CPT O'Keeffe

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Editor
Captain David R. Getz

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

REPLY TO
ATTENTION OF

JALS-RL 13 DEC 1985

SUBJECT: Appointment of Environmental Law Specialists - Policy Letter 85-7

STAFF AND COMMAND JUDGE ADVOCATES

1. Increasing litigation and heightened public awareness over environmental matters demonstrate the need for Army lawyers to become involved at the earliest possible stage.

2. To be responsive to the needs of our clients, you should:

a. Designate an Army lawyer at each installation to provide comprehensive legal services to the command on environmental matters.

b. Ensure the designated lawyer is qualified through appropriate professional training, e.g., courses at The Judge Advocate General's School, or equivalent training.

c. Make commanders aware of the ever increasing importance of environmental matters and the need for consideration of legal aspects in any proposed action.

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

30 DEC 1985

SUBJECT: Legal Assistance Representation of Both Spouses - Policy Letter 85-11

STAFF AND COMMAND JUDGE ADVOCATES

1. This letter reemphasizes and elaborates on the policy in AR 27-3, paragraph 2-2, which provides that representation of both parties in domestic relations matters is discouraged and should be avoided.

2. Each office should--

a. Establish procedures to screen clients in order to eliminate inadvertent conflicts.

b. Explain to conflicting clients why they cannot be seen in that office.

c. Establish a system whereby conflicting clients can receive legal assistance by referral to (1) another legal assistance office on the installation, (2) a legal assistance office on a nearby installation, or (3) a reserve judge advocate. If these alternatives are not feasible, the conflicting client may be referred to another branch in the same staff judge advocate office or to a Trial Defense Service Office.

d. Use different attorneys within the same legal assistance office only as a last resort. The specific approval of the staff judge advocate and the informed consent of both parties will be necessary. Facts requiring this dual representation will be memorialized.

3. The legal assistance officer must ensure that some form of communication is actually made between the conflicting client and the office to which the conflicting client is referred. Ideally, a specific appointment with a particular attorney should be made. It is not enough merely to advise a conflicting client where alternate legal assistance is available.

Hugh Overholt

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

Special Interest Items for Article 6 Inspections

The following checklist has been distributed by The Judge Advocate General to all command and staff judge advocates and will be used by general officers when conducting UCMJ art. 6 inspections. Comments about the checklist are welcome and should be forwarded to the Executive, Office of The Judge Advocate General, Washington D.C. 20310–2200.

1. GENERAL AREAS FOR INQUIRY.

a. Office appearance and morale. Adequacy of facilities.

b. Relations with commander(s) and staff and legal counterparts (if any), higher headquarters (incl OTJAG) and subordinate commands.

c. SJA objectives for coming 12 months.

d. Personnel status (officer, civilian, enlisted): authorizations filled? Critical losses identified to PT or other appropriate office?

e. Operations Law. Is the OSJA involved in review of war plans, highlighting law of war issues?

f. Is there a program to support TRADOC and MACOM requirements for formal training regarding Geneva and Hague Conventions?

g. Reserve judge advocate training.

(1) Does the office train JAGSO units? If so, what training schedule do they use?

(2) Are IMA's assigned to the office? Are there vacancies? What management plan is used to schedule ADT, keep the IMA's informed of office developments, and assist them in getting required retirement points?

(3) What kind of working relationship does the SJA have with the appropriate Army SJA in his area?

(4) Does the office participate in On-Site Reserve instruction?

h. Relations with the media. Do judge advocates and other personnel understand the rules?

i. Positive and negative trends in functional areas.

j. Is the office engaged in any non-JAG missions?

k. Is there a program designed to brief those leaving service as to their post-employment restrictions?

l. Does the office have a plan for professional development of all personnel? Is budget consideration given for personnel to attend career enhancing conferences or training?

m. Status of relations with local officials, including the local bar?

n. Condition of library and library holdings?

o. Is the office doing something new and innovative in support of the Family Action Plan?

p. Does the office have a current, functional SOP, and is it being used to promote office professionalism and efficiency?

q. Does the office have a plan for premobilization legal counseling?

r. What provision has the office made for mobilization and deployment plans pertaining to Military Law Centers and JA sections?

s. Does the SJA office or the command have a DTIC account?

t. Enlisted Considerations.

(1) Who manages local assignments—AG or SJA?

(2) Are there shortages? If so, why?

(3) Is there a SQT training program for legal specialists?

2. INTRODUCTORY PROGRAM FOR NEWLY ASSIGNED JA'S.

a. Does SJA office have one?

b. Do new JA's spend time with troop units?

3. PHYSICAL FITNESS AND WEIGHT CONTROL/LEAN PROGRAM

a. Does SJA office have a regular PT program?

b. Have personnel over 40 been medically screened?

c. When was last PT test? Did all personnel participate?

d. Are overweight personnel in a medically supervised weight control program?

e. Are personnel professional in appearance? Uniform? Grooming?

f. See also, item 7, DA MANDATED TRAINING.

4. LEGAL ASSISTANCE PROGRAM.

a. Is there a viable, aggressive preventive law program?

b. Are offices attractive and professional? Sufficient privacy?

c. Are experienced officers assigned to LA? Are any members of local bar?

d. How does the SJA determine client satisfaction?

e. Are legal services publicized?

f. Are soldiers getting legal assistance for OER/EER appeals? Is there any significant manpower impact from this new requirement?

g. How does the office handle circumstances in which both spouses seek representation in domestic relations matters?

h. Army Tax Assistance Program. What is the SJA doing to improve tax assistance for soldiers?

i. What is the waiting time for an appointment?

j. How long does it take to have a will prepared?

k. Is there an in-court representation program? Pro se assistance?

5. CLAIMS.

a. Are claims personnel sufficiently trained? Which if any have attended TJAGSA courses, claims workshops, etc.?

b. Are experienced officers supervising claims functions?

c. Does claims office staffing indicate requisite SJA support of claims mission?

d. Are small claims procedures being used?

e. What is average processing time for payment of claims?

f. What is relationship with medical treatment facility? Do they have a risk management program?

g. How much did claims office recover in medical care recoveries last FY? How much in carrier recovery? What is current trend?

h. How does the SJA determine client satisfaction?

i. Is the office: properly equipped, receiving adequate admin support, and presenting a professional image?

j. Does the office have the current Claims Manual?

6. LABOR COUNSELOR PROGRAM. (Policy Letter 85–3)

a. Does SJA office have a designated Labor Counselor?

b. Has the Labor Counselor had sufficient training?

c. Are library assets adequate?

7. DA MANDATED TRAINING.

a. Do OSJA personnel participate in required training such as physical training, weapons qualification, and NBC training?

b. Are military judges and TDS personnel invited to participate with OSJA? Do they?

8. TERRORIST THREAT TRAINING. (Policy Letter 85–5)

a. Are personnel properly trained in legal aspects of countering terrorist threats?

b. As a minimum, do all personnel have a working knowledge of AR 190–52, TC 19–16, and the MOU between DOD, DOJ, and FBI on use of Federal military force in domestic terrorist incidents?

9. RECRUITING FOR THE RESERVE COMPONENTS. (Policy Letter 85–1)

a. Does the SJA have a program to identify quality legal specialists and court reporters for service with the Reserve Components?

b. Is information about these soldiers being forwarded to the OTJAG Senior Staff NCO?

c. Does the SJA encourage quality judge advocates to join a Reserve Component? Is TJAGSA Guard and Reserve Affairs Division notified when a quality judge advocate expresses an interest in joining a Reserve Component?

10. AUTOMATION STATUS. (Policy Letter 85–4)

a. Who is the automation manager?

b. What are the automation needs?

c. What is the plan to satisfy these needs?

d. What is the current status?

11. STANDARDS OF CONDUCT (AR 600–50)

a. Does the SJA office have a designated DSCC?

b. Is there an active roster of positions in the command for which a DD Form 1555 is to be filed?

c. Is there an active discussion with GO and SES personnel concerning their DD Forms 278?

d. Are the 278's reviewed with each GO at the time they are first assigned to the command or assume a new duty position in the command?

e. Is there an active standards of conduct training program?

f. Are the SJA and DSCC familiar with the filing requirements for 278's and 1555's?

g. Does the SJA have a firm grasp on the proper approach to take if local senior personnel (including the CG) are alleged to have committed violations of the standards of conduct?

12. INTELLIGENCE OVERSIGHT.

a. Is the SJA aware of the mission, organization, and function of intelligence units within his jurisdiction?

b. Does the office maintain a library of current intelligence directives and regulations?

c. Have intelligence oversight attorneys received INSCOM-sponsored training on intelligence law topics and oversight responsibilities? Do they have the necessary personal security clearances?

13. MILITARY JUSTICE.

a. Are appropriate confinement and finance and accounting offices being notified by electronic message within 24 hours of convening authority action IAW paragraph 12–3, AR 27–10?

b. Has an active witness/victim assistance program been developed and implemented? If implemented, what is SJA's impression of program effectiveness?

c. Is the jurisdiction experiencing any problems with requests for civilian and overseas witnesses?

d. Are rates for Article 15's and courts-martial, and courts-martial processing times comparable to area command and Army-wide rates?

e. Are Law of War problems included in ARTEPs, FTXs and other exercises?

f. Does a mutual support agreement exist between the SJA and TDS, in which responsibility for Priority III duties is clearly defined? Is it working?

g. Relations between OSJA, TDS, and Trial Judges.

h. What efforts are being made to ensure that JA personnel are involved in the criminal justice process at early stages?

i. Do commanders at all levels receive adequate instruction regarding military justice duties, especially avoidance of unlawful command influence?

14. TCAP.

a. Are trial counsel using the services of the Trial Counsel Assistance Program?

b. Are the chief of military justice and all trial counsel attending TCAP seminars?

c. Are trial counsel satisfied with the assistance rendered by the Trial Counsel Assistance Program?

15. LITIGATION.

a. Does the office have a program in the area of Contract Fraud?

b. What is being done to foster close relationships with U.S. attorneys?

c. Is the office having any problems with the U.S. Attorney's office?

d. What kind of relationship does the office have with the Magistrate's Court?

e. What support is given the local hospital activity in litigation matters, medical malpractice questions, and quality assurance/risk management issues?

f. Any jurisdictional problems on post?

g. What type of contact has the office had with local authorities concerning child abuse and spouse abuse cases?

16. CONTRACT LAW

a. To what extent is nature of legal work in SJA office shifting from military justice to civil law areas such as acquisitions, environmental, litigation, etc.?

b. What activities at the installation are facing commercial activities review? (Contracting out a major activity such as DEH may require the usual contracts lawyer to work full time on the CA project for an extended period.)

—Is the SJA comfortable that adequate legal support is available? and

—Is the SJA prepared to discuss contract types with his commander?

c. Has the SJA visited the contracting office? Is at least one lawyer designated and trained to provide installation contracting support? Does the contracting officer know who his lawyer is? Does the contracting officer view "his" lawyer as part of the contracting team or merely another obstacle to be overcome?

d. Is the installation anticipating any significant procurement of ADP Equipment within the coming year?

e. How is the Acquisition Law Specialty program viewed by the SJA and other JA's? What interest is expressed in the specialty? The LL.M. Program?

f. Is the SJA involved in acquisition issues?

g. How closely does the SJA monitor acquisition law advice?

h. Has the acquisition portion of the mobilization plan been reviewed and revised?

i. What acquisition law advice is planned for predeployment and deployment?

j. What training by members of the SJA office has been given (is planned) for members of the command concerning irregular acquisitions and fiscal law matters?

k. How many contracts, and what percentage of annual contract dollars, were awarded during the last quarter of the fiscal year? Could any have been awarded earlier with advance planning?

l. How many contracts were awarded during the past quarter and past fiscal year other than by full and open competition? What percentage of total contracts awarded and total contract dollars were involved in these awards?

m. How many bid protests were filed during the past quarter and past fiscal year? How many were sustained? What issues were involved and what remedial measures were undertaken? To what extent was the SJA consulted and involved?

n. How many contract claims were filed during the past quarter and past fiscal year? What issues were involved and what, if any, remedial measures were undertaken? To what extent was the SJA consulted and involved?

o. How many contracting officer's final decisions were issued during the past quarter and past fiscal year? What issues were involved? How many were appealed to the ASBCA or Claims Court? To what extent was the SJA consulted and involved?

p. What is the general attitude of the command group and staff concerning acquisition law issues? What actions has the SJA taken to foster sensitivity to acquisition law issues?

17. ENVIRONMENTAL LAW.

a. Has the SJA appointed an Environmental Law Specialist? Are there any on-going violations of federal or state environmental laws?

b. Are procedures in effect for learning of and reporting to JALS-RL of utility rate increase and other proposals affecting local Army activities?

