who have discussed the case with the accused's commander and heard him communicate his views concerning an appropriate punishment should not sit on the case.[50] A challenge for cause should be made whenever relationships or circumstances exist which are suggestive of a prosecution bias, even though the member disclaims the existence of bias.[51]

Testimony of specific witnesses. It should be expected that most court members will have the tendency to assume that officers and law enforcement officials perform their duties properly. If the testimony of these witnesses is important to the government's case, the defense may inquire as to the weight court members will give their testimony.[52] Court members indicating a predisposition to attach greater credence to officers or military police officers than they would to the testimony of other witnesses should be excused for cause.[53] Although most court members will deny that they would attribute more weight to these types of witnesses, *voir dire* questioning will serve the function of reminding court members to scrutinize their testimony as closely as they scrutinize the testimony of other witnesses.

Racial prejudice. Where the accused is a member of a racial or ethnic minority, *voir dire* questions designed to elicit possible racial prejudice are permissible.[54] The failure to allow such questions is a violation of due process if the circumstances suggest a significant likelihood that the facts of the case will involve racial prejudice.[55] The problem defense counsel will likely encounter in this area is not convincing the military judge to grant a challenge if racial prejudice has been admitted, but rather prompting the prospective member to admit racial prejudice in the first place. Court members cannot be expected to voluntarily reveal racial prejudice and may not even be aware that they harbor latent prejudices. Thus, if *voir dire* is to be productive, counsel must conduct a searching inquiry designed to lead court member's into an open and frank discussion of relevant attitudes. Counsel must be alert to any opinion or belief which suggests racial prejudice. Of course, counsel should request individual *voir dire* of any member suspected of harboring racial prejudice.

Religious beliefs. The religious beliefs of a prospective court member are the proper subject of *voir dire* to the extent that such beliefs cast light on the member's personal fairness and impartiality.[56] Questions in this area are likely to embarrass or antagonize court members, however. Therefore, inquiry into this area should be avoided unless the facts or circumstances raise the potential for religious prejudice.[57]

Legal propositions. Because certain misconceptions about legal standards are prevalent,[58] counsel should consider asking questions designed to reveal court member's attitudes about such legal principles as presumption of innocence, proof beyond a reasonable doubt, and burden of proof. A member who reveals a mistaken attitude about an important legal principle should be challenged for cause. For example, members who indicate they would draw an inference against the accused for remaining silent[59] or who believe the accused must affirmatively demonstrate his innocence to the court, probably should not be allowed to sit on the case.[60]

The defense counsel should also consider examining the court members about their attitudes concerning the proposed defense. These questions serve the useful function of alerting the members to the defense theory of the case and may help counsel discover a member who is reluctant to fairly consider the anticipated defense.[61] Counsel should recognize that simply asking the members if they will follow the military judge's instructions will generally be insufficient to discover attitudes about defenses such as self-defense, intoxication, and insanity, which the members may be prone to reject. Questions concerning legal principles should be fully and accurately expressed. Counsel should exercise great care in drafting these questions and ensure before trial that they comport with the Military Judge's Benchbook[62] and controlling case law.

---

[49] United States Kentner, 12 C.M.A. 667, 31 C.M.R. 253 (1962); United States v. Olsen, 11 C.M.A. 286, 29 C.M.R. 102 (1960).

[50] United States v. Miller, 19 M.J. 159 (C.M.A. 1985). *See also* United States v. Rosser, 6 M.J. 267 (C.M.A. 1979).

[51] *See* United States v. Miller, 19 M.J. 159 (C.M.A. 1985); United States v. Ennis, 15 M.J. 970 (A.C.M.R. 1983).

[52] United States v. Tomcheck, 4 M.J. 66 (C.M.A. 1977); United States v. Johnson, 3 M.J. 558 (A.C.M.R. 1977); United States v. Arvie, 7 M.J. 768 (A.C.M.R. 1979).

[53] *Tomcheck*, 4 M.J. at 70 n.1. *See also* United States v. Johnson, 3 M.J. 558 (A.C.M.R. 1977). Sally v. United States, 353 F. 2d 897 (D.C. Cir. 1965); Chavey v. United States; 258 F. 2d 816 (10th Cir. 1958), *cert. denied sub nom.* Teraria v. United States, 359 U.S. 916 (1959).

[54] Aldridge v. United States, 283 U.S. 308 (1931); United States v. Parker, 6 C.M.A. 274, 19 C.M.R. 400 (1955); United States v. Weatherspoon, 12 M.J. 588 (A.C.M.R. 1981), *aff'd*, 16 M.J. 252 (C.M.A. 1983); United States v. Credit, 2 M.J. 631 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977).

[55] *Compare* Ham v. South Carolina, 409 U.S. 524 (1973) (refusal to allow *voir dire* concerning racial prejudice held to violate due process) *with* Ristaino v. Ross, 424 U.S. 589,598 (1976) *(voir dire* concerning racial prejudice not constitutionally required where circumstances do not "suggest a significant likelihood that racial prejudice might affect [the] trial").

[56] United States v. Credit, 2 M.J. 631 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977).

[57] United States v. Walbert, 32 C.M.R. 945 (A.F.B.R.), *petition denied*, 33 C.M.R. 246 (1963).

[58] For example, studies have shown that many jurors believe that an indictment is evidence of guilt and often draw a negative inference from a defendant's failure to take the stand. *See* Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1968).

[59] United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1960).

[60] United States v. Deain, 5 C.M.A. 44, 17 C.M.R. 44 (1954); United States v. Kellum, 23 C.M.R. 882 (A.F.B.R. 1957). *See also* United States v. Carver, 6 C.M.A. 258, 19 C.M.R. 384 (1955).

[61] For a helpful a discussion of the use of *voir dire* to indoctrinate the court members in military practice, *see* Holdaway, *supra* note 6.

[62] Dep't of Army, Pam. No. 27-9, Military Judge's Benchbook (1 May 1982).

Bias toward certain offenses. A prospective court member's responses during *voir dire* may reveal the existence of a bias against a certain class of offenses. Military appellate courts have held that a general bias against a particular offense is not a ground for disqualification unless the court member's predisposition will not easily yield to the evidence and law presented.[63] On the other hand, any court member who indicates that he or she cannot put his or her particular distaste for a certain type of offense aside should be challenged for cause.[64]

Predisposition toward sentence. Many prospective court members will harbor a predisposition toward adjudging a punitive discharge merely because the case has been referred to a bad-conduct special or general court-martial. In recognition of this fact, the courts have granted counsel considerable latitude during *voir dire* to conduct inquiry into possible sentencing predispositions.[65] A court member having an inelastic attitude or fixed preconception as to the degree of punishment that should be imposed for a particular offense or offender is subject to a challenge for cause.[66] The predicate required for a sustainable challenge in this area is an inelastic attitude that will not yield to the evidence presented and the military judge's instructions.[67] Thus, an initial inclination or predisposition to adjudge a punitive discharge is not necessarily disqualifying. If a member clearly reveals an inelastic attitude, however, he or she is subject to challenge even though the member indicates he or she will consider matters presented during the sentencing phase of trial.[68]

Preserving the Issue on Appeal

The chance for succeeding on a challenge for cause issue on appeal is directly linked to the efforts of defense counsel at trial. Counsel must discover and develop on the record, facts supporting the contention of impartiality. This is usually accomplished by eliciting facts and opinions from a member during *voir dire.* In some cases, counsel may consider presenting extrinsic evidence to establish a court member's bias, particularly if the member asserts impartiality despite evidence suggesting otherwise. The failure to make a challenge for cause at trial, with very few exceptions, will constitute waiver of the issue on appeal.[69]

The Court of Military Appeals has consistently encouraged trial judges to be liberal in granting challenges for cause.[70] Despite this policy, counsel can expect some military judges to be reluctant to grant challenges for cause even though the existence of an actual or implied bias has been raised. Under the 1984 Manual, counsel must exercise his or her peremptory challenge to preserve an issue of an improper denial of a challenge for cause.[71] The peremptory challenge does not have to be used against the member unsuccessfully challenged for cause to preserve the issue.[72] If, however, counsel exercises his or her peremptory challenge against the member challenged for cause, he or she must state on the record that it would have been used against another member.[73]

Standard on Appellate Review

Military appellate courts generally accord considerable deference to the military judge's decision on a challenge for cause.[74] Because he or she is in a position to observe demeanor, appellate courts will give great weight to the evaluation of the trial judge when the responses of a court member are ambiguous or when the facts concerning an area of bias are in conflict.[75] Notwithstanding this deference, however, a trial judge is not free to ignore applicable legal principles or disregard the realities of military life when ruling on challenges for cause.[76] Moreover, a military judge may not rely solely on a member's declarations of impartiality to deny a challenge if the facts establish the existence of actual or implied bias.[77] If an area of prejudice emerges, the military judge should ensure that objective facts are developed to make an informed decision as to the member's competency. The Court of Military Appeals has cautioned that the mere inconvenience of delaying the trial to obtain additional members is not an adequate ground for denying a challenge.[78] The military judge's ruling on a

---

[63] United States Porter, 17 M.J. 377 (C.M.A. 1984); United States v. Davenport, 17 M.J. 242 (C.M.A. 1984).

[64] United States v. Heriot, 21 M.J. 11 (C.M.A. 1985); United States v. Cleveland, 15 C.M.A. 213, 35 C.M.R. 185 (1965); United States v. Parker, 6 C.M.A. 247 19 C.M.R. 400 (1955); United States v. Dean, 5 C.M.A. 44, 17 C.M.R. 44 (1954); United States v. Huggins, 14 M.J. 534 (A.C.M.R. 1982); United States v. Mitchell, 11 M.J. 907 (A.C.M.R. 1981), *modified,* 15 M.J. 214 (C.M.A. 1983); United States v. Bann, 50 C.M.R. 384 (A.C.M.R. 1975).

[65] United States v. Fort, 16 C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Cleveland, 15 C.M.A. 213, 35 C.M.R. 185 (1965); United States v. Jemmings, 50 C.M.R. 247 (A.C.M.R. 1975).

[66] *United States v. Fort;* United States v. Tucker, 16 C.M.A. 318, 36 C.M.R. 474 (1966).

[67] United States v. Tippitt, 9 M.J. 106 (C.M.A. 1980); United States v. McGowan, 7 M.J. 205 (C.M.A. 1979).

[68] United States v. Cosgrove, 1 M.J. 199 (C.M.A. 1975); United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Goodman, 3 M.J. 1106 (A.C.M.R. 1977).

[69] *See* RCM 912(g)(4).

[70] United States v. Smart, 21 M.J. 15 (C.M.A. 1985); United States v. Miller, 19 M.J. 519 (C.M.A. 1984); United States v. Porter, 17 M.J. 377 (C.M.A. 1984); United States v. Harris, 13 M.J. 288 (C.M.A. 1980).

[71] R.C.M. 912(g)(4).

[72] *Id.*

[73] *Id.*

[74] *United States v. Smart; United States v. Harris;* United States v. Dawdy, 17 M.J. 523, (A.F.C.M.R. 1983) *petition denied,* 17 M.J. 285 (C.M.A. 1983).

[75] *See United States v. Smart. See also* UCMJ art. 41(a).

[76] United States v. Miller, 19 M.J. at 163. *See also United States v. Harris.*

[77] *United States v. Miller; United States v. Harris.*

[78] *United States v. Smart; United States v. Miller;* United States v. Mason; 16 M.J. 455 (C.M.A. 1983). *See also* Patton v. Yount, 104 S. Ct. 2885 (1984).

challenge for cause will be tested on appeal by the "clear abuse of discretion" standard.[79]

Conclusion

Defense counsel should strive to obtain as much pertinent information about the prospective court members as is necessary to enable him or her to make intelligent and rational challenges. Two effective but often underutilized tools to achieve this goal are court member questionaires and an effective *voir dire*. A thoughtful and carefully conducted *voir dire* will not only provide the information on which to make sound challenges, but can also serve to develop rapport with the members and alert them to the major issues to be litigated and the client's theory of the case. Counsel should know the basic standards for determining court member impartiality and be familiar with the case law applying these standards to effectively implement a client's right to trial by an impartial panel.

Trial Judiciary Notes

Delegation of Authority to Appoint Part-Time Military Magistrates

Under the provisions of Army Regulation 27–10, para. 9–2*b*, The Judge Advocate General has the authority to appoint part-time military magistrates. The regulation permits this authority to be delegated to the Commander, USALSA, the Chief Trial Judge, Chief Circuit Judges, and supervising military judges. Until recently, The Judge Advocate General has delegated this authority only to the Commander, USALSA.

On 28 October 1985, Major General William K. Suter, Acting The Judge Advocate General, approved a request by the Chief Trial Judge to further delegate authority to appoint part-time military magistrates. The Commander, USALSA, will retain his delegated authority to appoint part-time military magistrates, but under normal circumstances the appointment will be made by the Chief Trial Judge and appropriate circuit judges who have been delegated such authority.

The primary reason for this change was to expedite the processing of requests for such appointments. The authority to appoint part-time military magistrates has been delegated as follows:

a. The authority to appoint part-time military magistrates for CONUS, Alaska, Hawaii and Panama has been delegated to the Chief Trial Judge.

b. The authority to appoint part-time military magistrates for Europe, Africa and the Middle East has been delegated to the Chief Judge, Fifth Judicial Circuit (located in USAREUR).

c. The authority to appoint part-time military magistrates for the Far East has been delegated to the Chief Judge, Sixth Judicial Circuit (located in Korea).

Further delegation of this authority is not authorized.

Public Access to Courts-Martial

The recent decision in *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), is instructive concerning the procedures to be followed when the government wants a closed hearing. Essentially, the judge must consider and enter findings concerning whether the government's interest in closing outweighs the accused's and the public's interest in a public trial. A mere assertion that a witness will be embarrassed by testifying publicly is insufficient. MCM, 1984, R.C.M. 806(a).

Also of interest is footnote 6, 20 MJ at 438:

> It was stated in oral argument that it is the practice in some military courts to bar admittance of spectators except during a recess. Employment of such a procedure is a denial of public access to courts-martial and should be discontinued.

If any Army court is currently violating this proscription, it should cease immediately. In small courtrooms, however, where the entry or departure of spectators distracts the trial participants, spectators can be required to wait until a witness enters or departs, or until a similar pause in the proceedings. *See* MCM, 1984, R.C.M. 806(b).

USAREUR Military Magistrate Program

Major Charles E. Trant
Military Judge, Fifth Judicial Circuit, Mannheim, FRG

Introduction

The military magistrate program is an Army-wide program for the review of pretrial confinement and the issuance of search and seizure authorizations based upon probable cause by neutral and detached magistrates. In the overseas context it has a heightened significance due to such factors as the unavailability of federal or state magistrates to issue search warrants and, as elsewhere in the Army, the lack of any bail system. Unresolved issues of recent interest,

[79] United States v. McQueen, 7 M.J. 281 (C.M.A. 1979)

such as the applicability of the "good faith" exception to the exclusionary rule for searches based upon facially valid but not latently defective magistrate warrants, and the U.S. Army Europe (USAREUR) issue of the power of the community/administrative commander vis-a-vis the tactical commander to issue warrants, have brought the military magistrate into the limelight. This article outlines the USAREUR implementation of the military magistrate program.

Overall Organization

The Chief Circuit Judge for the Fifth Judicial Circuit, under the supervision of the Commander, USALSA and the Chief Trial Judge, is responsible for the general administration of the program. He determines the extent to which military judges will perform magistrate duties, appoints and terminates part-time magistrates, assigns supervising military judges (including himself) for each part-time magistrate, reviews monthly reports of all magisterial activity in USAREUR, and supervises the annual training of part-time magistrates. Supervising military judges are the senior military judges who normally service a general court-martial (GCM) convening authority and are responsible for the direct supervision of all part-time magistrates assigned to that command. They render intermediate input into the nomination/appointment process and ensure that their part-time magistrates possess the requisite training, experience, and maturity to perform magisterial duties and are not engaged in duties inconsistent with the neutral and detached status of magistrates, such as the prosecution or defense function or criminal investigation. Supervising military judges are also available to advise their part-time magistrates on particular legal issues.

Although all military judges are empowered to perform magisterial duties, it is not envisioned that all military judges will routinely or necessarily perform such duties. The Chief Circuit Judge has, determined however, that it is logically proper, legally sound, and economically reasonable for a military judge with duty at Mannheim to routinely act as the Mannheim military magistrate to review all cases of pretrial confinement at the United States Army Confinement Facility, Mannheim. The Mannheim military magistrate assists the Chief Circuit Judge in the general administration of the program, is available to advise all USAREUR part-time magistrates, and conducts an annual training conference for all USAREUR magistrates.

The part-time magistrates, who presently number sixteen, are judge advocates assigned to the general court-martial convening authorities and perform their principal non-criminal law duties under the supervision of their staff judge advocates. They have been nominated by their staff judge advocate to perform the additional duty of a part-time magistrate and have been appointed by the Chief Circuit Judge. All part-time magistrates exercise the power to authorize searches and seizures or apprehensions. The only part-time magistrates who have any occasion to review cases of pretrial confinement are the part-time magistrates located in Berlin and the Southern European Task Force (SETAF) for their respective confinement facilities, and the part-time magistrates from Worms and Darmstadt who provide back-up support to the Mannheim military magistrate for the Mannheim Confinement Facility. The remainder of this article will focus on the role of the USAREUR part-time magistrate.

Appointment and Termination

A staff judge advocate may nominate one or more judge advocates for appointment as part-time magistrates. He or she does so by sending a military letter through the supervising military judge for his command to the Chief Circuit Judge. As the Chief Circuit Judge is also the supervising military judge for part-time magistrates from Berlin, SETAF, and areas outside the Federal Republic of Germany, those nominations are sent directly to him. The letter must indicate that the nominee meets all the requisite qualifications established in AR 27–10, para 9–2*b*(2). The supervising military judge endorses the letter with a recommendation for approval or disapproval and forwards the nomination to the Chief Circuit Judge, who may appoint the nominee to serve at the pleasure of the Chief Circuit Judge or disapprove the nomination for any reason. Part-time magistrates will serve until terminated by the Chief Circuit Judge, which will routinely occur upon a permanent change of station move, release from active duty, or upon the assignment to and performance of principal duties inconsistent with the neutral and detached status of a magistrate.

Authority of Part-Time Magistrates

Part-time magistrates can issue search and seizure or apprehension authorizations based upon probable cause as delineated in Mil. R. Evid. 315(d)(2) with respect to persons and property specified in Mil. R. Evid. 315(c). This power is coterminous with military magistrates in the States with respect to persons subject to military law, military property, and persons or property within military control. Additionally, USAREUR part-time magistrates can authorize searches of non-military property within Europe under Mil. R. Evid. 315(c)(4) and the NATO Status of Forces Agreement, searches of military post offices (TJ Memo 83–1, 26 Jan 83), and searches of customers' financial records held by financial institutions on overseas military installations (TJ Memo 84–10, 13 Nov 84). Neither stateside nor USAREUR part-time magistrates can authorize an intercept/pen register order (TJ Memo 82–6, 15 Jan 82), or the search of an attorney's office (TJ Memo 84–2, 10 Feb 84). Individuals seeking search authorizations are encouraged to contact part-time magistrates first. A military judge should be contacted only if a part-time magistrate is unavailable. Although military judges are not *per se* disqualified from presiding over cases in which they earlier have issued a search authorization, the Chief Circuit Judge has determined that it is more efficient to utilize the network of part-time magistrates as the initial contacts.

The overwhelming majority of USAREUR pretrial prisoners are confined at the Mannheim confinement facility and have their cases reviewed for compliance with all legal requirements by the Mannheim military magistrate. When part-time magistrates have occasion to review pretrial confinement cases at Mannheim, Berlin, or SETAF, they exercise the same independent power of an assigned magistrate and may approve continued pretrial confinement or order an unconditional release.