18. TDS

a. Is SJA support adequate?

b. Is an effort being made to enhance the professional development?

19. MILITARY JUDGES

a. Is SJA support adequate?

b. Is an effort being made to enhance professional development?

Policy for Providing Assistance to Staff Judge Advocates

Office of The Judge Advocate General

The following supercedes the policy published in The Army Lawyer, *May 1980, at 58.*

1. The following research and support may be provided by OTJAG to Staff Judge Advocates and military and civilian legal officers worldwide:

a. Written legal opinions of The Judge Advocate General.

b. On an emergency basis, usually in response to telephone requests: oral advice, research, and reference to pertinent statutes, legislative history, directives, instructions, regulations, and other printed material. In these circumstances the information provided does not constitute an opinion of The Judge Advocate General.

2. The Judge Advocate General provides legal advice to the Secretary of the Army and the Army Staff. Care must be exercised to ensure that, in providing assistance to soldiers and military lawyers, an opinion is not given by the Office of The Judge Advocate General to an interested party in any matter which may come before The Judge Advocate General in his official capacity. The appearance or existence of conflict of interest must be avoided.

3. The following pertains to requests for OTJAG assistance:

a. Except in emergencies, requests must be in writing, signed by the Staff or Command Judge Advocate, and forwarded through legal channels (e.g., SJA of intermediate higher headquarters). "For the Commander" signatures are inappropriate. Intermediate SJA's should be advised of emergency requests and OTJAG's response.

b. The office requesting assistance should exhaust all reasonably available research tools. The product of this research and legal conclusions should be submitted as an enclosure to the request for assistance. Intermediate (higher headquarters) judge advocates, using any additional research sources, will attempt to resolve the issue without forwarding to OTJAG. However, if an issue is forwarded to OTJAG, intermediate judge advocates should provide all comments and conclusions resulting from their review.

4. The following assistance is also available:

a. Direct communication between Staff Judge Advocates and The Judge Advocate General is authorized pursuant to Article 6b, UCMJ.

b. Correspondence to International Affairs Division may be forwarded directly to OTJAG. An information copy should be provided the SJA of intermediate higher headquarters.

c. In matters pertaining to civil litigation or request for representation (AR 27–40): direct contact between judge advocates and action attorneys in Litigation Division, OTJAG, is encouraged on all matters before State and Federal Courts in which the Army has an interest.

d. In matters pertaining to the settlement of administrative claims: direct contact between military and civilian legal officers at commands and installations and action attorneys at the U.S. Army Claims Service is encouraged (See para 1-8, AR 27-20).

e. Direct communication is authorized between Staff Judge Advocates and the Legal Assistance Office, OTJAG, for assistance in obtaining information which is not available from local sources.

f. Defense counsel are encouraged to communicate directly with the U.S. Army Trial Defense Service, U.S. Army Legal Services Agency.

g. Trial counsel are encouraged to communicate directly with the Trial Counsel Assistance Program.

h. Direct communication between Staff Judge Advocates and individual judge advocates with the Personnel, Plans, and Training Office is authorized in matters concerning personnel management and staffing.

i. Direct communication is authorized between Staff Judge Advocates and the Labor and Civilian Personnel Office, OTJAG, to report picketing at an installation; to report that an investigation by the Office of Special Counsel, Merit Systems Protection Board, is taking place at an installation; and to seek technical guidance on labor and civilian personnel matters when no senior labor counselor is in the technical chain of command.

j. Direct communication is authorized between judge advocates and action attorneys in the Contract Law Division in matters involving tax litigation, GAO protests, and GSBCA protests involving ADPE procurements, as well as ASBCA disputes being handled by Contract Appeals Division.

The Stationing Agreements and Their Impact at the Federal German Level: A Bonn Perspective

Captain John E. Parkerson, Jr.
34th Graduate Course

Historical and Legal Basis for the Stationing Agreements

A series of treaties that came into force on May 5, 1955, formally ended the occupation of the Federal Republic of Germany by the Western allies. From that date, allied occupation troops became "stationed" troops with a contractually regulated status. The Federal Republic became a fully sovereign state. Many provisions were negotiated into these and subsequent agreements governing the continued stationing of the allied forces in the FRG which, arguably, depending on how one interprets "sovereignty," gave the Federal Republic something less than the full benefits generally conferred upon a fully sovereign state. This article examines these provisions and their effects at the federal level and describes the instrumentalities through which the allied stationed forces and the Federal Republic deal with the stationing agreements.

When the Federal Republic of Germany formally came into existence in may 1949, it confronted an Occupation Statute by which the three Western powers—the United States, Great Britain, and France—retained supreme authority in many fields.[1] The new German Chancellor, Konrad Adenauer, saw his most important objective as gradually regaining freedom of action for his nation. In his mind, the best means of achieving this was by the greatest possible integration of the Federal Republic into the gradually forming Western community.[2] World political events favored this approach. On April 4, 1949, the United States and eleven other nations, responding to increasing East-West tensions, established the North Atlantic Treaty Organization (NATO).[3] By the early 1950's, most NATO powers were ready to add German troops to the Western alliance.

By the Paris Agreements of 1954, the Federal Republic became a member of NATO. It was the coming into force of these agreements on May 5, 1955 that formally ended the Occupation Regime and conferred sovereignty upon the

[1] Lexicon—Institute Bertelsmann, Facts About Germany 67–70 (1984) [hereinafter cited as Facts About Germany]; L. Edinger, Politics in West Germany 87–89 (1977) [hereinafter cited as Edinger].

[2] Facts About Germany, *supra* note 1, at 85; Edinger, *supra* note 1, at 88–89.

[3] North Atlantic Treaty Between the United States of America and Other Governments, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 (entered into force for the United States Aug. 24, 1949).

FRG.[4] These agreements, in common, addressed a unique situation that makes them quite distinguishable from the ordinary treaties to which the Federal Republic is a party. They address a situation in which the FRG professed itself to be a part of one nation, presumed one day to be reunited, which had lost two World Wars, and already again was the veritable focus of East-West tensions. The most fundamental of these agreements was the Relations Convention.[5] Article 1 of this agreement recited that its entry into force terminated the occupation and that the Federal Republic "shall have accordingly the full authority of a sovereign State over its internal and external affairs." The first sentence of Article 2, however, provides:

> In view of the international situation which has so far prevented the reunification of Germany, and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement.[6]

The Relations Convention, to the extent that it has not been modified or replaced in part by subsequent international agreements, remains in force today and is the legal basis for the Three Powers' continued role in certain areas of allied reserved rights over the FRG and Berlin. This legal basis will remain—unless the United States, Great Britain and France negotiate it away—until Germany is reunited and a formal peace treaty is signed between the old warring factions from World War II. Furthermore, the end of occupation necessitated a new legal foundation regarding the status of former occupation troops of the Three Powers that continued to be stationed in the newly sovereign Federal Republic. The transition from occupation to stationed forces was accomplished simultaneously by the Convention on the Rights and Obligations of Foreign Forces and their members in the Federal Republic of Germany.[7] This treaty, as amended by the Paris Protocol,[8] governed the status of the Three Powers in the Federal Republic until 1963, but contained certain continuing aspects of the occupation mentality which annoyed German federal authorities.

In 1951, the parties to NATO had signed a Status of Forces Agreement (NATO SOFA) which governed the status of one NATO state's forces when stationed in the territory of another NATO state.[9] Like any multilateral treaty of broad and varied membership, the NATO SOFA, which remains in force today, is quite general. When the FRG became a member of NATO, the NATO SOFA provisions were recognized from the outset as being inadequate for the unique situation in Germany without supplementation. Therefore, the NATO states that had forces present in Germany delayed concluding agreements with Germany that would make the NATO SOFA applicable there until an agreement applying specifically to the Federal Republic and supplementing the NATO SOFA could be negotiated. Toward that end, negotiations between the NATO states and the FRG for a special agreement governing the status of all foreign forces (not just the Three Powers') stationed in the Federal Republic of Germany were carried out throughout the 1950s. Finally, by 1959, the negotiators had reached agreement. The result was the commonly-called NATO SOFA Supplementary Agreement.[10]

By the preamble of the Supplementary Agreement, the basic NATO SOFA signed in 1951 simultaneously became applicable to the FRG. The NATO SOFA Supplementary Agreement, and its Protocol of Signature, which interpreted and indeed supplemented various articles of the NATO SOFA and its Supplementary Agreement, entered into force for the Federal Republic of Germany and the six so-called "sending states" (*i.e.*, those NATO states with forces stationed in the FRG) in 1963, having been delayed by the

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[4] The most important of this series of agreements were:

a. Convention on Relations Between the Three Powers and the Federal Republic of Germany (Relations Convention), May 26, 1952, 6 U.S.T. 4251, T.I.A.S. No. 3425, 331 U.N.T.S. 327;

b. Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany (Rights and Obligations Convention);

c. The Finance Convention;

d. Agreement on the Tax Treatment of the Forces and their Members (Tax Agreement);

e. Convention on the Settlement of Matters Arising Out of the War and the Occupation (Settlement Convention), May 26, 1952, 6 U.S.T. 4411, T.I.A.S. 3425, 332 U.N.T.S. 219.

These so-called "Bonn Conventions" were amended by and simultaneously came into force with the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany (the Paris Protocol), Oct. 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425, 331 U.N.T.S. 253.

Also signed in Paris at that time was the Tripartite Agreement on the Exercise of Retained Rights in Germany, Oct. 23, 1954, 6 U.S.T. 5703, T.I.A.S. No. 3427. A further agreement was the Convention on the Presence of Foreign Forces in the Federal Republic of Germany (Presence Convention), Oct. 23, 1954, 6 U.S.T. 5689, T.I.A.S. No. 3426, 334 U.N.T.S. 3.

The Rights and Obligations Convention, the Tax Agreement, and the Finance Convention were abrogated in 1963 by the Agreement on the Abrogation of the Convention on Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, the Agreement on the Tax Treatment of the Forces and Their Members, and the Finance Convention, Aug. 3, 1959, 14 U.S.T. 686, T.I.A.S. No. 5351, 481 U.N.T.S. 591 (effective July 1, 1963). Therefore, their citations were not provided above.

[5] Relations Convention, *supra* note 4, at a.

[6] *Id.*, art. 2.

[7] Rights and Obligation Convention, *supra* note 4, at b.

[8] Paris Protocol, *supra* note 4.

[9] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (NATO SOFA), June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (entered into force for the United States Aug. 23, 1953).

[10] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature (Supplementary Agreement and Protocol), Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 (entered into force for the United States July 1, 1963).

ratification processes of several states.[11] The six sending states are the United States, Great Britain, France, Canada, Belgium, and the Netherlands. There are, of course, other NATO agreements and administrative arrangements and various bilateral agreements between individual sending states and the FRG that have a bearing on the sending states forces in Germany; but, fundamentally, the NATO SOFA, the Supplementary Agreement with its Protocols, and the practice which has developed under them are what govern matters pertaining to the stationing of foreign forces in the FRG today.

Instrumentalities Through Which Germany and the Sending States Deal with the Stationing Agreements

In no other NATO country are so many foreign forces and arms stationed as in the Federal Republic of Germany, which is host nation to the forces of the six allied sending states. Altogether, there are approximately 392,000 soldiers from the six sending states' forces and approximately 325,000 family members living in the FRG. Americans, who number 450,000 of these soldiers and family members, are by far in the majority. Another 9,500 personnel from the United States, Great Britain, and France are stationed in occupied West Berlin. No other Western country has such a concentration of military installations in such a confined space.[12] These facts mean extra burdens for the Federal Republic; questions concerning the application of the NATO SOFA and Supplementary Agreement arise daily.

Generally, most questions today are resolved quite easily on a local level; however, domestic and foreign policy pressures, or particular needs of the sending states' forces, are elevating stationing agreement issues to the ministerial level more and more frequently. Much of the reason for this development arises from renewed German national consciousness and desires to assert full sovereign "rights" at federal and state levels, and from pressure directed toward German decision-makers and the forces by various interest groups and political factions which perceive the sending states' forces as exercising some kind of extraterritorial authority in Germany at the expense of the environment, society, and their peaceful existence. In that vein, important but vague articles in the agreements such as, for example, Article II of the NATO SOFA, which sets out the duty of the forces to "*respect* the law of the receiving State [FRG] . . . ,"[13] are increasingly being questioned by many Germans as inadequate protection against unfair interpretation by the "guest" forces.