Monthly Magistrate Reports

The Mannheim military magistrate files a monthly report to the Chief Circuit Judge which indicates: by race, all pretrial confinees released by the magistrate upon initial or subsequent review and all magistrate-influenced command releases; by race and GCM command, all pretrial confinees, including German-holds, who are in the confinement facility as of 2400 hours on the last calendar day of the month; by race, all command and administrative (i.e., AR 635–200, chapter 10) releases, and all releases/change of status (post-trial) as a result of courts-martial; and, by time in confinement, all German-hold prisoners awaiting trial or pending appeal who are in the Mannheim facility.

All part-time magistrates file a monthly report to the Chief Trial Judge with copies to the Chief Circuit Judge and supervising military judge which indicates: number of search warrants requested and approved/denied; by number only, cases of pretrial confinement reviewed and number of releases with/without probable cause; and, administrative data on hours/days performing magisterial duties and any funds expended. These reports are a valuable tool for the supervising military judge in his direct supervision and the Chief Circuit Judge in his general supervision of the program.

Officer Efficiency Reports

Normally, only part-time magistrates whose primary magisterial duties involve reviewing pretrial confinement will receive letter input (AR 623–105) to their officer efficiency reports from their supervising military judges. This does *not* involve a dual rating chain. Part-time magistrates whose primary magisterial duties involve acting on requests for search authorizations *normally* will not receive such letter input. If a question arises concerning whether input would be required or appropriate, the Chief Circuit Judge provides guidance on individual cases. Part-time magistrates who receive letter input must ensure that SJA personnel provide adequate notice to the supervising military judges of when such input will be required.

Training

As part-time magistrates have demanding non-criminal law duties, they have little opportunity or time to stay current in recent developments in criminal law. They can contact their supervising military judges or the Mannheim military magistrate for guidance on specific issues as they arise. To provide a more extensive update, there has been an annual one-day military magistrate conference in Mannheim since 1983. The conference has been coordinated and presented by the Mannheim military magistrate under the supervision of the Chief Circuit Judge. The topics have included presentations on the military magistrate program, Supreme Court fourth amendment cases from the year, military search and seizure law update and new developments, and pretrial confinement law review and update. A tour of the Mannheim Confinement Facility has also been included annually. The purpose of the conference has not been *de novo* instruction on magisterial/search and seizure law, as that would require more than one day. Because each magistrate has had basic course criminal law instruction, and possibly graduate course instruction, the conference seeks to refresh their recollection in the specific areas of concern to magistrates, to make them aware of the overall program and their part in it, to sensitize them to develop criminal issues which may confront them, and, most importantly, to provide them with current, relevant materials which will then be available to them when they receive that proverbial call in the middle of the night. Funding is provided by the local command and USAREUR staff judge advocates have enthusiastically supported the conference.

Conclusion

Magisterial decisions impact upon two freedoms vital to our soldier-citizens—the freedom from unreasonable searches and seizure, and the liberty of individuals prior to conviction. Well-trained and supervised magistrates can ensure adequate protection of the individuals' privacy and liberty interests *and* the strong government interests in the detection of criminal misconduct, protection of society from future serious criminal misconduct by those awaiting trial, and the appearance of accused at their courts-martial.

Clerk of Court Notes

Army Court of Military Review Statistics

In fiscal year 1985, 2113 records of trial were received for review pursuant to Article 66, Uniform Code of Military Justice. In an additional 8 cases, appellate review was waived, and 4 of the 2113 cases were withdrawn from appellate review.

During the same period, 2233 cases were submitted to panels of the Army Court of Military Review for decision. The difference between the number of records received and number of cases submitted for decision is due in part to cases remanded by the Court of Military Appeals (31), cases returned after further proceedings by a trial court or convening authority (87), interlocutory appeals under Article 62 (6), and extraordinary writ cases (13). One case was referred to the court under Article 69(a). Also, due to the briefing process, cases are not necessarily submitted for decision in the same fiscal year in which received.

The court issued 2401 decisions, reducing the number of cases pending in panels from 435 on 1 October 1984 to 267 on 30 September 1985. The court's backlog (cases on hand more than 60 days) fell from 266 to 96 in the same period. Oral argument was heard in 97 cases. Opinions were published in 109 cases, memorandum (unpublished) opinions were issued in 725 cases, and 1567 cases were affirmed without opinion.

Complete information as to appellate processing time is not available. A sample of 182 cases decided during the year (cases in which the court was required to correct an error in the promulgating order) suggests that, on average, six months elapsed from the month in which the convening

authority's action was taken to the month in which the court's decision was rendered. This is compatible with other information suggesting that the average period for filing an assignment of error and brief on behalf of an accused was approximately 90 days, the government's answer brief required 45 to 60 days, and the average decision time was approximately 30 days.

Fiscal Year 1985 Court-Martial Processing Times

In general courts-martial, an average of fifty-one days elapsed from the date charges were preferred or the accused was placed in restraint, whichever occurred first, to the date a sentence was adjudged. An average of fifty-two days passed from the date of sentencing until the date of the convening authority's action on the record, according to data drawn from the 1,467 GCM records of trial received by the Clerk of Court in FY 1985. In the 892 BCD special courts-martial received, the average number of days from restraint or charging to sentencing was thirty-one days. This suggests that the average Article 32 investigation and formal Article 34 pretrial advice, usually involved only in general courts-martial, consumed about 20 days. In BCD special courts-martial, the average time from sentencing to action by the convening authority was 47 days, 5 fewer than that required for general courts-martial.

Although post-trial processing time for general courts-martial took a sudden jump (from fifty to fifty-seven days) in cases received during the quarter following the effective date of the Military Justice Act of 1983, when averaged over the year, there appeared to be no significant increase in post-trial processing time. The average period from the date of the convening authority's action to the date the record was dispatched to the Clerk of Court (a date not always accurately discernible from the record) was six days, indicating that records were not being held the full ten days allowed for an accused's decision whether to waive appellate review.

All Services Appellate Military Judges' Conference

The Army Court of Military Review joined with the Court of Military Appeals in sponsoring an All Services Appellate Military Judges' Conference on November 15, 1985, at the Federal Bar Building in Washington, D.C. The one-day event featured attendance and remarks by the Honorable Robinson O. Everett, Chief Judge, and the Honorable Walter T. Cox, Associate Judge, Court of Military Appeals, and Mr. Andrew L. Frey, Deputy Solicitor General of the United States.

The purpose of the conference was to allow appellate military judges from the four services and the Coast Guard to review and discuss topics of current interest. This goal was aided by six interesting and sometimes controversial topics that the forty-two conferees discussed in three working groups throughout the day. The topics included Adoption of Supreme Court Minimum Constitutional Standards; Sentencing; Supervisory Responsibility of Courts of Military Review; Article 62 Appeals; Role of Panels versus Court *En Banc*; and the Military Justice Act of 1983 Advisory Commission Report Issues.

The keynote speaker was Colonel Francis A. Gilligan, Deputy Commandant of The Judge Advocate General's School. His presentation entitled "Search for the Truth?" covered subjects such as specificity and waiver, discovery, speedy trial, post-trial review, fact finding by the trial judge, and *DuBay* hearings. This address served as a focal point of the conference and provided a fresh perspective in these important areas.

The appellate judges took from the conference a greater sense of comradeship and a clearer understanding of controversial issues, developing areas of the law and the views of their brethren. Future appellate military judges' conferences, hosted in turn by the other services, are being planned.

Upcoming USALSA CLE Seminars

TCAP Seminars

7–8 Jan. 86, Fort McPherson, GA
3–4 Feb. 86, Fort Carson, CO
24–28 Mar. 86, Korea

Trial Judiciary Conferences

1–4 Feb. 86, Fort Ord, CA
30 Mar.–4 Apr. 86, Tri-Services Conference, Maxwell AFB, AL

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Legal Assistance Items

Legal Assistance Resource Material

Colonel Richard S. Arkow, Chief, Legal Assistance Office, OTJAG, developed this recommended list of resource material that should be in the possession of every legal assistance officer. The list is not exhaustive and should be tailored to meet the needs of the practice at each installation.

I. Regulatory and Policy Matters

AR 27–3, Legal Assistance.

AR 27–1, Judge Advocate Legal Service.

AR 600–14, Preventive Law.

AR 27–55 (formerly AR 600–11), Authority of Armed Forces Personnel To Perform Notarial Acts, 21 March 1980, with Change 1, dated 12 July 1985.

Heffelfinger, *An Analysis of Army Regulation 27–3, Legal Assistance*, The Army Lawyer, Feb. 1984, at 1.

Policy Letter 81–3, Office of The Judge Advocate General, U.S. Army, subject: Army Legal Assistance Program, 15 Dec. 1981, *reprinted in* The Army Lawyer, Jan. 1982, at 2.

Policy Letter 84–1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Legal Assistance, 16 Feb. 1984, *reprinted in* The Army Lawyer, Mar. 1984, at 2.

Policy Letter 84–2, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance for OER/EER Appeals, 2 Aug. 1984, *reprinted in* The Army Lawyer, Oct. 1984, at 2.

Policy Letter 84–5, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance Representation of Both Spouses, 21 Nov. 1984, *reprinted in* The Army Lawyer, Jan. 1985, at 2.

Letter DAJA–LA, Office of The Judge Advocate General, U.S. Army, subject: Tax Status of Personnel Who Die as a Result of Terroristic or Military Action Against the US, 15 May 1985 (For the text of a letter of understanding regarding this subject, *see* The Army Lawyer, Aug. 1985, at 43.)

II. Substantive Subject Matter

A. Department of the Army

AR 27–10, Military Justice.

AR 27–20, Claims.

AR 27–40, Litigation.

AR 600–4, Remission or Cancellation of Indebtedness.

AR 600–15, Indebtedness of Military Personnel.

AR 600–50, Standards of Conduct.

AR 608–3, Naturalization & Citizenship of Military Personnel and Dependents.

AR 608–9, The Survivor Benefit Plan.

AR 600–33, Line of Duty.

AR 608–99, Family Support, Child Custody, and Paternity.

AR 735–11, Reports of Survey.

DA Pam 27–166, Soldiers and Sailors Civil Relief Act.

All Ranks Personnel—UPDATE.

Officer Ranks Personnel—UPDATE.

Enlisted Ranks Personnel—UPDATE.

B. The Judge Advocate General's School

All States Guides (available through the Defense Technical Information Center).

Legal Assistance Officer's Deskbook & Formbook (available through the Defense Technical Information Center).

C. Other

Uniformed Services Almanac (Annual).

Retired Military Almanac (Annual).

Federal Administrative Procedure Sourcebook.

Consumer's Resource Handbook.

III. Tax Materials

IRS Publication 17 (Annual).

IRS Tax Information Publications Vols 1–4.

Prentice Hall or CCH "Master Tax Guide."

Internal Revenue Code (Title 26 US Code).

IV. Management (For Supervisors)

AR 340–15, Preparing and Managing Correspondence.

Strategies For Handling Health Spa Problems

The National Consumer Law Center, in a recent Deceptive Practices and Warranties Edition of its NCLC Reports, offered the following guidance on assisting consumers who either desire to cancel a health spa contract or are left without an apparent remedy when the health spa closes without refunding the consumer's membership fee.

Initially, the legal assistance attorney should determine if the state is one of a growing number of jurisdictions which require health spas to purchase a bond or place the membership fees in escrow. These jurisdictions include Virginia, Rhode Island, North Carolina, New York, New Hampshire, Maryland, Louisiana, Kentucky, Indiana, Illinois, Hawaii, Florida, the District of Columbia, and Connecticut. As a preventive law measure, legal assistance attorneys should advise clients who are considering purchasing such memberships to inquire into the club's policy concerning membership fees.

Another option is to find a deep pocket. In *Kelly v. Sclater,* 40 Bankr. L. Rep. (CCH) 594 (E.D. Mich. 1984) the court pierced the corporate veil and found the spa owner personally liable for the spa's false "implied representation that the spa intended to and had the financial ability to provide the benefits of membership throughout the term of the agreements." The health spa chain may also be liable under an unfair and deceptive acts and practices theory, even if the insolvent spa is an independent franchise, if the chain aided and abetted the spa's deceptive advertising, contracts or sales presentations.

Where the spa takes bankruptcy, it may also pay for the client to intervene in the bankruptcy filing. Under the priorities established in the federal bankruptcy code (11 U.S.C. § 507), unsecured consumer claims of $900 per individual occupy the sixth priority. First priority is given to administrative expenses associated with the bankruptcy action, followed by unsecured claims in an involuntary bankruptcy action which arose after commencement of the action but before appointment of a trustee. Most cases involving health spas will be voluntary actions with the spa's owners seeking the protection of the bankruptcy laws via a voluntary filing, so that there ordinarily will be no second priority claims. Third and fourth priorities are reserved for claims by employees of the bankrupt spa for wages, salaries, and contributions to an employee benefit plan. The fifth priority is reserved for claims by farmers against grain storage facilities which take bankruptcy and by fishermen against fish produce storage or processing facilities.

In a practical sense then, in a voluntary bankruptcy, consumer claims rank behind administrative expenses of the bankruptcy action and claims by employees of the spa for wages and employee benefit plan contributions.

Another approach in a bankruptcy action is to argue that the spa owner's reckless disregard in selling memberships in a spa known to be on the brink of insolvency constituted a sufficient claim of fraud to prevent the claim from being discharged in an individual bankruptcy.

A second matter upon which soldiers often consult legal assistance officers concerns how to cancel a health spa contract. Again, a growing number of states have enacted legislation which provides a statutory basis for cancelling a health spa contract. These jurisdictions include Arizona, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Minnesota, New Hampshire, New York, North Carolina, Ohio, Rhode Island, South Carolina, Virginia, and Wisconsin. In addition, sales made outside the spa's place of business must comply with the Federal Trade Commission's three-day cooling-off period rule and any state cooling-off period statute.

Basic contract law principles also allow a consumer to cancel a health spa contract at any time for any reason with the consumer being liable only for the spa's reasonable damages. The National Consumer Law Center points out that contractual refund formulas that require the consumer to forfeit more than the spa's actual damages are unenforceable penalty clauses.

Concerning health spas, it is also arguably an unfair and deceptive act and practice for a spa:

- to claim that a contract cannot be cancelled or claim the contract can only be cancelled after paying an unreasonably high penalty;
- to fail to comply with its own cancellation policy;
- to sell a membership to a consumer not physically qualified to participate in the spa's activities;
- to misrepresent the nature and extent of a binding contract, such as misrepresenting a binding contract as a membership application or a guest register;
- to close or to not offer the full range of facilities and services promised without offering a refund;
- to use coercive sales tactics, including obscenities, humiliation, fear, and even force, to enroll a consumer;
- to charge some health spa customers significantly more than the normal membership fee;
- to misrepresent the results possible from participation in spa programs and the nature and efficiency of weight reduction and figure-shaping programs.

Therefore, legal assistance attorneys in a state which has an unfair and deceptive practices act may use the act in an attempt to get the client out of the contract or should consider referring the client to a civilian attorney to initiate an action for affirmative relief.

Finally, in states which have unfair and deceptive practices acts, as well as in states which do not, two other avenues of relief are always open. First, contact the state's attorney general consumer affairs representative. Second, contact the regional office of the Federal Trade Commission and lodge a complaint. Major Hemingway.

Tax Refund Discounting

As the deadline for filing income tax returns approaches, legal assistance officers should be wary of businesses which offer to discount income tax returns. Many businesses have been guilty of discounting income tax returns in the past few years. Soldiers should be made aware that the practice violates federal law and often victimizes the taxpayer due to the excessive discount rates charged.

The usual practice is for discounters to advertise that they will give immediate cash for assignment of income tax return refunds. The discounters generally prepare the returns for the individual and discount them for immediate cash. Some discounters, *e.g.*, automobile dealers, use the discounted refund as down payment on a purchase. The discounter and taxpayer execute documents assigning the refund to the discounter. In addition, the taxpayer executes a power of attorney giving the discounter the right to receive and negotiate the refund check. The discounter's address is substituted for the taxpayer's address. The refund check, when received, is cashed or deposited in the discounter's account.

The assignment of income tax refunds violates 31 U.S.C. § 3727. Although the authorized representative may receive a refund check payable to another, the representative may not endorse another's check. A refund check may be negotiated under a specific power of attorney executed after the issuance of the check to the recipient. Discounters obviously do not do this because they would lose control by having the check go first to the taxpayer. A return preparer who endorses or otherwise negotiates a refund check of another is liable for a $500 penalty for each check negotiated. I.R.C. § 6695(f).

An injunction may be sought to preclude businesses from discounting income tax returns. The legal assistance office at Fort Campbell, Kentucky, in conjunction with the IRS and local U.S. Attorney, has successfully brought an action against a discounter to enforce the tax laws.

The damage to the service member is often the amount of the discount charged. Discounters generally charge between 20 and 50% for discounting a tax refund. Although this seems like an outrageous charge, many soldiers have fallen prey to this offer because it provides instant cash or an instant down payment. Legal assistance officers can assist soldiers by publicizing the illegality and dangers of discounting and by encouraging soldiers to file for their refunds early. Additionally, the Armed Forces Disciplinary Control Board and the IRS should be made aware of any known discounting of tax refunds. An aggressive preventive law program should be pursued to prevent problems in this area. Major Mulliken.

IRAs

Clients who have Individual Retirement Accounts (IRAs) should be reminded that to be deductible against 1985 taxes, contributions to an IRA must be made by 15 April 1986. In the past, taxpayers were permitted to make deductible contributions any time before the deadline for filing their return, including extensions of the time for filing the return. The Tax Reform Act of 1984 changed the law. Now, even if the taxpayer obtains an extension of time in which to file the return, the taxpayer must make any contributions to an IRA by 15 April 1986 if the taxpayer wants to deduct the contribution on the 1985 tax return.

Tax Revision

The following information was provided by First Lieutenant William P. Trendell, USAR, presently assigned as an Individual Mobilization Augmentee at the 101st Airborne Division (Air Assault), Fort Campbell, KY.

The House Ways and Means Committee recently announced its proposed revision of the federal income tax code which generally will have a positive impact on individual taxpayers. Taxpayers will keep most popular deductions, while benefiting from lower tax rates. On the average, individual taxpayers will see a nine percent reduction on their tax bills.

Provided the committee's tax plan becomes law, individuals should note the following provisions:

1. Individual tax rates—The 14 individual tax rates (15 for single taxpayers) ranging from 11% to 50% will be replaced by 4 tax rates (15%, 25%, 35%, and 38%).

2. Personal exemptions—The personal exemption will increase to $2,000 from $1,080. The exemption for those who itemize will be $1,500.

3. Standard deduction—In 1987, the standard deduction for single taxpayers will increase to $2,950 from $2,480. For joint returns, the deduction will rise to $4,800 from $3,670. For 1986, the Committee eliminated the special deduction for two-earner families.

4. Mortgage interest—The Committee retained deductions on mortgage interest for first and second homes.

5. Educational assistance programs—The plan excluded from taxation, for two years, employer-paid educational assistance.

6. Charitable contributions—Contributions will continue to be fully deductible for taxpayers who itemize. Non-itemizers will receive a partial deduction.

7. State and local taxes—The committee kept deductions for state and local taxes.

8. Child care credit—The current law allowing a credit for employment-related child care services was not changed.

9. Energy credit—The 15% credit for installing energy conservation and insulation materials in a principal residence was not retained.

Involuntary Allotment "Authorized Persons"

The legal office, U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana reports that some Army legal assistance attorneys are sending letters to the Army and Air Force finance centers directing the finance centers to start involuntary allotments on behalf of their clients.

The involuntary allotment statute, codified at 42 U.S.C. § 665, provides that where a soldier who is obligated to pay child or child and spousal support pursuant to a court or administrative order becomes delinquent in an amount equal to a two-month arrearage, an involuntary allotment may be initiated against his pay account. The statute provides that the process is initiated by a notice to begin the allotment which is sent from an "authorized person" to the respective finance center.