Several fora are available for addressing stationing problems which arise between the sending states' forces and FRG officials. If the issue is of multilateral concern to all NATO states, and not just to the particular German situation, the matter likely will be handled by the respective national diplomatic and military missions to NATO. If the stationing issue is confined to Germany and affects the stationed forces' rights or obligations under the NATO SOFA and Supplementary Agreement, however, the matter generally is resolved through one of the various working level channels which have been established to permit the relevant officials and experts from "guest" and "host" nations to resolve the matter. Of course, if these working level channels do not bring satisfaction, the matter may be raised to the diplomatic level for resolution.

In Germany, each of the sending states' forces has a liaison mission at the federal level, often located in its embassy, which is tasked by its force's headquarters to coordinate stationing matters with pertinent ministries in the federal German government and with the other forces' liaison missions.[14] Specific provision for these liaison activities was made in the Paris Protocol, signed in 1954. Article V of this agreement provided that "the authorities of the Forces and the German authorities shall take appropriate measures to ensure close and reciprocal liaison." This provision also was included in Article III of the NATO SOFA.[15] To fulfill this role, each liaison mission is able to draw upon the vast technical expertise of its force's headquarters and the numerous subordinate agencies and commands, which provide research data, experts to attend negotiating sessions, and authoritative headquarters "positions." These liaison missions work closely with their national diplomatic personnel, particularly on matters where additional diplomatic "clout" is needed or politically sensitive issues arise. The forces' liaison missions generally act fairly independently of diplomatic personnel on the majority of stationing issues, however, which usually concern rather technical interpretations and implementation of various provisions of the NATO SOFA and Supplementary Agreement.

The Commander in Chief, USAREUR, Liaison Officer Bonn (CINCUSAREUR LO), performs these liaison functions for the U.S. Army, Europe (USAREUR). He is the representative of the Commander in Chief, USAREUR, to the American Ambassador and the American Embassy, Bonn, to the liaison officers of the other sending states' forces, and to the FRG for contacts with German governmental agencies at the federal level.[16] The CINCUSAREUR LO is an Army colonel under the staff

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[11] *Id.* Although not part of the treaty itself, the Summary Record of Proceedings is often relied upon for additional authoritative interpretation of Supplementary Agreement provisions.

[12] Federal Minister of Defense, White Paper 1983, *Security of the Federal Republic of Germany* 127 [hereinafter cited as White Paper 1983].

[13] NATO SOFA art. II. The Federal Republic on occasion has asserted that "respect" requires strict compliance with its law. The sending states have reasserted that "respect" actually requires only general compliance with the spirit of FRG law.

[14] The Netherlands' forces do not have a specific liaison mission as such in Bonn; their interests are adequately represented by their embassy in Bonn and through the frequent presence of their stationing agreement experts from the Dutch Ministry of Defense in The Hague on German federal, state, and local level discussions, and the internal sending states' forces discussions in the FRG. The Belgians have their forces liaison mission in Köln. *See* U.S. Army, Europe (USAREUR), Reg. No. 10–18, Organization and Functions: Commander in Chief, United States Army, Europe, Liaison Officer, Bonn, 26 Oct. 1977 [hereinafter cited as USAREUR Reg. 10–18]; USAREUR, Pam. No. 10–1, Organization of the German Federal Government and Interface with USAREUR Staff and Agencies (13 Aug. 1981) [hereinafter cited as USAREUR Pam. 10–1]. Much of this section comes from personal observation experience.

[15] USAREUR Pam. 10–1, para. 5*c*.

[16] USAREUR Reg. 10–18, para. 2*a*.

supervision of the USAREUR Chief of Staff.[17] The office, located in the American Embassy, Bonn, includes a civilian deputy liaison officer, two senior noncommissioned officers, and a German local national secretary. Co-located within the office is the USAREUR Legal Liaison Officer, a Judge Advocate General's Corps officer under the supervision of the USAREUR Judge Advocate. While the USAREUR LO has general responsibility for maintaining satisfactory relationships between USAREUR, the American Embassy, and the German government, the USAREUR Legal Liaison Officer maintains contacts with German government and sending states' forces legal authorities, and with the Embassy Legal Advisor.[18]

The USAREUR LO and the Legal Liaison Officer work closely together in order to complement each other's mission. The great majority of issues affecting the status of the U.S. forces stationed in the FRG that have reached the federal level pass through the CINCUSAREUR LO. As the "ears" of the CINCUSAREUR in Bonn, the LO constantly keeps his superiors in Heidelberg informed of events in Bonn which may affect the U.S. forces, and the Legal Liaison Officer similarly briefs the USAREUR Judge Advocate on legal matters emanating from the federal ministries and the sending states' forces. Headquarters, U.S. Air Force, Europe (USAFE), also has a liaison office in the embassy, but USAREUR generally is recognized as having lead responsibility in stationing agreement matters which affect the U.S. forces as a whole.[19] Consequently, the USAFE liaison's responsibilities generally are confined to technical matters peculiarly affecting the air forces. USAREUR LO actions that affect USAFE interests are coordinated closely with appropriate USAFE agencies to ensure a single U.S. forces approach.

An interesting practice has developed over the years at the liaison mission level and at the federal German level that has benefited both the sending states' forces and German federal officials on matters pertaining to stationing rights and obligations. When a sending state's force discovers that a stationing issue is likely to affect more than one of the six "guest" forces in the FRG, the forces liaison missions generally form expert working groups to develop a common sending state consensus before either approaching the pertinent German authorities or responding to them. The sending states' forces' legal experts are intimately involved in this process, as often the legal interpretation and not just technical application of NATO SOFA and Supplementary Agreement provisions is required. Many of these "ad hoc" sending states' forces' working groups become fairly permanent bodies where problems are likely to be ongoing, such as in the area of the environment. In addition to experts' working groups, the sending states' forces' representatives meet regularly in formal plenary conferences and informal consultative working groups to discuss stationing matters of mutual concern. There is some evidence that federal German authorities who deal regularly with the sending states' forces—primarily the Finance, Defense, Justice, and Interior Ministries and the Foreign Office—may have similar intragovernmental fora for coordinating their approaches to the "guest" forces; but it appears that their gatherings are less formally established and are more on the basis of truly ad hoc working groups as required by particular issues. The Germans are well aware of the sending states' solidarity (although there are many issues on which solidarity cannot be achieved and the individual sending state force either backs away from the issue or decides to pursue it bilaterally), and they appear generally content with this manner of conducting business when issues affecting all sending states' forces are involved. They probably benefit as much as the sending states' forces from this because solutions to stationing problems are thereby settled uniformly among all affected parties. Where the stationing issue is chiefly of interest to only one sending state's force, the other forces are not usually involved and the force's liaison mission works directly with the pertinent federal German ministries.

Similar, although much less extensive, forces liaison missions exist at the *Land*, or state, level, which work with the state counterparts to the federal German ministries.[20] As the NATO SOFA and the Supplementary Agreement are international treaties, and interpretation of treaties is an exercise of national authority and not state authority, the *Land* liaison offices generally are less involved in treaty interpretation than are the liaison offices located at the federal level. They do become involved in stationing agreement interpretation where necessary to define their local implementation and the political consequences at the state level. Also, under the principles of federalism, the states are somewhat limited by the FRG Basic Law[21] in developing policies in certain areas, such as defense and foreign policy, and must defer to federal government authority on matters falling within those areas. In addition to these formal liaison structures, informal working contacts exist on all levels

[17] USAREUR Reg. No. 10–5, Organization and Functions, United States Army, Europe, para. 5*a*(9) (23 Oct. 1980); USAREUR Reg. 10–18, para. 2*b*.

[18] The Legal Liaison Officer position was established by Memorandum from the USAREUR Chief of Staff to the USAREUR Judge Advocate, 17 Nov. 1967, subject: Posting of JA Officer at AMEMB, Bonn. Duties were set forth in a Memorandum of LTC Wade H. Williamson, Chief, International Affairs Division, 15 Dec. 1967, subject: Liaison Duties, American Embassy, Bonn.

[19] USAREUR responsibility for the U.S. forces on NATO SOFA and Supplementary Agreement matters likely evolved from the Department of Defense requirement that, in the geographical areas for which a unified command exists, the commander thereof will designate within each country a "commanding officer" (DCO). For Germany, the DCO is the Commander in Chief, USAREUR. Dep't of Army, Reg. No. 27–50, Legal Services-Status of Forces Policies, Procedures, and Information, app. C (1 Dec. 1984). The requirement, however, implements Senate Resolution of July 15, 1953, Advising and Consenting to Ratification of the NATO SOFA, which mandates appointment of a "commanding officer" to ensure that certain procedural safeguards contained in NATO SOFA art. VII pertaining to foreign criminal jurisdiction are provided to U.S. forces personnel. AR 27–50, app. B.

[20] USAREUR, Reg. No. 550–140, Conduct of Government Liaison Activities in States (Laender) of the Federal Republic of Germany (1983); USAREUR Pam. 10–1, para. 5.

[21] Edinger, *supra* note 1, at 15–17, 282–83. When the Federal Republic was formed, the founders did not want to write a constitution because they hoped for eventual reunification with East Germany. Instead, they created the Basic Law as the framework for their federal form of government. Powers that are specifically assigned to the states under the Basic Law mainly concern educational and cultural matters. Other matters, such as defense and foreign policy, are the exclusive preserve of the federal government. Still other powers are shared by the state and federal governments in the form of concurrent legislative authority. Generally, public officials of the states control most of the public administration, the police, radio and television stations, and the disbursement and use of public funds by county and municipal authorities.

and in diverse technical areas between sending state personnel and their German counterparts. These technical channels are beneficial in that potential or actual stationing agreement issues often are defused in this manner before they are required to be elevated to a formal instrumentality.

Practical Constraints: Major Areas of Concern

The personnel of a sending state's force in the Federal Republic are granted many rights and privileges under the NATO SOFA and Supplementary Agreement which ordinary foreigners do not have. Article I, NATO SOFA defines the force's personnel as the service members of the force, the "civilian component" accompanying and employed by the force, and their dependents.[22] The Supplementary Agreement, in Article 2, expands these categories of privileged personnel to include certain close relatives who live with and are dependent on the service member or civilian component personnel.[23]

Some of the most basic privileges accruing to a person with the "status" provided by these stationing agreements are those concerning the identification, border crossing, entry and exit, and alien residence requirements of the force's personnel in the FRG. Article III, NATO SOFA, in conjunction with Articles 5 and 6, Supplementary Agreement, clearly reveal the privileged position of these "guest" force personnel. By these provisions, these sending states' individuals generally are relieved of customary passport and visa requirements when entering or exiting the Federal Republic to or from another NATO country. Instead, identification cards issued by the pertinent state's military authorities provide sufficient documentation for border crossings. Furthermore, once sending state personnel have arrived in the FRG, German authorities cannot require them to submit to the usual alien registration and control requirements.[24] For all practical purposes, these foreign forces personnel are not "present" in the Federal Republic in the usual sense of the term. This is further illustrated by the fact that their household goods and motor vehicles are not subject to the normal customs procedures and are exempt from any customs duties, both upon arrival and upon departure from the FRG.[25] Additionally, once these individuals have arrived in Germany, their automobiles are not subject to normal safety inspection procedures, they receive driver's licenses and auto registration from their force's authorities, and they may purchase gasoline at special subsidized prices.[26] U.S. forces personnel also are permitted to register their privately owned firearms under U.S. forces administered registration procedures.[27] Unlike German citizens or other persons residing in the Federal Republic, U.S. forces personnel not only are exempt from any local, state, or federal taxation on income devolved from employment with the force[28] but also an elaborate administrative scheme has been set up by each sending state's force that in effect permits personnel to make individual purchases on the German economy, for example, a Mercedes Benz, without paying the fourteen percent Value-Added Tax *(Mehrwertsteuer)*, by taking advantage of Supplementary Agreement provisions that allow the "force" (not its individual personnel) to make purchases exempt from taxation.[29]

The Supplementary Agreement even extended this privileged status to persons who work for the sending state forces through employment with certain private organizations or firms, provided that they are not German, or "ordinarily resident" in the FRG, or nationals of a non-NATO state, and also provided that in their employment they serve the force exclusively. In general, these benefits extend to qualifying personnel who work for specified non-German non-commercial organizations, such as the American Red Cross or various American universities;[30] or who work for certain non-German commercial organizations, such as American Express banking facilities;[31] or certain individuals who because of their particular skills are classified as "technical experts."[32] Efforts by the forces to expand or to replace those organizations and their personnel often have created problems with German federal finance (*i.e.*, tax) and labor authorities, who are interested in interpreting strictly any NATO SOFA or Supplementary Agreement provisions which, because of vague or open-ended language, may be interpreted liberally by sending states' forces to obtain more benefits at the expense of German business, labor, or revenue interests. In this regard, terms such as "ordinarily resident," which have different meanings in different systems of jurisprudence, often create difficulties between sending states and FRG authorities. German government officials and labor unions naturally desire to provide maximum employment opportunities for the native labor market. Consequently, they often express displeasure at sending state interpretations of "ordinarily resident" which appear to provide maximum opportunities to sending state nationals, who, in the Germans' view, have

[22] NATO SOFA art. I, para. 1.