Legal assistance attorneys, private attorneys, and custodial parents entitled to receive child support on behalf of their children are not "authorized persons" within the meaning of the statute. The finance centers will not honor a directive from one of these persons to initiate an involuntary allotment. The statute defines an "authorized person" as any agent or attorney who has the duty or authority under state law to seek to recover child support or child and spousal support, any court which has the authority to issue an order against the soldier for the support and maintenance of a child, and any agent of such a court.

Legal assistance attorneys should refer clients who have court or administrative orders upon which a qualifying arrearage exists to the local child support enforcement office, state social services office, local IV-D (Aid to Families With Dependent Children) office, or other office responsible for enforcing child support obligations.

CHAMPUS Eligibility for Former Spouses

Currently a spouse of a member or former member of the uniformed services loses CHAMPUS eligibility as of 12:01 a.m. of the day following the date of a final decree of divorce, dissolution, or annulment of the marriage, except where the spouse qualifies as an eligible former spouse under the provisions of sections 1004 and 1006 of Pub. L. No. 97–252, 10 U.S.C. §§ 1072(2), 1076. To be eligible, the former spouse must be unremarried; have been married to the member or former member for at least twenty years during which time the member or former member performed at least twenty years of creditable service; and not be covered under an employer-sponsored health plan. In addition, the final decree of divorce, dissolution, or annulment of the marriage must be dated on or after February 1, 1983.

Section 645 of Pub. L. No. 98–525 relaxes the requirements for CHAMPUS eligibility for former spouses. Section 645(b) eliminates the February 1, 1983, limitation imposed by Pub. L. No. 97–252 so that any former spouse who meets the requirements of Pub. L. No. 97–252 is eligible for CHAMPUS, regardless of the date of the divorce, dissolution, or annulment.

Section 645(a), 10 U.S.C. § 1072(2)(G), extends CHAMPUS eligibility to former spouses of members or former members who performed at least 20 years of creditable service if the former spouse is unremarried; was married to the member or former member for a period of at least twenty years, at least fifteen, but less than twenty of which were during the period the member or former member performed creditable service; and is not covered under an employer-sponsored health plan. Moreover, the date of the final decree of divorce, dissolution, or annulment must be before April 1, 1985.

Under section 645(c), those former spouses who meet the requirements of section 645(a), but have final decree of divorce, dissolution, or annulment dated on or after April 1, 1985, are eligible for CHAMPUS for only two years beginning on the date of such final decree.

The provisions of section 645 are effective for health care services furnished on or after January 1, 1985.

Using a Separation Agreement Checklist

Major Mark Sullivan, USAR, assigned as Chief (IMA), Legal Assistance Section, Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, North Carolina, is a private practitioner in Raleigh, North Carolina. He is also a member of the American Bar Association's Standing Committee on Legal Assistance for Military Personnel. He provided the following information on using a separation agreement checklist.

Current statistics indicate that roughly one-half of all marriages presently end in divorce, and the break-up figure is even higher for second marriages. Military legal assistance attorneys, in the course of their daily or weekly routine, counsel a substantial number of divorcing or separated spouses on various family law problems. The most helpful tool in structuring an amicable separation is the separation agreement.

Although some installation legal offices do not prepare separation agreements, leaving this to civilian attorneys or to Reservists who perform duty at the legal assistance office, those offices which do draft and execute separation agreements ought to have a standard separation agreement which addresses problems and issues between the parties, not only concerning the spouses themselves but also any children of the marriage (regarding such matters as support, visitation and custody). While the counseling, advice, and clauses used in a separation agreement will vary substantially from office to office, an excellent device to use in preparing clients for thinking about terms to include in a separation agreement is the Separation Agreement Checklist.

The purpose of the checklist is to outline various options that are available to clients in preparing a draft separation agreement. While the list is by no means exhaustive, it constitutes a good first step in preparing the parties for the negotiation of a separation agreement and the final execution of this document.

A copy of the checklist information letter used in this author's practice is shown below. Legal assistance officers are,

of course, free to copy, modify, and supplement the items listed below. Using the checklist as a hand-out to clients can go a long way toward providing the "extra measure" of assistance and protection needed by all legal assistance clients.

Subject: Client Information Letter—Separation Agreement Checklist

We have prepared this list of provisions for separation agreements for you to consider. You may wish to review and discuss the following terms with your spouse. Using this checklist, which is not all-inclusive by any means, you can help us to prepare a separation agreement that will best protect and cover your interests and concerns.

A. Standard Clauses.

1. Right to live separate and apart, as if each party were single and unmarried.

2. Mutual non-harrassment provisions.

3. No modification of agreement except in writing.

4. Mutual releases of all claims and marital rights.

5. Rules for interpreting and enforcing agreement.

6. Attorney's fees recoverable if one spouse breaches agreement.

7. Representation of parties by attorneys (or waiver of representation by one spouse).

B. Optional clauses (depending on particular family circumstances).

1. Alimony provisions.

a. Waiver of alimony (spousal support)—this may be *permanent under applicable state law, even if there is a later reconciliation.*

b. Amount of alimony—flat amount or modifiable according to some objective standard (for example, income of payor or payee, Consumer Price Index for each year, or flat percentage).

c. Tax consequences (ordinarily taxable to payee and deductible by payor, unless agreed otherwise).

d. Medical insurance for spouse/ex-spouse.

e. Unreimbursed health care expenses for spouse/ex-spouse (see 3.c. below).

f. Termination of alimony based on death of either spouse, payee's remarriage (or payee's cohabitation?).

2. Child custody.

a. Joint legal custody—share decision-making for major choices in child's life (for example, religion, non-emergency health care, private/public school, tutoring).

b. Sole custody.

c. Visitation rights by non-custodial parent.

i. "Reasonable visitation"—unstructured, left to consent of spouses with reasonable advance notice.

ii. "Structured visitation"—specified times (for example, one-half of Christmas and summer vacations, every other weekend during school year, plus half of each year's major holidays).

3. Child support by noncustodial parent.

a. Cash amount of support per week, month, etc. (considering local or service child support guidelines).

b. Medical insurance for child—who pays premiums if private insurance coverage?

c. Uncovered health care expenses—who pays? (for example, routine physicals, eyeglasses, prescription drugs, psychological/psychiatric treatment, initial deductible amount for insurance, remaining percentage uncovered).

4. Additional child-related terms.

a. Annual modification—"escalator clause" (see B.1.b. above).

b. College expenses.

c. Maintaining life insurance for benefit of child (if non-custodial parent dies before child support obligation ceases).

d. When child support ends—age eighteen, graduation from high school, or emancipation (if earlier).

5. Tax issues.

a. Filing status of parties.

b. Exemption for each child for federal and/or state returns (for federal taxes as of 1985, this belongs to parent with custody for over 50% of the year unless agreement otherwise).

6. Payment of debts—how much and by whom?

7. Property division—who gets what?

a. Real property (land and buildings).

b. Tangible personal property.

i. Division of household furnishings.

ii. Personal effects of each spouse.

iii. Books, tools of a trade, business equipment.

iv. Motor vehicles (cars, boats, planes, motorcycles).

v. Collections, jewels, china, silver.

c. Intangible personal property.

i. Stocks and bonds.

ii. Individual Retirement Accounts (IRAs), Keogh Plans, vested pension rights and retirement plans.

iii. Bank assets (checking and savings accounts, money market funds, certificates of deposit).

iv. Life insurance (whole-life, universal-life and term insurance, including group-life insurance).

v. Partnerships, business interests, tax shelters.

Fort Dix Will Information Sheet

Captain Herb Irish, Chief, Legal Assistance, Fort Dix, New Jersey, provided the following will information sheet which is given to clients at Fort Dix when their will is executed. Although this information is typically given to clients orally by legal assistance attorneys, many clients do not remember it in the excitement of the will execution procedure. Legal assistance orders may adapt the following information sheet to meet the needs of their own locality.

Legal Assistance Branch

SUBJECT: Your Last Will and Testament

To our Clients:

1. You have just executed your last will and testament with the necessary formalities required by law. A will is a very important tool for providing for your survivors and it can help make a difficult time easier for your family. If you don't treat your will properly however, many of its benefits can be lost to you.

2. *Storing your will:* This office recommends, at a minimum, a sturdy, fireproof box of some sort, where you can store all your important documents. Another excellent and common place for the storage of wills is a bank safety deposit box. This is especially recommended for individuals who are settled and do not anticipate moving out of the area soon. Should you choose to safeguard your will in a safety deposit box, you and an appropriate person outside your immediate household should become thoroughly familiar with the bank's procedures for retrieving the will should something happen to you. If you are on active duty, especially if you live in the barracks, you should store your will with your important papers. Make sure that your family and, if appropriate, your chain of command knows where it is. If you are in a deployable unit, you will probably receive guidance concerning how to safeguard your will. You normally should *not* send your will home to be kept by your parents or other family members, as it would be difficult to locate and obtain your will should it be needed.

3. *Copies of your will:* We have provided two information copies of your will to you. These are not substitutes for the original, should anything happen to it. Do not sign any of these copies, as that might cause legal problems for your survivors. You may choose to keep one copy as your personal reference, particularly if you are keeping your original in a safety deposit box, to avoid inconvenience should you need to refer to your will. The other should normally be given to someone outside your immediate household, such as the person you have designated as executor or alternate executor if you have appointed your spouse executor. You should do everything necessary to help this person locate the original will, should that become necessary. You may make additional copies of your will, but we recommend you make a copy of one of the copies we have provided, rather than a copy of the original will, to preclude the possibility of confusion.

4. *Changing your will:* As you review your will from time to time, you might notice errors or changes you want to make. Do not attempt to amend your will without the specific guidance of a lawyer. Doing so could, in some circumstances, invalidate your will. Should any questions arise concerning your will, or if your financial or family situation changes significantly, you should contact your legal assistance attorney or a civilian lawyer for advice.

5. *Periodic Review:* Although your will meets your needs at this time, both your personal circumstances and the law may change in the future. Because of that possibility, it is important that you bring your will in periodically to have it reviewed by an attorney.

More Jurisdictions Toughen Child Support Laws

Responding to the requirements of the Federal Child Support Enforcement Amendments of 1984, Pub. L. No. 98–378, 98 Stat. 1305, that all states and territories enact provisions for mandatory wage withholding against parents who are delinquent in child support payments, eight jurisdictions have passed laws implementing the act.

Connecticut (Public Act 85–548), Idaho (H.B. 100, 1985 Acts), New York (Chapter 809, the New York State Support Enforcement Act of 1985), Ohio (S.B. 80, 1985 Session Laws File No. 91), Puerto Rico (Act 106) and Alaska, Nevada, and New Hampshire have all passed enabling legislation implementing provisions of the federal act. The statutes all provide that when a thirty-day delinquency in child support payments accrues, the delinquent parent's employer is directed to begin automatically withholding delinquent and current child support from the parent's wages and begin forwarding it to the custodial parent or other person authorized to receive the support payments.

In other state family law developments, Louisiana has passed a statute (H.B. 471, 1985 Public Act 173) which authorizes child support to continue beyond the age of majority if the child is an unmarried dependent student. Louisiana also has a new law (H.B. 470, 1985 Public Act 172) which authorizes courts to require a bond or other security to ensure compliance with a child visitation order.

Alabama and Texas Wage Assignment Laws Amended

Effective January 1, 1986, a change in the Alabama wage assignment and garnishment law will specify that withholding orders or garnishment writs for child support will take priority over any other writ of garnishment or state legal process against the same income, whether the writ of garnishment or other process was served prior or subsequent to the support order. The amendments also specify that if the income of an obligor in Alabama is subject to more than one withholding order or writ of garnishment, the total amounts withheld may not exceed the statutory maximums. The amendments further provide that the current month's support payments must be satisfied before any arrearages are deducted.

A Texas law which took effect September 1, 1985, gives child support withholding orders priority over any other garnishment, attachment, execution or other assignment or order affecting disposable earnings. The amount of disposable earnings subject to withholding under the Texas statute may not exceed the maximum amounts permitted under the Federal Consumer Credit Protection Act garnishment provisions found at 15 U.S.C. § 1673. These exemptions provide that a soldier with a second set of dependents may have fifty percent of his disposable pay subjected to garnishment or wage assignment. If the soldier has no second set of dependents, fifty-five percent of his pay may be taken. In either of the situations above, if the soldier is more than twelve weeks in arrears on support obligations, an additional five per cent of his disposable pay can be taken.

Advertisement Comparing Automobile Sale Price to "Dealer Invoice" Found Deceptive

The October 1985 issue of the *Commercial Protection Reporting Service,* published monthly by the Consumer Mediation Clinic at the George Washington University, Washington, D.C., highlighted a recent New Jersey Supreme Court decision of interest to legal assistance attorneys.

In *Barry v. Arrow Pontiac,* 100 N.J. 57, 494 A.2d 804 (1985), the New Jersey Supreme Court held that advertisements comparing sale prices to "dealer invoice" costs violated both the New Jersey Consumer Fraud Act and its implementing regulations, which prohibit automobile advertising containing comparisons to "dealer's cost" or "inventory price."

The defendant, Arrow Pontiac, mailed its customers a letter advertising many of its cars as priced below "dealer invoice." The Director of the Consumer Affairs Division in the state sought and obtained a cease and desist order, alleging that such a claim violated the statutory and regulatory prohibition. Arrow Pontiac argued that the advertisement did not violate the regulation or statute and that the advertisement was consistent with the meaningful price disclosure policy of the regulation. The firm argued that the term "dealer invoice" has an inflexible and definite meaning within the automobile sales industry.

The New Jersey Supreme Court upheld the cease and desist order, finding that the advertisement was misleading and deceptive to consumers. The court explained that the purpose of the regulation was to protect consumers and provide them with meaningful disclosure of bottom-line prices, which can serve as a clear reference point for informed comparison shopping. The state presented expert testimony that the term "dealer invoice" did not have a single, inflexible meaning within the industry, and that it was ambiguous and potentially misleading.

Although the violation did not create an apparent right on the part of consumers who purchased automobiles in reliance on the advertisement to cancel those contracts, the decision does not highlight the preventive law aspect of legal assistance practice. At installations in states with consumer codes similar to that of New Jersey, soldiers will be able to make wiser purchases of new automobiles if legal assistance officers monitor local industry practices and report substantiated violations to the state attorney general or other appropriate state consumer official. Major Hemingway.

Ruling Reinforces Care Required in Dual Representation and Power of Attorney Cases

Attorneys are often cautioned on the dangers of engaging in dual representation of clients in divorce cases and of the care which must be exercised in recommending and preparing powers of attorney. A case which illustrates the pitfalls inherent in both was recently decided in Oregon. In *Hilt v. Bernstein,* 750 App. 502, 707 P.2d 88 (Or. Ct. App. 1985), an attorney prepared several documents, including a property settlement agreement, for Kay Hilt and her then-husband, who were contemplating divorce.

One of the documents prepared was a special power of attorney which gave the husband the power to borrow money, using the marital house as collateral, and obligating Mrs. Hilt on that loan. The husband used the power of attorney to borrow money that he then converted to his own use. The money was ostensibly to have been used for improvements to the marital home, which was the only substantial asset in the marital estate. No home improvements were made and after the husband spent the money on himself, he quit making payments on the loan. The lender foreclosed on the house and the wife lost her $15,000 in equity.

Mrs. Hilt sued Bernstein for malpractice over both the dual representation and the power of attorney. She argued that dual representation amounted as a matter of law to common law negligence. The court, while indicating that Bernstein's conduct might constitute a violation of the disciplinary rules concerning dual representation, declined to find that such a violation would give rise to a cause of action for common law negligence. The court found that a "violation of the disciplinary rules is not negligence as a matter of law in a civil action for damages against the violator." The court, however, found that the attorney's conduct in preparing and advising Mrs. Hilt to sign the special power of attorney was sufficient to give rise to a cause of action in negligence. The court noted that the attorney was aware of the husband's financial difficulties and that it was reasonably foreseeable that the husband might be inclined to use the loan proceeds for himself. Major Hemingway.

New Utah Consumer Credit Code Takes Effect

The Utah Uniform Consumer Credit Code was repealed effective July 1, 1985, and replaced with the Utah Consumer Credit Code. The new code applies to all credit offered or extended by a creditor to an individual primarily for personal, family, or household purposes. The new code permits the parties to a consumer contract to contract for any finance charge and for other charges and fees. Delinquency charges are limited to the greater of fifteen dollars or five percent of the amount of the delinquent unpaid installment. Confessions of judgment and waiver of rights provisions are prohibited and wage assignments are limited to payroll deduction plans or assignments that are revocable at the will of the debtor.

Debtors are entitled to prepay an unpaid balance and creditors are permitted to use acceleration clauses. Home solicitation sales, consumer credit insurance, repossession and satisfaction are also covered by the new law. The Utah Department of Financial Institutions is expected to issue new regulations to implement the new code.

USAREUR Legal Assistance Items

Captain Anne H. Avera, a legal assistance officer at the Hanau Legal Center, 3d Armored Division, recently provided two helpful items on stepparent adoptions and on service of process in the Federal Republic of Germany.

The first item is a bilingual consent/waiver form for use in American stepparent adoptions in Germany (*see* figure 3). The form was obtained from Mr. Peter Holzer, a German attorney who works in legal assistance for the U.S. Army at 21st Support Command, Kaiserslautern. He has found the consent/waiver form to be acceptable to German courts in the Kaiserslautern area.

Captain Avera also furnished an information paper on the involuntary service of civil process in Germany under the Hague Convention on the Service Aboard of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. This little known treaty is a method under which personal service can be obtained on soldiers in Germany using German government officials to serve the process. This is necessary because officers of the U.S. Foreign Service are prohibited by federal regulations (22 C.F.R. § 92.85) from serving process on behalf of private litigants or appointing others to do so.

The treaty provides for service of process by a central authority pursuant to a request submitted on Form LAA–116, available at the office of any United States Marshal. The text of the treaty, which is self-explanatory, is printed in 28 U.S.C.A. in the Appendix following the annotation of Rule 4 of the Federal Rules of Civil Procedure, and in Volume VII of the current Martindale–Hubbell Law Directory. Further information on the treaty may be obtained from a United States Marshal's office (*see also* U.S. Marshal's Memo No. 386, Revision 3, dated July 1979, which explains the administrative process in detail. The U.S. Marshal's office will have a copy of this Memo).

In ratifying the treaty, the Federal Republic of Germany made a number of declarations, including one which makes the above procedure the only acceptable method of serving process in the Federal Republic of Germany. The appropriate central authorities in Germany are as follows:

Baden-Wuerttemberg
das Justizministerium Baden-Wuerttemberg D 7000 Stuttgart

Bavaria
das Bayerische Staatsministerium der Justiz D 8000 Muenchen

Berlin
der Senator fuer Justiz D 1000 Berlin

Bremen
der Praesident des Landgerichts Bremen D 2800 Bremen

Hamburg
der Praesident des Amtsgerichts Hamburg D 2000 Hamburg

Hesse
der Hessische Minister der Justiz D 6200 Wiesbaden

Lower Saxony
der Niedersaechsische Minister der Justiz D 3000 Hannover

Northrhine-Westphalia
der Justizminister des Landes Nordrhein-Westfalen D 4000 Duesseldorf

Rhineland-Palatinate
das Ministerium der Justiz D 6500 Mainz

Saarland
der Minister fuer Rechtspflege D 6600 Saarbruecken

Schleswig-Holstein
der Justizminister des Landes Schleswig-Holstein D 2300 Kiel

Consent to Adoption

I, _____
(Full name, address and Social Security Number)

being the natural father of _____,
(full legal name of child)

born _____, and currently living in _____
(date of birth)

_____ do hereby give my full, free and unrevocable consent to the adoption of said child by

_____,
(full name, address and Social Security Number of Adopting Parent)

and hereby relinquish all my rights, duties and obligations as natural father.