[23] Supplementary Agreement art. 2.

[24] NATO SOFA art. III; Supplementary Agreement art. 5.

[25] NATO SOFA art. XI; Supplementary Agreement art. 66.

[26] NATO SOFA art. IV; Supplementary Agreement arts. 9, 10 and 11.

[27] US-FRG Agreement on the Possession and Use of Privately Owned Firearms in the FRG, Oct. 1984. The NATO SOFA and the Supplementary Agreement do not provide the basis for the firearms registration privilege, which is provided by administrative agreement. Beneficiaries, however, are defined by reference to categories of personnel having "status" under the NATO SOFA.

[28] NATO SOFA art. X; Supplementary Agreement art. 68.

[29] Supplementary Agreement art. 67, para. 3. The program is run on a community basis by the local Morale Support Fund agency.

[30] Supplementary Agreement art. 71; Protocol of Signature regarding art. 71.

[31] Supplementary Agreement art. 72; Protocol of Signature regarding art. 72.

[32] Supplementary Agreement art. 73.

become "ordinarily resident" in the FRG and thereby disqualified from the benefits of civilian component or other privileged status.[33]

It is in the field of labor relations where the Germans have defended their rights most vehemently. The Supplementary Agreement has been amended only once since it became effective: in 1974, the labor area was amended to incorporate certain changes in German domestic law. Article 56 of the Supplementary Agreement, as amended, states that German labor law generally applies, with some exceptions because of the unique nature of the armed forces, to the employment relationship of civilian labor with the force.[34] It ensures that German civilian laborers working with a force will be engaged in services only of a non-combatant nature; it provides for collective bargaining procedures in certain areas; provides for works council representation; and clarifies a disputes procedure in which German jurisdiction applies and lawsuits against the force by an employee will be filed against the Federal Republic. The labor relations provisions are among the more difficult for the forces, particularly because German labor legislation, which changes frequently, generally applies through Article 56 to the employment relationship between local civilians and the forces, whereas members of the "civilian component" are governed in their employment relationship by each force's respective national legislation.

The stationing agreements also allow sending state forces to exercise criminal jurisdiction over their personnel. Under Article VII, NATO SOFA, each sending state's force and the FRG have exclusive jurisdiction with respect to criminal offenses that are punishable solely under their own laws. In most cases, however, both states have concurrent jurisdiction. In these cases, the primary right to exercise jurisdiction depends on the circumstances surrounding the offense. The Federal Republic has agreed in advance to waive this right, subject to recall in cases where "major interests of German administration of Justice" are involved.[35] Because of very close cooperation between the forces and the Justice ministries at the federal and state levels, however, the Germans rarely exercise their right to recall.

A further practical constraint on the Federal Republic is in the area of real estate. The market value of all the buildings and grounds placed at the disposal of the allied stationed forces is roughly 40 billion Deutsch Mark (DM). The annual rental value is 2 billion DM. Under the stationing agreements, the allies use these accommodations free of charge. The Federal Government places 131,866 dwelling units at the disposal of allied soldiers' families, 89,795 of them free of charge. The American forces alone use 67,200 dwelling units, 56,195 of them free of charge. Altogether, one of every hundred dwellings in the FRG is used by sending state personnel.[36] This tremendous German contribution to the NATO effort sometimes goes unnoticed by NATO governments when their defense programs are being planned; but the Supplementary Agreement negotiators did not fail to recognize the importance of this aspect of the German contribution and, indeed, from the fiscal standpoint, the articles dealing with accommodations are the most important. Noting the peculiarities of each sending state force's accommodations requirements and the financial burdens imposed thereby, however, the negotiators left large gaps to be filled by administrative agreements at later dates. Many of these gaps, such as procedures governing construction contracts, have been filled by bilateral or multilateral administrative agreements.[37] Other areas, such as who will pay for certain aspects of accommodation such as access roads or sewage connections, or how maintenance and repair within installations (for which the forces are responsible) is defined,[38] continue to create problems and are continually being negotiated.

Increasingly, federal and local authorities and environmental groups are accusing these mostly old installations of harming the environment. Article 53 of the Supplementary Agreement permits a force to take, within its accommodations, "all the measures necessary for the satisfactory fulfillment of its defense responsibilities."[39] In carrying out these measures, the forces inevitably produce noise, air, and water pollution. The Federal Republic throughout the 1970s and into the 1980s developed and implemented an environmental program which increasingly is coming into conflict with what the forces perceive to be their rights under Article 53. There are no provisions in the NATO SOFA or the Supplementary Agreement which deal specifically with environmental issues, although the Germans at times argue that they are aided in part by a segment that appears to mandate forces' application of German regulations in the field of "public safety and order" where FRG regulations are more stringent than forces' regulations.[40] Regardless of whether and to what extent the stationing agreements address the situation, the forces can expect pressure to increase in this area as German sensitivities to

[33] There are frequent feuds over the status of forces retirees, tourists, and other citizens of a sending state who happen to be in the Federal Republic for some reason and desire to be employed by the forces with the full benefits and privileges under the NATO SOFA and Supplementary Agreement. European Economic Community countries have special labor regulations which also apply to employment by their forces in Germany in addition to the stationing agreements. Much of this commentary is derived from personal observation.

[34] Supplementary Agreement art. 56; Protocol of Signature regarding art. 56; Agreement to Amend the Agreement of 3 August 1959 to Supplement the Agreement between Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany, Oct. 21, 1971, 24 U.S.T. 2355, T.I.A.S. No. 7759 (effective Jan. 18, 1974).

[35] NATO SOFA art. VII; Supplementary Agreement art. 19. Because of U.S. Supreme Court rulings denying overseas U.S. military courts jurisdiction over non-service members, the U.S. forces do not extend these treaty rights over civilian component personnel and dependents. *See e.g.*, Reid v. Covert, 354 U.S. 1 (1957).

[36] White Paper 1983, *supra* note 12, at 127; Supplementary Agreement arts. 48 and 63.

[37] Supplementary Agreement art. 49; Administrative Agreement ABG 1975 between the Federal Minister for Regional Planning, Building and Urban Development and the United States forces on the Supplementation of Construction Works, Oct. 8, 1982. The other sending states forces also have concluded bilateral ABG 75 construction agreements with the FRG.

[38] Supplementary Agreement arts. 48 and 63; Protocol of Signature regarding art. 48 and regarding art. 63.

[39] Supplementary Agreement regarding art. 53, para. 1; Protocol of Signature regarding art. 53.

[40] Supplementary Agreement regarding art. 53, para. 1; Protocol of Signature regarding art. 53.

environmental issues increase. The forces are not likely to give in easily, however, as modifications to meet new environmental standards are very expensive.

In spite of appearances, in many instances the sending states' forces do not enjoy extraterritorial rights within their accommodations. As a sovereign nation, the FRG is legally responsible for the security of persons and property within its geographical boundaries. This is nowhere clearer illustrated than in situations involving terrorist acts, demonstrations, or other instances where law enforcement interests of both the forces and the German authorities coverage. Consistent with general principles of international law, German authorities have a legitimate interest in and right to enforce the law and maintain security on forces' installations within the territory of the FRG. Although none of the stationing agreements specifically mentions terrorism, demonstrations, *etc.*, they do contain provisions concerning the exercise of police powers and the maintenance of security. By way of these international agreements, the FRG allows the sending states' forces to exercise certain kinds of authority on their installations.

There are several NATO SOFA and Supplementary Agreement provisions which could apply to the kinds of situations noted above. Article VII, paragraph 10 of the NATO SOFA provides:

> Regularly constituted military units or formations of a force shall have the *right* to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to insure the maintenance of order and security on such premises.[41]

This provision does not suggest that "premises," or installations, are considered territory of the sending states' force. Rather, forces' security on their premises is exercised because the treaty allows the sending states' forces to take such action. The stationing agreements do not *require* the forces to take action, but neither do they negate host nation authority to act.

The sending states' forces' military police also may act off post in certain instances "insofar as such employment is necessary to maintain discipline and order among the members of the force,"[42] so long as such action is coordinated with host nation authorities. The Supplementary Agreement elaborates further. For incidents occurring on the installation, the sending states' forces under Article 53 may (note that the language is permissive and not mandatory) take whatever measures are necessary for the fulfillment of their defense responsibilities; *may* under certain conditions apply their own regulations on public safety and order; but *must* in all cases ensure that German authorities are enabled to take such measures on-post as are necessary to safeguard German interests; and *must* cooperate with the German authorities to ensure smooth implementation of whatever measures are taken.[43] Off the installation, the forces' military police may take measures only with respect to military and civilian personnel of the sending states' forces; however, if the German police request military police assistance for incidents occurring off the installation involving forces personnel who are creating disorders or endangering public safety, the military police are *obligated* to assist.[44]

None of these provisions cited above substantially alters the basic rule that security of forces' installations is a host nation responsibility. What the agreements do is give the forces the *right* (not the responsibility) to do whatever is necessary to maintain order and security on the installation. The exercise of this right, however, is always subject to an obligation to cooperate with German authorities and allow them to take measures necessary to protect German interests. If the forces do not choose to exercise this right, the FRG remains exclusively responsible. Most of the sending states' forces have administrative agreements with German authorities at the local or state level that specify the instances which fall within these provisions and procedures for responding to them.[45]

The sending states' forces also enjoy substantial tax exemptions. Article 67 of the Supplementary Agreement exempts the forces from taxation with respect to property devoted to official activities. This applies to all kinds of taxes on real estate and services as well as procurement activities conducted by the forces.[46] While it may seem apparent what constitutes a tax, the forces on occasion have disputed certain charges added by the FRG which are termed "operating costs" or other charges from which the forces are not exempt, but which appear to the forces to be disguised tax levies.[47] Customs exemptions are another substantial benefit to the forces, which are able under the NATO SOFA and Supplementary Agreement to import and re-export free of duty any equipment for the force, and provisions, supplies and other goods for the exclusive use of the force or its individual members, civilian component and dependents. Furthermore, special customs clearance procedures are available to the forces' benefit.[48]

A final area of contention, and one that imposes great practical constraints on German officials and citizens alike, is field maneuvers and the resultant damage to property and "host-guest" relations at the grass-roots level. In no country in the West are more military exercises conducted in such a confined area as are conducted in the Federal Republic of Germany. Every year some 5,000 exercises lasting

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[41] NATO SOFA art. VII, para. 10 (emphasis added).

[42] *Id.*

[43] Supplementary Agreement art. 53; Protocol of Signature regarding art. 53.

[44] Supplementary Agreement art. 28.

[45] These "entry" agreements generally are not available to the public and will not be cited. Many are oral.

[46] Supplementary Agreement arts. 63 and 67.

[47] Supplementary Agreement art. 63; Protocol of Signature regarding art. 63. Since January 1, 1975, the forces have successfully resisted payment of a levy added by a FRG law to electricity bills. The FRG calls it an operating cost payable under Supplementary Agreement art. 63, while the forces argue that it is a disguised tax.

[48] NATO SOFA art. XI; Supplementary Agreement art. 65.

from three to four days and involving up to 2,000 troops are held. Eighty maneuvers involving more than 2,000 troops last longer than four days. In 1981 and 1982, maneuver damage amounted to roughly 240 million DM for each year.[49] Under the NATO SOFA, twenty-five percent of the maneuver damage caused by sending states' forces is paid for out of the FRG budget, even though one sending state alone may be responsible. The forces and their service members who cause the maneuver damage are immune from German court jurisdiction. An agency of the German government—the Defense Costs Office—pays all damage claims and is then reimbursed the proper proportion by the sending state concerned.[50]

Future Prospects for the Stationing Agreements

Each of the areas outline above, and others as well, offer constraints upon German authorities upon their free exercise of sovereign rights. In the interest of the security provided by NATO forces in the FRG, Germans have been willing to live with these constraints. There is some general indication that many Germans feel that particular constraints impose burdens which today are unnecessary. Grass-roots level objections to environmental pollution and maneuver damages increasingly reverberate at state and federal levels. At times, this prompts questions from Germans about the continued relevance of the stationing agreements, particularly the Supplementary Agreement. While the old occupation prejudices are not present *per se* in the Supplementary Agreement, it was negotiated at a time when the victorious Western Allies still had the upper hand and before the FRG had reached its present state of maturity as a sovereign state. Provisions of the treaties which favor the sending states or which are ambiguous but have been interpreted in the sending states' favor, irritate some FRG officials who would like to alter the situation. The sending states, however, have consistently shied away from suggestions of renegotiation or amendment of the stationing agreements. Recognizing this situation, the Germans have not pushed for renegotiation, but instead are interpreting treaty provisions very strictly in their favor where possible. It is likely that the general situation will continue unchanged for the near future. Against this background, the importance to the U.S. forces of maintaining secure contacts with its Federal German and sending states' forces counterparts becomes even more apparent.

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[49] White Paper 1983, *supra* note 12, at 128. Supplementary Agreement art. 45, governs the right of the forces to conduct maneuvers.

[50] NATO SOFA art. VIII; Supplementary Agreement art. 41; Protocol of Signature regarding art. 41.

Army Automatic Data Processing Acquisition Update

Captain Mark W. Reardon
Office of Chief Counsel, U.S. Army Communications-Electronics Command, Vint Hill Farms, VA

The manner in which Army activities acquire information resources, both from management approval and procurement law standpoints, has changed radically in the past year.[1] The management approval process[2] which was system specific has given way to a new and arguably more coherent philosophy which stresses functional approval of an integrated Information Management Plan.[3] The Competition in Contracting Act[4] has imposed new, more stringent requirements for automatic data processing (ADP) acquisitions and has provided a new forum for protesters. This statute, its implementing regulations, and the new Army management regulations provide new challenges and opportunities for Army attorneys in this field as they review information asset acquisitions or plan their own information systems.

Transition

The blurring of distinctions among word processing, computing, and communications technologies, coupled with increased dependence upon these resources, provides the factual backdrop for the Army's new management approach toward these technologies. In May 1984, the Army Chief of Staff announced the creation of the Information Management Area.[5] To lead this synthesis of resources, the positions of the Assistant Chief of Staff for Information Management (ACSIM) and the U.S. Army Information Systems Command (USAISC) were created.[6] Recognizing that the mission of information management and a new management philosophy totally different from the existing regime would require careful coordination and implementation, a transitional information management plan (TIMP) was promulgated to ensure the continuity of information services presently governed by a number of regulations while switching the entire Army over to the Information Mission Area Program (IMAP) system.[7]

The TIMP sets forth responsibilities during the changeover from the old fragmented management system and provides guidance for "acquisition, development, and use of information services and resources during the transition period."[8] Overall responsibility for supervision of the TIMP and publication of final versions of the implementing regulations resides with the ACSIM.[9] Each Army staff agency head is required to designate an information manager to ensure execution of the transition plan and to provide coordination with the transition team at ACSIM. Major Army commands (MACOMs) are charged with designating Deputy Chiefs of Staff for Information Management/Directors of Information Management (DCSIM/DOIM) to act as the command information "czars" with powers transcending those of the previous Director of Management Information Systems. The MACOMs had to submit their transitional plans to ACSIM by 1 August 1985. During this transition period, MACOMs have been delegated the authority to approve:

(1) Competitive purchase of ADP equipment which does not exceed $2.5 million per request.
(2) Competitive purchase of software which does not exceed $1.0 million per request.
(3) Competitive acquisition of ADP services, maintenance, and supplies.
(4) Noncompetitive purchase of equipment, software, services, maintenance, and supplies under $50,000.

The remaining authority resides with the Assistant Secretary of the Army (Financial Management), and the authority in (1)–(3) above may be redelegated.[10]

The Information Systems Command has additional responsibilities, including the drafting of a plan for initiating requirement-type contracts for equipment, software, and services.[11] This centralization of acquisition may present problems at the installation level, primarily by limiting the flexibility needed to meet local needs.

Annex A to the IMAP covers operations during the transition period. It stresses the desire to affect users minimally and to avoid duplicate approvals. The target date for the end of the transition period was 15 Nov. 1985. While AR

[1] For an overview of automatic data processing equipment acquisition, *see* Reardon, *Automatic Data Processing Equipment Acquisition*, The Army Lawyer, Aug. 1984, at 19.

[2] Dep't of Army, Reg. No. 18–1, Army Automation Management (15 Aug. 1980) [hereinafter cited as AR 18–1].

[3] Dep't of Army, Draft Reg. No. 25–1, The Information Mission Area Program (14 Dec. 1984) [hereinafter cited as AR 25–1]; Dep't of Army, Draft Reg. No. 25–5, Information Management for the Sustaining Base (Jan. 1985) [hereinafter cited as AR 25–5].

[4] Pub. L. No. 98–369, 98 Stat. 1175 (1984) (codified at 10 U.S.C. §§ 2301–2306, 31 U.S.C. §§ 3551–3556 40 U.S.C. § 749(h), 41 U.S.C. §§ 253, 254) [hereinafter cited as CICA].

[5] Message, HQDA, 25 May 1984, subject: Information Mission Area.

[6] *Id.*

[7] Information Mission Area Transition Plan, DAIM–PS, 11 Jan. 1985, Annex A [hereinafter cited as TIMP].

[8] TIMP at 1.

[9] TIMP at 1.

[10] Information Mission Area Letter of Instruction, DAIM–PS, 24 June 1985, at 2–2–4, para. A–2–5.

[11] TIMP.

25–5 will replace AR 18–1, AR 105–22,[12] and AR 340–8,[13] the associated standards, technical bulletins, and other related publications will remain for a time. Previously approved systems and funding will remain in effect to minimize duplication and adverse impact on systems in the pipeline.[14] If, during the transition period, changes to the Information Mission area are required by external authority, e.g. the General Services Administration (GSA), the ACSIM will be the central point of contact for such changes to guidance and Army implementation. Annex A of the IMAP also expressly recognizes what has been a fact for nearly a decade: that procedures and justifications previously required and based on high cost mainframes are no longer appropriate for microcomputer acquisition. Service and equipment requests will henceforth use a single abbreviated format while software, operation, and maintenance will receive greater attention as they make up a far greater portion of a system's life cycle cost. What has been commercial reality for ten years is now belatedly being set as a cornerstone of the new Army management philosophy.

Annex B of the IMAP covers integration of regulations and other publications into the IMAP and merely identifies those which should be reviewed immediately.[15] Annex C addresses architecture preparation instructions and is directed towards technical personnel.[16]

Annex D provides the format for the TIMP which is described as an abbreviated form of the future information management plans required under AR 25–5. Due to the enormity of the task to convert the entire Army to the IMAP process, the TIMP submitted by each MACOM and the input they receive from their major subordinate commands will not be a complete baseline of the Army ADP/information resources inventory. Instead, only selected categories of information requirements will be identified in the TIMP.[17] The effort is designed to bring about an orderly change without unduly disrupting users. Those requirements which fall within the categories which must be reported in the TIMP will be categorized by the appropriate MACOM. The categories are, in descending order of importance: externally mandated; mission critical; mission essential; and functionally desirable.[18] After review by the ASCIM, those requirements identified will be approved or disapproved and reasons for disapproval noted. The approval of specific initiatives will constitute the functional as well as acquisition approval authorities.[19]

In theory, therefore, the TIMP will start the transition from the old system-specific approval process to an integrated Army-wide information resources procedure. This will involve blanket approvals on an annual basis, avoiding over-justification, miro-management of information resources, and eliminating the artificial categorization of some equipment as word processors, others as microprocessors and yet others as communications devices.

The Information Mission Area Program

As stated by its authors, AR 25–1 is a new type of regulation; a capstone document that gives the general outline of the responsibilities and procedures which will govern the management of information support and resources in the Army. The Information Mission Area Program (IMAP) is a synthesis of separately managed resources. Applications, communications, data (of whatever media), equipment and presentation all support decision-makers. The goal is, of course, to supply these decision makers with the best information possible. The Information Mission Area is not just hardware, software, machines, and raw knowledge; it includes personnel resources as well.

The information mission area has been divided into three functional parts: those resources applied to the information needs of the strategic area, the theater/tactical area, and the sustaining base area.[20] Each has similar components: automation, communication, audiovisual, records management, *etc.* In short, the medium is not the message. Information, regardless of form, must be integrated fully into the Army's command. It must be recognized as an asset just like more tangible items such as trucks and people. As is the case with other assets, the subdivisions of information are aligned under the IMAP in those areas in which the information is created and used.[21]

Strategic area information can be described as the types of information produced and shared among MACOM level organizations and above and equipment to serve these purposes acquired in accordance with Department of Defense and joint service regulations. Theater/tactical area information is that which is processed between the foxhole and command headquarters.[22] Equipment and software used to process such information will normally be developed in accordance with Army Regulation 70–1[23] or Army Regulation 1000–1.[24] A notable exception, which is a carryover from AR 18–1, is that non-developmental items used to process strategic and theater/tactical information

[12] Dep't of Army, Reg. No. 105–22, Telecommunications Requirements Planning, Developing and Processing (1 July 1978) [hereinafter cited as AR 105–22].

[13] Dep't of Army, Reg. No. 340–8, Army Word Processing Program (1 Feb. 1980) [hereinafter cited as AR 340–8].

[14] TIMP, at Annex A, para 1.

[15] TIMP, at Annex B.

[16] TIMP, at Annex C.

[17] TIMP, at Annex D, para. C.

[18] TIMP, at Annex D, para. 3b(s).

[19] TIMP, at Annex D, para. 5(d).

[20] AR 25-1, para. 1*c*.

[21] *Id.* at para. 2*d*.

[22] *Id.* at para. 2*d*(1).

[23] Dep't of Army, Reg. No. 70–1, Systems Acquisition Policy and Procedure (1 Feb. 1984).

[24] Dep't of Army, Reg. No. 1000–1, Basic Policies for Systems Automation (1 May 1983).

will be acquired in accordance with AR 25-5.[25] The final category is the sustaining base area which, for purposes of this discussion, is the most important. Sustaining base information is usual business-type information, *i.e.*, personnel, budget, and management. As would be expected, most of the resources used to collect, preserve, and manipulate this information is commercially available, general purpose equipment, software, services, and communications devices. The regulation expressly admits that there will be overlap among these information areas, yet it does not adequately provide an expeditious dispute resolution mechanism in view of this "built-in" coordination problem.[26]

Operationally, there appear to be potential areas of severe conflict. The ACSIM is charged to encourage decentralized program execution in order to provide commanders with the flexibility to improve local conditions. The Information Systems Command, however, has been tasked to develop plans for Army-wide requirements contracts for information resources. These contractual vehicles will no doubt follow the pattern of current Army-wide mandatory contracts, which, while avoiding the pitfalls of GSA schedule contracts, do not offer the wide range of products which the marketplace offers. If deviations from the use of such contracts are granted by the same mechanism that exists today, decentralized execution will amount to local funding and local contracting officers acting as ordering officers.[27]

True flexibility would be eliminated as standard equipment and software packages would be the rule and not the exception. While such a goal may be welcomed by some, the continued support of extant systems may be more difficult. Another area of potential conflict which has not improved over the AR 18-1 era concerns the interplay of the Assistant Secretary of the Army (Financial Management) and the Assistant Secretary of the Army (Research, Development & Acquisition). Both are senior information management officials; the former for the sustaining base and the latter for theater/tactical and strategic resources. Both have interpretative roles concerning guidance from higher authority and statutes. Both possess the approval authority for sole source acquisitions and both can permit leasing as a method of acquisition. As both have vested interests in exercising authority over the "overlap" areas between sustaining base and theater/tactical or strategic, conflicts which can only cost time are inevitable. As nondevelopmental items (products that are commercially available) are encouraged as alternatives to custom designed equipment, the number of potential "turf fights" are not decreased.

For the installation contract attorney, the provisions of AR 25-5 will be the most important. In the execution of the information mission area, this regulation will supersede AR 18-1, AR 105-22, AR 108-2,[28] and AR 340-8. It removes the regulatory fences which had previously separated these related resources and provides a uniform method of managing the acquisition approval for these items. AR 25-5 will govern the areas of audiovisual activities, automation, office automation, printing, technical libraries, records management, and other information assets.[29] To adequately manage these diverse yet interdependent resources, each agency, MACOM, and installation will have a single information manager. This overall information "czar" will be the organization's main focal point for the IMAP and the TIMP.

Rather than using the AR 18-1 system-specific approval process, each installation will submit an annual information management plan. This plan will provide the installation and each succeeding level of command a means by which information requirements can be identified and approved. A secondary use of the information management plan will be to submit funding requests to the Planning, Programming, Budgeting and Execution System.[30]

Another notable difference from the AR 18-1 system is the documentation required for the information management plan. Under the old system, a Mission Element Needs System (MENS) was the basis for management approval of the user's requirement.[31] That requirement was constantly refined and updated through the submission of system decision papers and economic analyses. All this documentation was generated by the user and did not necessarily include expert automation personnel in the drafting and requirements definition stage. Under AR 25-5, an information systems planning study is mandatory.[32] This formal study will address the management process and information classes required for planning, controlling, and operating an organization to meet its missions and goals.[33] As most users will not have the technical expertise to draft such a plan, information resource experts, either in-house or contractor, will provide a degree of expertise not necessarily present in the MENS process. In view of the review and refinement chain set up by AR 25-5, the information systems planning study provides a tool to weed out ill-conceived or poorly coordinated requirements which were initiated, funded, and pushed by the requiring activity with limited or no objective analysis. The information systems planning study also forces the requiring activity to look at the way it does business as opposed to trying the fit automation into "business as we've always done it" strictures.