Dated this ____ day of _____ 19____.

_____
(Signature of natural parent)

Certified by _____
(Notary Public)

State of _____

My Commission expires _____

Einwilligungserklaerung zur Adoption

Ich, _____ gebe als
(voller Name, Adresse, Sozialversicherungsnummer)

biologischer Vater des Kindes _____,
(voller Name)

geboren am _____, in _____ zur Zeit wohnaft in

_____ hiermit meine volle, freiwillige

und unwiderrufliche Einwilligung zur Adoption des obengenannten Kindes durch _____

_____ und gebe hiermit
(voller Name Und Adresse des adoptierenden Vaters)

alle Rechte, Pflichten und Obliegenheiten als nateurlicher Vater auf.

Datum _____ Ort _____

Notariell beurkundet von _____

Figure 3. Consent to adoption

JAGC Automation Overview

Lieutenant Colonel Daniel L. Rothlisberger
Information Management Officer, OTJAG

This is the first in a planned series of articles for *The Army Lawyer* on subjects pertaining to automation in the Judge Advocate General's Corps. The purpose of these articles is to present information which may be of interest and assistance to all JAGC personnel involved with automation.

Background

The JAGC automation effort began on 20 September 1982 when Major General Hugh J. Clausen signed a decision memorandum establishing automation as an objective. In his memorandum, MG Clausen said, "My goal is to have the JAG Corps use automation and telecommunication technologies to improve mission support and enhance our ability to render timely, accurate, and complete legal services."[1]

On the same day this memorandum was published, the JAGC Automation Management Office (now the Information Management Office) was created. Soon after, work was begun on an Information Systems Plan (ISP) identifying information classes and processes involved in JAGC operations.[2] The ISP, completed in May 1983, identified the information used in both technical and administrative activities, and became the cornerstone for building the JAGC information management system.

The ISP established parameters for the JAGC automation objective and was used by the Assistant Secretary of the Army for Financial Management (ASA(FM)) to approve the JAGC Mission Element Need Statement (MENS).[3] This document set forth the concept of JAGC automation and approved the design and development of the Legal Automation Army-Wide System (LAAWS). A year after approval of the MENS, the ASA (FM) approved a LAAWS Product Manager Charter assigning support responsibilities to various agencies in the Information Systems Command.[4]

Over the past three years, the JAGC Information Management Officer has initiated a variety of studies and approval processes to define the size and nature of the JAGC automation requirement. These projects have now been completed and the basis for JAGC automation has been clearly established.

Unfortunately, recognition of need does not equate to funding for a system to satisfy the need. In fact, OTJAG does not have funds to buy computer hardware and software for any other office or group of offices. Thus, near-term planning by staff and command judge advocates should not be based on an expectation of OTJAG-acquired computer equipment.

User Level Development

In the absence of central acquisition and fielding of computer hardware, it is incumbent on users at all levels to design and acquire their own automation systems. This user-level development is referred to in the draft of AR 25–5 as development of Tier 3 of the Army Information Architecture.[5] Tier 2 of the architecture involves development of an automation network within individual commands or installations, and Tier 1 involves development of an automation network from one region of the country or globe to another using the Defense Data Network (DDN) as a communication vehicle.[6]

In practice, user-level development has been taking place in the JAGC for the past four or more years. Staff judge advocate offices at the Presidio of San Francisco, Fort Gordon, Fort Belvoir, and other locations have evaluated their information management needs and have taken action to obtain automation equipment through the Director of Information Management (DOIM) at their installation. The solutions they have developed have met their needs and have enhanced their ability to deliver timely, accurate, and complete legal services.

In his policy letter on automation, Major General Hugh R. Overholt commended those whose initiative has moved the Corps toward the automation objective.[7] He called upon them to share their experiences, plans, and ideas so we can avoid problems often associated with the process of automation.

---

[1] Memorandum of Decision, DAJA–ZA, Office of The Judge Advocate General, U.S. Army, subject: Project Initiation for Automated Legal Systems, 20 Sept. 1982.

[2] The JAGC ISP was approved by MG Clausen on 31 May 1983.

[3] Action Memorandum, HQDA, subject: Mission Element Need Statement (MENS) for The Judge Advocate General's Legal Automation Army-Wide (LAAW), 23 May 1983.

[4] Product Manager Charter For The Legal Automation Army Wide Systems (LAAWS) Standard Multicommand Management Information Systems (STAMMIS) Project, approved by the Assistant Secretary of the Army (Financial Management) on 7 May 1984. This Charter was revised on 17 October 1985 to reflect a change in the name of the LAAWS Product Manager.

[5] Dep't of Army, Reg. No. 25–5 (Draft), Information Management, chapter 3.

[6] The DDN is currently available for use in some areas. You should check with your local automation support personnel to see if it is available at your location. OTJAG is working with the Army Material Command to obtain its own DDN address. This address will be published when obtained.

[7] Policy Letter 85–4, Office of The Judge Advocate General, U.S. Army, subject: JAGC Automation, 23 Oct. 1985, *reprinted in* The Army Lawyer, Dec. 1985, at 4. MG Overholt emphasized the need to keep OTJAG informed of progress you make toward automation.

Why Automate?

The primary reason to automate is to use the power of the computer to organize, store, retrieve, and process information. The computer has proven itself as a word processor, but it can do much more. It offers a means of doing automated legal research, time management, docketing, case management, litigation support, data management, and telecommunications. As a multifunctional device, it is a force multiplier which helps existing staff keep pace with ever-increasing workloads. Computerization saves money and helps attorneys do the best job possible.

How To Automate

The first step is to identify your Information Management Officer (IMO); that is, put someone in charge of your automation planning and implementation. The IMO must be both a manager and a technician. He or she must learn the capabilities of a computer and be able to apply those capabilities to the satisfaction of office information management needs. In many cases, the IMO will have to be a translator, and an organizer looking at today's needs and seeing tomorrow's solutions.

The second step in the automation process is an assessment of information processing of data (input) and the creation of work products from that data (output). This analysis will help you determine what kind of terminals, printers, and software you need.

Next, develop a plan of action. Configure your system based on the functional activities you want to automate. Phase in total automation over time, as required by available resources.

A proposed configuration of a personal computer (PC) was attached as an enclosure to a letter from the Information Management Office dated 28 October 1985.[8] When configured with the recommended components, the PC will perform all the law office functions mentioned previously in this article.

To provide standardization of system components and ensure compatibility for exchange of software, the IBM PC or IBM PC-compatible has been adopted as the standard JAGC workstation. Having at least one properly configured IBM or IBM-compatible PC will ensure disk compatibility for running software developed on OTJAG equipment. Questions concerning compatibility should be addressed to your local Automation Support Office or to the OTJAG Information Management Office at AUTOVON 227–8655.

Distribution of OTJAG-approved software will be based on responses to the automation questionnaire distributed with the 28 October 1985 Automation Update Letter. Those offices with the present ability to run the programs will be on the distribution list. Those offices which later acquire the hardware to run the programs should so advise the OTJAG IMO.

Conclusion

In the last three years, we have verified through studies and experience that automation is a useful tool in the law office environment. The computer has shown itself to be a multifunctional workstation with ever increasing capabilities driven by advancing technology. It is no longer a question of whether or not we need automation. The question now is how much do we need and how we can get it. Absent a centrally acquired system, the answers to those questions depend on your initiative and your determination. As a Corps, we have enjoyed isolated success in automation, and there will be more in FY 86. These success stories and lessons learned will be the subjects of future articles.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Active Guard/Reserve Program

Presently there are opportunities in the Active Guard/Reserve (AGR) Program for Reserve Component judge advocates to obtain full-time active duty tours. The program is available to those officers desiring only one AGR tour, as well as those desiring to make a career in the program. An AGR officer may accumulate twenty years of active federal service and qualify for active duty retirement.

There are eight AGR judge advocate positions in the Reserve and fifty-four in the National Guard. The cutoff date for the Summer Reserve AGR selection board is 21 February 1986. If you are a Reserve or National Guard judge advocate, or will soon be released from active duty, and would like additional information on the AGR Program, contact Lieutenant Colonel William O. Gentry (Reserve Representative to The Judge Advocate General's School) or Lieutenant Colonel Robert D. Doane (National Guard Representative to The Judge Advocate General's School), Judge Advocate Guard and Reserve Affairs Department, The Judge Advocate General's School, Charlottesville, VA 22903–1781, telephone (804) 293–6121, FTS 938–1301/1209, or AUTOVON 274–7110, ext. 293–6121.

[8] Letter, DAJA–IM, Office of The Judge Advocate General, U.S. Army, subject: JAGC Automation Update, 28 Oct. 1985.

Enlisted Update

Sergeant Major Gunther Nothnagel

As the new Corps Sergeant Major, I solicit your support and welcome those suggestions which will enhance our JAG family. In coming months I hope to address areas of common concern and provide you with an update of ongoing projects. I look forward to the challenge of serving you.

(Sergeant Major Walt Cybert, OTJAG Sergeant Major, retired in October 1985 and was awarded the Legion of Merit by The Judge Advocate General.)

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA Course Schedule Change

The 15th Law Office Management Course, originally scheduled for 7-11 July 1986, has been rescheduled for 21-25 July 1986. Persons who have already obtained a quota for the course will be contacted to confirm the new dates.

3. TJAGSA CLE Course Schedule

February 3-7: 32nd Law of War Workshop (5F-F42).

February 10-14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24-7 March 1986: 106th Contract Attorneys Course (5F-F10).

March 10-14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10-14: 10th Admin Law for Military Installations (5F-F24).

March 17-21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24-28: 18th Legal Assistance Course (5F-F23).

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12-15: 22nd Fiscal Law Course (5F-F12).

May 19-6 June 1986: 29th Military Judge Course (5F-F33).

June 2-6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10-13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16-27: JATT Team Training.

June 16-27: JAOAC (Phase II).

July 7-11: U.S. Army Claims Service Training Seminar.

July 14-18: Professional Recruiting Training Seminar.

July 14-18: 33d Law of War Workshop (5F-F42).