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[25] AR 25-1, para. 2*d*(2).

[26] AR 25-1, Figure 2.

[27] Under one current program, the so-called Army micro buy, deviations must be approved by the Assistant Secretary of the Army (Financial Management) (Ltr, DA ACSIM (DAIM-2B), 25 Mar. 1985, subject: Policy on Acquisition and Use of Microcomputers in DA Activities).

[28] Dep't of Army, Reg. No. 108-2, Army Training and Audio Visual Support (26 July 1976).

[29] AR 25-5, para. 1-1.

[30] AR 25-5, para. 1-4*h*.

[31] AR 18-1, para. 1-6*e*.

[32] AR 25-5, para. 1-4*f*.

[33] AR 25-5, para. 3-3*a*.

A holdover from AR 18–1 and similar systems specific regulations is the concept of life cycle management.[34] The development through maturity and replacement of the system principles remain viable and, through the annual information management plan submissions, particular systems can be tracked from initial acquisition through retirement and potential reuse. This may prove to be quite an effective management tool and simplify Army reutilization efforts.

Under AR 25–5 the USAISC is charged with acquiring standard items of information technology and establishing requirement types contracts for use by Army organizations.[35] Early efforts to solicit for such standard items may be hampered by the lack of an accurate baseline of information resources.

The IMAP accomplishes the management function for sustaining base assets through the use of various tools. As discussed previously, the formal information studies requirement will benefit this mission area by the injection of independent, disciplined analyses of information requirements. The unified requirements approval process has the potential to streamline the management foundation of systems acquisition on an annual Army-wide basis. Through the central management of information resources, the identification of a steady rate of capital investment to upgrade/replace existing capability should provide additional control over system replacement planning and acquisition planning.[36] Acquisition is also enhanced to an extent as the USAISC will not only review the IMAP but also the acquisition approvals and authorizations required from DA, DOD, or the GSA. While possessing the advantage of standardization, the USAISC's second responsibility of establishing requirements contracts for equipment, software, firmware, and services will suffer from the inherent inflexibility such vehicles present to a wide variety of users with differing levels of sophistication and missions.

Chapter 3 of AR 25–5 covers the information architecture. The purpose of the architecture is to ensure the integration of information flow among the three mission areas and to help avoid duplicative systems. The Army information architecture is employed as yet another tool to provide a framework for this mission area. The Army architecture is the synthesis of an information model, a baseline configuration, and an objective configuration. The information study required for new information initiatives will provide the basis for the information model.[37] Each descending element will use the information model of its next higher level as a baseline for its information model. As each level provides a structure for its subordinate, no subordinate will be outside the overall information model.

The second element of the information architecture, the baseline configuration, is the current inventory of information resources.[38] This current inventory not only provides the foundation from which new requirements are identified but also satisfies regulatory requirements.[39] The third element is the objective configuration which consists of the resources needed to provide optimum capability.[40] This configuration may never be achieved as it is a target that will be modified continually as missions and technology changes.

The information management plan is the document that describes what each activity, installation, major subordinate command and MACOM possesses in the way of information resources (baseline configuration) and how, using the tools described earlier, each element will move towards the goal of effective, standardized information management (optimum configuration). The information management plan is the basic document that brings together the resources on hand, the systems needed in the future, the approvals and funding required and the integration of the information resources.[41] This plan will also be used for the development of the Planning, Programming, Budgeting and Execution System, but it will not program resources.[42]

The information management plan cycle is as follows. By 1 January each year Army information management guidance will be published. This guidance will be reflected in the MACOM plans submitted to the ACSIM by each 1 July. After review, the approved plan will be released by 15 November.[43] At the installation level, the plan will contain those initiatives which have been approved and funded. During a solicitation review it will be easy to check for acquisition approval and identify in one document those acquisitions which can be expected during the year. Although out-of-cycle requests will still occur, the information management plan will give the installation procurement and legal offices a consolidated listing of planned acquisitions rather than piecemeal AR 18–1 approvals.

The final chapter of AR 25–5 covers information management at MACOMs and installations.[44] This chapter sets the responsibilities of the DCSIM/DOIM. These officials, one at the MACOM level and one at the installation level, are the staff officers responsible for determining the best means of satisfying information needs, regardless of the technology required.[45] Other than executing the externally mandated information initiatives, the DOIM will assist the

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[34] AR 25–5, para. 1–4*n*.

[35] AR 25–5, para. 1–5*n*(1).

[36] AR 25–5, para. 2–2*g*.

[37] AR 25–5, para. 3–3*a*.

[38] AR 25–5, para. 3–3*b*.

[39] Federal Information Resource Management Regulation, 41 CFR Part 201–33 [hereinafter cited as FIRMR].

[40] AR 25–5, para. 3–3*c*.

[41] AR 25–5, appendix C.

[42] AR 25–5, para. 5–2*a*.

[43] AR 25–5, para. 4–4.

[44] AR 25–5, para. 6–1.

[45] AR 25–5, para. 6–3*b*.

functional users of information in their development of requirements and the use of existing capability. The information resource request replaces the MENS as the formal identification of user information needs. After submission of the information resource request, the DOIM will determine if the need can be satisfied by installation assets or planned initiatives. If the required resource is not available, the project becomes subject to the next information management plan submission provided the project is consistent with the IMAP.[46]

In sum, AR 25-1 and AR 25-5 will bring an interdisciplinary approach to Army information management that better reflects the manner in which information is used to support missions.

The Federal Information Resources Management Regulation

Army Regulation 25-5 provides for the functional and acquisition approval of information systems. Once the installation information management plan has been approved, however, there are still other regulatory hurdles. Federal Acquisition Regulation (FAR), Part 39 was to contain acquisition guidance relating to information assets, but it was never promulgated. To fill that void, GSA combined and streamlined the Federal Procurement Regulation and Federal Property Management Regulation sections on information assets and created the Federal Information Resources Management Regulation (FIRMR).[47] The FIRMR includes in its coverage procurement procedures mandated by the Brooks Bill[48] and the Competition in Contracting Act. The FIRMR is supplemented by temporary regulations and bulletins. The FIRMR, Defense FAR Supplement (DFARS) Part 70 and Army FAR Supplement (AFARS) Part 70 constitute the procurement regulations which govern ADP acquisition. The requirement for a delegation of procurement authority from GSA remains, although the thresholds have been raised. Agencies may acquire ADP equipment without a specific delegation of procurement authority whenever the acquisition is made under the terms of GSA requirements or schedule contracts or if the value of the competitive acquisition (including evaluated optional features) does not exceed $2.5 million purchase price or an annual lease cost (including maintenance) that does not exceed $1,000,000. In the case of less than full competition, the thresholds drop to $250,000 and $100,000, respectively.[49] The delegation of procurement authority DPA thresholds for software and maintenance are $1,000,000 for competitive acquisitions and $100,000 for sole source acquisitions.[50]

Due to the frequent changes in acquisition laws and regulations it is important to remember that should there be conflict among the AFARS, DFARS and a delegation of procurement authority, the latter provisions take precedent.[51]

CICA—Its Impact

The Competition In Contracting Act of 1984 (CICA) has significantly modified acquisition practices in the federal government, but no specific area has been as affected as ADP resources acquisitions.[52] This discussion will be limited to the first months of CICA as it applies to ADP protests.

The traditional forum for ADP protests has been the General Accounting Office (GAO). CICA provided a specific statutory basis for the Comptroller General's protest responsibilities and expanded the traditional powers. This change has been welcomed by some.[53] The Reagan Administration initially questioned the constitutionality of the provisions which concerned stays of contract award and payment of successful protester's attorney's fees. On 17 October 1984, the Department of Justice concluded that these provisions violated the separation of powers and the Office of Management and Budget (OMB) advised executive agencies to ignore those provisions.[54] This prompted a scathing response by the House Committee on Government Operations.[55] These issues have been at least temporarily resolved as a result of *Ameron Inc. v. U.S. Army Corps of Engineers*,[56] where the district court held that the disputed CICA provisions were constitutional and ordered that its provisions be followed. On 4 June 1985, the OMB rescinded its order; all federal agencies now should be complying with the disputed provisions.[57]

As recent decisions demonstrate, the GAO has taken the CICA provisions to heart. In *Storage Technology Corp.*,[58] the GAO dismissed a protest contesting the propriety of the Air Force's issuance of a purchase order. The basis of the protest was that the order issued was for equipment which was more expensive than the protester's items. The protester failed to provide the contracting officer with a copy of the protest within one day of its filing with GAO as required.

[46] AR 25-5, para. 6-4c.

[47] FIRMR, subpart 201-1.101-1(b)2(c).

[48] 40 U.S.C. § 759 (1982).

[49] FIRMR, Temp. Reg. 6, § 201-23.104-1 (Dec. 21, 1984).

[50] FIRMR, Temp. Reg. 6, § 201-23.104-2 (Dec. 21, 1984).

[51] DOD FAR Supplement 70.323 (48 CFR Part 270).

[52] For an overview of the CICA, *see* Cornelius & Ackley, *The Competition in Contracting Act of 1984*, The Army Lawyer, Jan. 1985, at 31.

[53] Butterfield, *New Rules Put Teeth in GAO Protests*, Federal Computer Market Report, Oct. 28, 1985, at 1; *see also* Miller, *The Protest Scene*, Federal Computer Market Report, Oct. 11, 1985, at 1.

[54] *Competition in Contracting Act's Delegation of Bid Protest Authority to Comptroller General Found Constitutional*, Gov't Contractor, June 24, 1985, at para. 181 [hereinafter cited as *Delegation of Bid Protest Authority*].

[55] *Seventh Report by the Committee on Government Operations: The President's Suspension of the CICA is Unconstitutional*, H.R. Rep. No. 138, 99th Cong., 1st Sess., *reprinted in* 749 Gov't Contr. Rep. (CCH), 14 June 1985, para. 2.

[56] No. 85-1064 (D.C.N.J. May 28, 1985).

[57] *Delegation of Bid Protest Authority, supra* note 54.

[58] B-213148-2 (11 Mar. 1985), 85-1 CPD para. 300.

Citing the requirements of CICA, the GAO steadfastly refused to entertain the protest. The Comptroller General stated, "Any delay in furnishing a copy of the protest . . . delays all subsequent protest proceedings and frustrates our efforts to provide effective and timely consideration of all objections to agency procurement actions." The clear message was that delays by any party to these protests would not be tolerated and extensions would be "sparingly granted."[59]

The disputed provision concerning the recovery of attorneys' fees has also been addressed.[60] The Department of Agriculture solicited for an accounting, budgeting, and financial management computer system. It erroneously awarded the contract to Peat, Marwick, Mitchell and Company, thereby unreasonably excluding the protester who would have received the award. The protest was filed more than ten days after contract award so there was no suspension of contract performance. By the time the protest was addressed by the GAO, performance was twenty-eight percent complete. In view of the substantial effort exercised, the GAO did not recommend termination. Pursuant to CICA and GAO implementing regulations, however,[61] the protester was allowed to recover its filing costs, the amount spent on pursuing the protest, attorneys' fees, and proposal preparation costs.

The goal of full and open competition set out in CICA has been directly addressed by the GAO. In *Systems, Terminals & Communications Corp.*,[62] the GAO held that the requirement for competition demanded that an Air Force solicitation be awarded on other than a single, aggregate award basis. The solicitation was for a variety of ADP peripheral equipment including visual display units, modems, and printers. STC protested that it would be precluded from bidding because it could only supply some of the items. That protest was sustained based upon the adverse effect upon competition caused by the basis of award.

GAO has not been loath to recommend termination of information resource contracts since CICA. In American Management System, Inc.,[63] the Department of Health and Human Services (HHS) placed an order under a GSA schedule contract with Cullinet. American Management Services alleged that the order diverted from the terms of the schedule contract and as such was improper. The GAO ordered that a competitive procurement be conducted. HHS argued that any disruption could cause a delay of up to a year and increased costs amounting to $6.9 million. GAO countered that as HHS had completed its requirements analysis prior to the improper order, there was "no apparent reason why HHS could not develop a procurement schedule that would allow completion of a competitive procurement without compromising its delivery requirements." In *System Development Corp.*,[64] a Defense Supply Service—Washington contract for the purchase and maintenance of word processing equipment was terminated. One specification required that some proposed equipment be TEMPEST certified. The award was made to Sperry for equipment that had not been certified by the National Communications Security Subcommittee on Compromising Emanations at the time of proposal submission. In view of this waiver of a material requirement, the GAO recommended terminating the Sperry contract and awarding of the remainder of the contract to SDC.

The level of urgency required to justify less than full and open competition in ADP acquisition is aptly demonstrated in the protest of *Information Systems & Networks Corp.*,[65] where the Department of State awarded a sole source contract to complete the development of an automated security system known as the Marine Security Guard Integrated Security System (MSGISS). The protester had performed initial development of the system under a separate contract. The successor contractor had hired away the original engineering team from ISN. The State Department determined that, due to the threat of terrorism to U.S. missions abroad, its needs were of such an unusual and compelling urgency that the completion of the system could not be delayed. The MSGISS system had been approved by Congress and special statutory action had been taken to enable the State Department to act rapidly. The GAO stated that with regard to items critical to human safety, the agency could narrowly define its needs to allow for the highest possible reliability and effectiveness and that, based on the actions of the executive branch and Congress in passing the 1984 Act to Combat International Terrorism, the State Department had no reasonable alternative to its course of action.

It is clear from the foregoing that a GAO protest is not trivial and that real, effective relief is available for disappointed bidders.[66]

The GSBCA

Perhaps the most significant change CICA has imposed upon information resource acquisitions is the authority granted to the General Services Board of Contract Appeals (GSBCA) to hear ADP protests.[67] This new forum has already received favorable attention in the industry press[68] and no doubt will continue to overshadow the accomplishments of the GAO. While the GSBCA's jurisdiction in

[59] *Id.*

[60] Computer Data Systems, Inc., B-118266 (31 May 1985), 85-1 CPD para. 624. *See also* The Analytic Sciences Corp., B-218074 (23 Apr. 1985), 85-1 CPD para. 464.

[61] 4 CFR 21.6(d)(c) (1985).

[62] B-218770 (21 May 1985), 85-1 CPD para. 578.

[63] B-216998 (1 July 1985), 85-2 CPD para. 3.

[64] B-219400 (30 Sept. 1985), 85-2 CPD para. 356.

[65] B-218642 (3 July 1985), 85-2 CPD para. 25.

[66] For an understanding of GAO's reaction to CICA, *see* Efros & Japikese, *Sequel to CICA—The GAO Perspective*, Pub. Cont. Newsletter—Sec. of Pub. Cont. L., Summer 1985, at 1.

[67] 40 U.S.C. § 749(h).

[68] Feidelman & Friedman, *GSA Board Receives New Bid Protest Jurisdiction*, Legal Times, 10 June 1985, at 18; *See also* Jones & Galloway, *Lanier: Litigating GSBCA's First ADP Protest Decision*, 43 Fed. Cont. Rep. 764 (1985).

these protests is less than a year old, important decisions have been issued which require careful attention and study.

The first case to go to the merits, *Lanier Business Products*,[69] gave clear and unequivocal guidance concerning the board's view of its statutory mandate. The protester alleged that the awardee had not met the mandatory requirements of the solicitation and that the Air Force conducted impermissible discussions and did not apply the evaluation criteria. The protest was denied. The first matter discussed concerned the standards of review. The board stated that the presumption of agency correctness, sometimes applied by the GAO, could not be permitted. Rather, the standard of review required by CICA was de novo, the same standard applied to a contracting officer's final decision in a dispute. The standard of proof adopted by the board was the preponderance of the relevant evidence. The board determined that if a challenged agency action violated a statute, regulation, or the provisions of any DPA, the board could suspend, revoke, or revise the procurement authority applicable to the challenged protest. In determining whether the burden has been met, the board will be "guided" by other judicial opinions and decisions of the GAO.

In *NCR, COMTEN, Inc.*,[70] the extent of a suspension of a DPA pending a decision on the merits provided another example of the board's interpretation of CICA. The protester alleged that a solicitation for communications processes was unduly restrictive. The board suspended the procurement, reciting the requirement that the government prove urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board in order to avoid suspension. The protester asserted that the board had no discretion, and that a suspension had to be complete. The board rejected this interpretation. The board reasoned that as its powers were coextensive with that of the General Services Administrator in ADP acquisition, to accept that it has no discretion in matters of suspension would be tantamount to placing a restriction upon the Administrator. As the Brooks Act vested such broad authority in the GSA, that authority included the reach and scope of any suspension of a DPA.

As stated in the above cases, the GSBCA's jurisdiction is derived from both CICA and the Brooks Act. Its application of the Brooks Act has been challenged. In *SMC Information Systems*,[71] Planning Research Corporation (PRC), the intervenor awardee, moved to dismiss the protest on the ground that the board had no jurisdiction. The contract in question was for ADP support services which included systems analysis, design and programming. GSA intervened opposing the motion. PRC argued that the plain language of the Brooks Act limited the GSA's authority, and therefore any derivative authority, to ADP equipment. The board rejected this attempt to limit its jurisdiction, citing the Act's twenty year legislative history. While the board's decision could be anticipated, it is interesting to note that it derided PRC for citing a seven-year-old GAO decision, "which in ADP terms is an eternity." It would seem that, unlike a GAO decision, a legislative history (which in ADP terms would be a triple eternity) grows more powerful with age.

The GSBCA has addressed an attempt by the Navy to avoid its jurisdiction. In *Julie Research Laboratories, Inc.*,[72] the Navy was purchasing microcomputer/instrument controllers by brand name. The Navy moved to dismiss, maintaining that the devices were not commercially available and the items were not subject to the Brooks Act because they were integral parts of a weapon system and as such exempt under the Warner Amendment.[73] The board noted in passing that the Warner Amendment was not the broad grant of authority which characterized the Brooks Act. Further, the GSBCA found that the items were commercially available and that special design features did not change the general purpose ADP nature of the equipment. The board also determined that the equipment was not an integral part of a weapon system, nor was it critical to the direct support of the maintenance of the weapons system. In analyzing what "direct support" meant, the board stated "there is a limit to the length of the daisy chain." While the protest was later dismissed on other jurisdictional grounds,[74] this case highlights the need for a clear definition of Warner Amendment application.

In claiming jurisdiction, the board has employed the spirit if not the plain language of CICA. In *North American Automated Systems Co.*,[75] the protester's president delivered a protest to the GAO. After learning that GAO might not be able to provide the relief requested, NAAS retrieved the protest and filed it with the GSBCA. The board denied the respondent's motion to dismiss, stating that more than mere filing was required for the CICA "forum shopping" provision to be applied. The board reasoned that the protester's election of forum was not clear and unwaivering. Further, the government could not show prejudice.

The board's jurisdiction also survives the cancellation of the protested agency action. In *North American Automated Systems Co.*,[76] the Navy cancelled a brand name only solicitation, admitting in its motion to dismiss that the brand name only specification did not state its actual needs. The same motion requested that the protest be dismissed as moot and that the protestor be denied recovery of any costs. The board held that the agency violated the FIRMR by specifying a brand name only, permitted the recovery of attorneys fees, and ordered the government to advise the protester when the government resolicited.

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[69] GSBCA No. 7702–P, 85–2 B.C.A. (CCH) para. 18,033 (Apr. 2, 1985), *reconsideration denied*, 85–2 B.C.A. (CCH) 18,101 (Apr. 25, 1985).

[70] GSBCA No. 7698–P, 85–1 B.C.A. (CCH) para. 17,903 (Feb. 7, 1985).

[71] GSBCA No. 8071–P, 85–3 B.C.A. (CCH) para. 18,296 (July 26, 1985).

[72] GSBCA No. 8070–P, 85–3 B.C.A. (CCH) para. 18,295 (Aug. 5, 1985).

[73] 10 U.S.C. § 2315(a) (1985).

[74] GSBCA No. 8070–P, 85–3 B.C.A. (CCH) para. 18,375 (Aug. 22, 1985).

[75] GSBCA No. 7864–P, 85–2 B.C.A. (CCH) para. 18,055 (Apr. 10, 1985).

[76] GSBCA No. 7976–P, 85–3 B.C.A. (CCH) para. 18,281 (July 11, 1985). *See also* Systems Designers International, GSBCA No. 8089–P, 85–3 B.C.A. (CCH) para. 18,298 (Aug. 6, 1985).

One of the major complaints concerning GAO protests was the lack of discovery. The GSBCA has devoted much time and effort to the discovery process. The importance of restrictive markings on proposals and protective orders has been stressed. In the protest of *Amdahl,*[77] the protester challenged a purported transfer under the Economy Act.[78] The intervenor and protester were compelled to comply with discovery requests having failed to show that protective orders would be insufficient.

In *Presearch, Inc.,*[79] the respondent, Defense Supply Service—Washington and the intervenor, International Technology Corp. moved for protective orders for unit price engineering modifications and systems configuration. The intervenor failed to offer proof that its ability to compete would be impeded by discovery nor was its proposal marked with the legends required under FAR § 52.215–12 "Restriction or Disclosure and Use of Data." The board denied the intervenor's protective order due to the previously stated deficiencies and the open nature of the civil proceedings. Similarly, in *Tidewater Consultants,*[80] the government was required to disclose its unsanitized "Rule 4 file" which did not comply with DOD Directive 5400.7. That directive requires that documents transmitted to officials in other departments and agencies of the executive and judicial branches to fulfill government functions be marked "For Official Use Only" if they contain unclassified information otherwise exempt from disclosure. The board's message is clear: full discovery will occur and the protection of information begins when a proposal is prepared. Thus far the GSBCA has provided meaningful remedies. In *Amdahl,*[81] the board declared the attempted transfer under the Economy Act void *ab initio* and awarded attorney's fees and protest costs. In *Federal Data Corporation,*[82] the protest was settled but the stipulation of dismissal required the government to debrief the protester, its goal in the protest. In two protests by *International Systems Marketing, Inc.,*[83] the remedies fashioned by the board included the costs of filing and pursuing the protests and ordering the termination for both contracts.

Conclusion

The Army's transition to the new information management scheme will present some difficulties; however, the benefits far outweigh the deficiencies. The new regulations can help avoid protests by emphasizing the requirements definition stage, thereby eliminating unduly restrictive specifications early in the acquisition cycle. An added benefit is that the planning documents required by the regulations will provide those faced with GAO and GSBCA protests with information which may prove critical in the litigation. Improvements are always possible and the inclusion in these regulations of clear guidance regarding the Warner Amendment and its application during the planning stages of an acquisition would not only reduce internal management disputes but could also lay a firm, documented foundation for subsequent procurement decisions. Both the GAO and GSBCA provide protesters with effective relief. The proper information resource acquisition management planning will reduce the chances of successful, expensive protests, and provide the Army with the resources it needs to meet its mission.

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[77] GSBCA No. 7859–P, 85–2 B.C.A. (CCH) para. 18,054 (Apr. 11, 1985).

[78] 31 U.S.C. § 1535 (1982).

[79] GSBCA No. 8075–P, 85–3 B.C.A. (CCH) para. 18,297 (Aug. 2, 1985).

[80] GSBCA No. 8069–P, 85–3 B.C.A. (CCH) para. 18,294 (July 26, 1985).

[81] GSBCA No. 7859–P–R, 85–3 B.C.A. (CCH) para. 18,221 (27 June 1985); GSBCA No. 7965 (7859–P–R), 85–3 B.C.A. (CCH) para. 18,283 (12 July 1985).

[82] GSBCA No. 7928–P, 85–2 B.C.A. (CCH) para. 18,122 (21 May 1985); 85–3 B.C.A. (CCH) para. 18,180 (June 6, 1985).

[83] GSBCA No. 7860–P, 85–2 B.C.A. (CCH) para. 18,102 (Apr. 5, 1985); GSBCA No. 7948–P, 85–3 B.C.A. (CCH) para. 18,196 (June 19, 1985).

Military Justice Automation*

Major John R. Perrin
Chief, Information Management Office, USALSA

On 12 November 1982, The Judge Advocate General directed the Commander, U.S. Army Legal Services Agency (USALSA) to appoint an automation management officer and to initiate a comprehensive automation project.[1] Subsequently, the Commander appointed an information management officer (IMO) and the original automation element was transferred to the Office of The Judge Advocate General (OTJAG). The USALSA automation mission was refined to include three components:[2]

1. Automation of USALSA divisions and offices;
2. Automation of Army-wide military justice activities; and
3. Development of procedures for acquiring automated legal research.

This article concerns military justice automation.