July 21-25: 15th Law Office Management Course (7A-713A).

July 21-26 September 1986: 110th Basic Course (5-27-C20).

July 28-8 August 1986: 108th Contract Attorneys Course (5F-F10).

August 4-22 May 1987: 35th Graduate Course (5-27-C22).

August 11-15: 10th Criminal Law New Developments Course (5F-F35).

September 8-12: 85th Senior Officers Legal Orientation Course (5F-F1).

4. Civilian Sponsored CLE Courses

April 1986

2-4: ALIABA, Pension, Profit-Sharing, & Deferred Compensation, San Francisco, CA.

3: PLI, Employment Litigation & Its Alternatives, San Francisco, CA.

3-4: FBA, Indian Law Conference, Phoenix, AZ.

3-4: UTSL, International Law, Houston, TX.

3-5: ABA, Workers Compensation, San Francisco, CA.

4: GICLE, Common Ethical Complaints, Atlanta, GA.

4-5: ALIABA, Liability for Medical Devices, Washington, DC.

5: SPCC, Family Law/Domestic Relations, Highland Hgts., KY.

6-10: NCDA, Special Crimes, San Francisco, CA.

10-11: PLI, Agricultural Bankruptcies, San Francisco, CA.

10-11: UTSL, Local Government & Environmental Law Conference, Houston, TX.

10-11: PLI, Tax Exempt Financing, San Francisco, CA.

11: SBA, Arizona Appellate Practice 1986, Phoenix, AZ.
11: MSBA, Commercial/Consumer Law, Augusta, ME.
11: GICLE, Employee Benefit Plans, Atlanta, GA.
11: GICLE, Workers Compensation Law, Savannah, GA.
11–12: KCLE, Environmental & Natural Resources Law, Lexington, KY.
11–12: PLI, Forensic Techniques for Use in Litigation, San Francisco, CA.
14–15: PLI, Discovery in Personal Injury Cases, San Francisco, CA.
17–18: PLI, Hazardous Waste Litigation, New York, NY.
17–18: UTSL, Professional Use of Small Computers, Austin, TX.
18: SBA, Arizona Appellate Practice 1986, Tucson, AZ.
18: GICLE, Will Drafting, Savannah, GA.
18: GICLE, Workers Compensation Law, Atlanta, GA.
18–19: NCDA, Regional Short Course, Omaha, NE.
20–24: NCDA, Investigators, Denver, CO.
21–23: GCP, Competitive Negotiation Workshop, Washington, DC.
24–25: FBA, 7th Annual Immigration Law Conference, Washington, DC.
25: GICLE, Will Drafting, Atlanta, GA.
26: SPCC, Comprehensive Crime Control Act, Highland Hgts., KY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the October 1985 issue of *The Army Lawyer.*

5. Mandatory Continuing Legal Education Requirement

Seventeen states currently have a mandatory continuing legal education (MCLE) requirement.

In these seventeen MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (Oct 1985) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by all of these MCLE jurisdictions with the exception of Kansas, which had not given approval to all courses as of 6 Dec. 1985.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date:

State	Local Official	Program Description
Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269–1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually
Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education 190 East 9th Avenue Suite 410 Denver, CO 80203 (303) 832–3693	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually
Georgia	Executive Director State Bar of Georgia 84 Peachtree Street Atlanta, GA 30303 (404) 522–6255	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually
Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342–8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281–3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
Kansas	Continuing Legal Education Commission 301 West 10th Street Topeka, KS 66612 (913) 296–3807	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually
Kentucky	Containing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564–3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 875 Summitt Ave St. Paul, MN 55105 (612) 227–5430	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 March every third year.
Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually
Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442–7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826–0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.

State	Local Official	Program Description
North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255–1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799–5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
Vermont	Vermont Supreme Court Committee of Continuing Legal Education 111 State Street Montpelier, VT 05602 (802) 828–3279	—Active attorneys must complete 10 hours of approved legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison Seattle, WA 98104 (206) 622–6021	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110E Main Street Madison, WI 53703 (608) 266–9760	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.
Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632–9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Current Material of Interest

1. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through the Defense Technical Information Center (DTIC): (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD B090375 Contract Law, Government Contract Law Deskbook Vol 1/ JAGS-ADK-85-1 (200 pgs).

AD B090376 Contract Law, Government Contract Law Deskbook Vol 2/ JAGS-ADK-85-2 (175 pgs).

AD B078095 Fiscal Law Deskbook/ JAGS-ADK-83-1 (230 pgs).

Legal Assistance

AD B079015 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).

AD B077739 All States Consumer Law Guide/ JAGS-ADA-83-1 (379 pgs).

AD B089093 LAO Federal Income Tax Supplement/ JAGS-ADA-85-1 (129 pgs).

AD B077738 All States Will Guide/ JAGS-ADA-83-2 (202 pgs).

AD B080900 All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).

AD B089092 All-States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).

AD B093771 All-States Law Summary, Vol I/ JAGS-ADA-85-7 (355 pgs).

AD B094235 All-States Law Summary, Vol II/ JAGS-ADA-85-8 (329 pgs).

AD B090988 Legal Assistance, Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).

AD B090989 Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).

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

AD B095857 Proactive Law Materials/ JAGS-ADA-85-9 (226 pgs).

Claims

AD B087847 Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).

AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).

AD B087774 Government Information Practices/ JAGS-ADA-84-8 (301 pgs).

AD B087746 Law of Military Installations/ JAGS-ADA-84-9 (268 pgs).

AD B087850 Defensive Federal Litigation/ JAGS-ADA-84-10 (252 pgs).

AD B087745 Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).

AD B088204 Uniform System of Military Citation/ JAGS-DD-84-2 (38 pgs.)

Criminal Law

AD B086937 Criminal Law, Evidence/ JAGS-ADC-84-5 (90 pgs).

AD B086936 Criminal Law, Constitutional Evidence/ JAGS-ADC-84-6 (200 pgs).

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD B095870 Criminal Law: Jurisdiction, Vol. I/ JAGS-ADC-85-1 (130 pgs).

AD B095871 Criminal Law: Jurisdiction, Vol. II/ JAGS-ADC-85-2 (186 pgs).

AD B095872 Criminal Law: Trial Procedure, Vol. I, Participation in Courts-Martial/ JAGS-ADC-85-4 (114 pgs).

AD B095873 Criminal Law: Trial Procedure, Vol. II, Pretrial Procedure/JAGS-ADC-85-5 (292 pgs).

AD B095874 Criminal Law: Trial Procedure, Vol. III, Trial Procedure/JAGS-ADC-85-6 (206 pgs).

AD B095875 Criminal Law: Trial Procedure, Vol. IV, Post Trial Procedure, Professional Responsibility/JAGS-ADC-85-7 (170 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

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

2. Regulations & Pamphlets

Number	Title	Change	Date
UPDATE #8	Unit Supply Update		10 Nov 85
UPDATE #8	Morale, Welfare & Recreation Update		26 Nov 85
AR 27–40	Litigation		4 Dec 85
AR 135–32	Retention in Active Status After Qualification for Retired Pay	1	29 Oct 85
AR 190–40	Serious Incident Report		14 Aug 85
AR 310–1	Publications, Blank Forms and Printing Management	1	30 Sep 85
AR 310–2	ID and Distribution of DA Publications and Issue of Agency and Command Admin Pubs	1	16 Sep 85
AR 340–18	The Army Functional Files System		18 Dec 85
AR 350–30	Code of Conduct/ Survival, Evasion, Resistance, and Escape (SERE) Training		10 Dec 85
AR 350–100	Officer Active Duty Service Obligations		25 Nov 85
AR 608–61	Application for Authority to Marry Outside the U.S.		16 Oct 85
AR 608–99	Support of Dependents, Paternity Claims and Related Adoption Proceedings		4 Nov 85
AR 612–2	Preparation of Replacements for Overseas Movement		28 Feb 85
DA Pam 600–26	Department of Army Affirmative Action Plan		13 Dec 85

3. Articles

Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 Harv. J. L. & Pub. Pol'y 539 (1985).

Chayes, *Nicaragua, the United States, and the World Court*, 85 Colum. L. Rev. 1445 (1985).

Egge & Bunting, *Divorce Settlements*, Trial, Aug. 1985, at 27.

Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 Empl. Rel. L.J. 181 (1985).

Jay, *Origins of Federal Common Law* (pts. 1 & 2), 133 U. Pa. L. Rev. 1003, 1231 (1985).

Johnson, *Avoiding Malpractice Claims That Arise Out of Common Estate Planning Situations*, 63 Taxes 780 (1985).

Malone, *The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*, 1985 Utah L. Rev. 373.

Moeller, *United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation*, 25 Va. J. Int'l L. 793 (1985).

National Security and the First Amendment, 26 Wm. & Mary L. Rev. 715 (1985).

Pipko & Pucciarelli, *The Soviet Internal Security System*, 19 Int'l Law. 915 (1985).

Polesky Lentz, *Parentage Testing: An Interface Between Medicine and Law*, 60 N.D.L. Rev. 727 (1984).

Rodino, *New Help for Crime Victims*, Fed. B. News & J., Fall 1985, at 88.

Sohn, *The Law of the Sea: Customary International Law Developments*, 34 Am. U. L. Rev. 271 (1985).

Sokol, *The Current Status of Medicine Malpractice Countersuits*, 10 Am. J.L. & Med. 439 (1985).

Wilson, *Children: The Casualties of a Failed Marriage*, 19 U.B.C.L. Rev. 245 (1985).

Comment, *Containing the Irrepressible: Judicial Responses to the Problem of Pre-Deliberation Discussion Among Jurors*, 18 Conn. L. Rev. 127 (1985).

Note, *The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal To Go Free Because the Soldier Has Blundered?*, 61 N.D.L. Rev. 107 (1985).

RESERVED

★U.S. GOVERNMENT PRINTING OFFICE: 1986-490-999:40140

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

Official Business
Penalty for Private Use $300

SECOND CLASS MAIL
POSTAGE AND FEES PAID
DEPARTMENT OF THE ARMY
ISSN 0364-1287