Substantive Law

An initial Army Judge Advocate General's (JAG) Corps automation objective was to demonstrate the value of automation to our legal offices. To meet this recognized requirement, USALSA developed the following strategy for military justice:

1. Encourage the use of automated legal research and the development of military justice databases in both WESTLAW and LEXIS/NEXIS: Early success in this area demonstrated the usefulness of this aspect of automation to the JAG Corps[3] This strategy permitted judge advocates to use automated legal research (ALR) technology on databases containing military authorities.[4]

2. Reduce the cost of ALR services: Recognizing that the cost of ALR services was too great for individual JAG Corps offices, and that central funding was unlikely, USALSA developed a cost-sharing plan in 1983 for all participating JAG offices. The resultant savings of $3500 per year and reduction in hourly search rates made it possible for most offices to acquire ALR.

Today, this billing arrangement has expanded to include any activity in the Department of Defense (DOD) using WESTLAW or LEXIS/NEXIS, to include public affairs offices, libraries, and legal offices.[5] Over 115 libraries and offices have subscribed to an ALR service through this arrangement, to include 29 JAG Corps offices. It is anticipated that the DOD billing arrangement will soon reach the lowest rate for these services under the Library of Congress contracts and negotiations will be necessary to obtain greater savings.[6]

A primary focus at USALSA has been to expand the military justice portions of the WESTLAW and LEXIS databases. In 1984, a USALSA study group developed a list of research materials required in the database, including *The Army Lawyer* and the *Military Law Review.*[7] The *Military Law Review* was added to the LEXIS database in September 1985. USALSA is exploring the addition of a legislative history of the Uniform Code of Military Justice and unpublished Army Court of Military Review decisions to this list.

Opportunities for further improvement exist. Communications enhancements will provide a means to access ALR from overseas locations.[8]

A number of Army projects will also provide increased ALR opportunities in the military justice area. Defense and Government Appellate Divisions (DAD and GAD) are each planning automated "brief banks." Trial Judiciary (TJ) is considering on-line information for trial judges. The Trial Counsel Assistance Program (TCAP) has developed

* Second in a series. The series began in the January 1986 issue of *The Army Lawyer.*

[1] Memorandum, HQDA (DAJA-ZA), 12 Nov 82, subject: Automation Management Officer. All documents cited in this article are available by writing USALSA (JALS-IM), 5611 Columbia Pike, Falls Church, VA 22041-5013.

[2] The Judge Advocate General's Functional System Plan, 1 June 1983; Memorandum, HQDA (JALS-IM), 3 Jan 84, subject: USALSA's Mission Element Need Statement Approval; Memorandum, HQDA (DAIM-PS), 28 Mar 85, subject: Information Management Master Planning Guidance; JAG Corps Information Management Plan, 15 Aug 1985.

[3] WESTLAW and LEXIS/NEXIS are computer-assisted research services operated by West Publishing Company, St. Paul, MN, and Mead Data Central, Inc., Dayton, OH, respectively. WESTLAW contains a database called National Defense. LEXIS contains a file called the Military Justice Library. Both services contain useful information on military justice and are rapidly expanding. No other vendor offers a complete on-line ALR service on military justice. The U.S. Court of Military Appeals and the Army JAG Corps were the leaders in encouraging the development of these databases.

[4] For information on WESTLAW, contact West Publishing Company, 1911 N. Fort Myer Dr., Arlington VA 22209. For information on LEXIS/NEXIS databases, contact Mead Data Central, 1050 Connecticut Ave., N.W., Washington, D.C. 20036.

[5] Memorandum, USALSA (JALS-IM), 7 Oct 85, subject: Automated Legal Research Services. The author recommends that larger JAG Corps offices subscribe to both services because research requirements may be better satisfied.

[6] Library of Contract contracts for ALR are administered by the Federal Library Information Center Committee (FLICC) under the Federal Library and Information Network (FEDLINK), Library of Congress, Washington, D.C. 20540.

[7] Memorandum, USALSA (JALS-IR), 15 Jun 84, subject: Military Law Database for Automated Legal Research. TJAGSA is reviewing vendor requests to supply publications for the databases.

[8] Overseas legal offices must initiate action through the command information management officer (IMO) to obtain a communication circuit for ALR. The services are available on public data networks (through many host nation telephone systems or by a DOD communication circuit from the host nation to the continental United States). JAG Corps communication plans, when developed, will address this need. For information on the JAG Corps-wide communication requirements, contact Lieutenant Colonel Daniel L. Rothlisberger, Chief, IMO, HQDA (DAJA-IM), Pentagon, Washington, D.C. 20310-2216.

an on-line database for rapid retrieval of case notes and other materials on military law. The Judge Advocate General's School (TJAGSA) is considering means to collect, store, and retrieve this type of substantive information.[9]

The Air Force Legal Information Services Office (which administers the Federal Legal Information Through Electronics (FLITE) database) is developing, on a laser disk, a prototype database of emergency authorities.[10] This technology will further reduce ALR cost and provide in a combat environment a large, highly-mobile and rugged collection of research materials.[11]

Procedural Law

Courts properly are conservative on the use of technology in the judicial process. Several state courts, however, are experimenting with testimony on video tape in certain instances, to include testimony of child victims of abuse or neglect.[12] Judges experimenting with the use of this technology are attempting to balance the rights of the defendant against the heightened concern for the victim and the administration of justice.

Trial Judiciary is experimenting with the use of a computer to rapidly tailor instructions to court members. In this system, the judge offers counsel a printed copy of the proposed instructions for review. Counsel may propose changes and the judge is able to rapidly alter the instructions as required. If appropriate, the written instructions may be provided to the court members. It is anticipated that trial practice will be modified to take advantage of new computer technology as it becomes available in the Army.

Reporting

Technological developments have had a particular impact on court reporting. USALSA has been monitoring these developments and will soon begin a study evaluating the various means of preparing a record of trial. Eight options have been identified for the study:

1. Videotape, without transcription;
2. Videotape, with transcription by typing;
3. Open microphone sound recording, with transcription by typing;
4. Closed microphone sound recording, with transcription by typing;
5. Manual shorthand, with transcription by typing;
6. Machine shorthand, with transcription by typing;
7. Machine shorthand, with transcription by computer; and
8. Contract-out reporting.

The divergent nature of the court reporting environment in the military justice system makes a number of these options attractive. The study will consider each environment, but combat reporting requirements will be given particular attention in the study.

The closed microphone system satisfies combat requirements extremely well, but is relatively labor intensive and slow. The advantage of the closed microphone system is that it will perform well in a noisy environment and is relatively easy to learn and operate. The audiotape will also survive many potential combat casualties, although a substitute reporter may experience some difficulty in transcription.

Combat readiness requirements do not exist everywhere in the military justice system. Many of these locations may be able to utilize videotape or open microphone sound recording. Videotape records without transcription are permitted on an experimental basis before the Kentucky Supreme Court,[13] and initial reviews have been surprisingly favorable.[14]

One technology that appears to satisfy combat requirements at least as well as (and perhaps better than) the closed microphone system is computer assisted transcription (CAT). The primary advantage is that a record can be prepared within a few hours after the close of trial for the day. The record is captured by a court reporter who uses a stenographic machine specially equipped with a cassette tape or microchip to store the record. The record is transcribed using a portable computer programmed to translate the shorthand. The shorthand machine operates off a battery lasting four years. The computer can operate off a battery for several hours, if necessary. Both are lightweight and compact.

The Marine Corps has tested CAT technology at two locations, and currently has twenty marines in a court reporting school for two years to learn the stenographic machine.[15] Once trained on the stenographic machine, the reporter is trained for two weeks on the CAT equipment. The problem is that the Army would have to commit personnel resources to a two-year training program, in addition to planning for retention of highly skilled personnel.

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[9] Interview with Major Joe A. Alexander, Automation Management Officer, TJAGSA, in Charlottesville, VA (Dec 6, 1985).

[10] *See generally* Memorandum, The Undersecretary of Defense, 28 Jan 85, subject: Emergency Authorities—Exercise Port Call – 86.

[11] In the author's opinion, laser disk technology will permit the development of a standard military justice library for all legal offices. Other library materials may also be available in this form.

[12] *See* National Legal Resource Center for Child Advocacy and Protection, American Bar Association Young Lawyer's Division. Child Sexual Abuse Law Reform Project, Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Abuse Cases (Apr. 1985). *See also* Abernathy, *Protecting the Child Witness: Avoiding Physical Confrontation With the Accused,* The Army Lawyer, Nov. 1985, at 23.

[13] ORDER Establishing Procedures for Appeals in which Videotape Recordation of Circuit Court Proceedings Serves as the Record of Appeal, Supreme Court of Kentucky, Oct. 11, 1985.

[14] National Center for State Courts, Northeastern Regional Office, *An Evaluation of Kentucky's Innovative Approach to Making a Videotape Record of Trial Court Proceedings* (Apr. 19, 1985).

[15] Telephone interview with Master Gunnery Sergeant J. Amparan, Court Reporting Sponsor, HQ, Marine Corps, (202) 694–2543 (Dec. 24, 1985). The Marine Corps enlists court reporters for a six-year active duty obligation. In the author's opinion, it is too early to evaluate the effectiveness of this approach to retention. It is certain that the study must evaluate professional pay and other incentives to retain Army court reporters trained in CAT technology, because they would have greater income potential in the civilian community.

Existing Management Information

The Judge Advocate General's top priority on military justice automation was to improve the existing statistical system.[16] Four problems were identified:

1. The system was not documented;
2. It was difficult to get useful information out of the system;
3. Information was not available as soon as expected; and
4. Only one person could use the system at a time.

The first and second problems have been solved. In 1984, USALSA completed the required documentation.[17] It was determined that the system could be enhanced with a modern report writing capability. Between March 1985 to January 1986, we responded to 20 out of 22 inquiries for information from the system. The information system is being modified to permit inquiries relating to the other two requests.

USALSA has installed software permitting the transfer of data from the statistical system to a personal computer for analysis and report writing. This permits USALSA to forward information on U.S. Army Europe and Seventh Army (USAREUR) courts-martial and disciplinary statistics to USAREUR, for example. The Army JAG Corps literally leads the legal profession in the ability to download information from a mainframe to a personal computer. The old "door stop" report provided to Headquarters, Department of Army (HQDA) and major army commands (MACOMs) is "history."[18] Reports are tailored to particular needs. The Clerk of Court provides The Judge Advocate General and other JAG Corps executives monthly summaries of data in graphical form.

The third problem requires more time, money, and other resources to solve. There is no solution available which will result in anything resembling real-time information, pending implementation of a trial-level case management system. Planning is on-going for several interim solutions, however, to include workload redistribution within USALSA, an optical character reader, and remote data entry, which will reduce the report preparation cycle by a few weeks. USALSA is also shifting from quarterly to monthly reports on some statistics as a means to provide more timely information.

The fourth problem, the single-user limitation, will be solved when the case-related information is transferred to the new Army Court of Military Review case management system, because this system will permit multiple, simultaneous inquiries, and because the remaining JAG 2 Report data can be transferred to personal computers without interfering with data entry operations.[19] This new system will be discussed later in this article.

Future JAG Corps military justice systems will be "operational systems." This means that each system will perform one or more operational processes, including, for example, preparing courts-martial orders, providing counsel and judges case status information, or scheduling a trial date. The information contained in this system will be accurate because errors will be caught and corrected. The value of operational systems, beyond preparation of required forms, reports and documents, is that errors are fewer than in statistical systems, and that statistical information can be produced as a bi-product of the system.

Future Case Management

USALSA plans to install an integrated trial and appellate case management system in 1988.[20] This system will permit Trial Judiciary to manage cases within each circuit, and allow trial judges to schedule (and reschedule) cases for trial electronically, because the system will know the calendars for all participants. Docket entries will be recorded to track case progress. Management reports will be produced for circuit judges, senior and regional defense counsel, chiefs of military justice, and staff judge advocates. The reports will contain accurate, consistent information, because the source of the data will be an operational system. A number of redundant steps will be eliminated saving clerical time, to include preparation of the Military Judge Case Report (MJCR).[21] The system will also speed required management information to MACOMs and to OTJAG and its field operating agencies.[22]

A further step is probable which will provide opportunities to share information with non-JAG Corps participants in the military justice process, to eliminate redundant

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[16] *See generally* Judge Advocate General's Corps Information Systems Plan, Implementation Priorities (at 5–22) and Problem Statement I (at 6–4 thru 6–7); Memorandum, HQDA (JALS–AM), 31 May 1983, subject: Acceptance and Approval of The Judge Advocate General's Information System Plan (ISP).

[17] DOD Standard No. 7935, Automated Data Systems (ADS) Documentation (15 Feb. 1983). Undocumented systems create problems for future managers. In the author's opinion, no JAG Corps system should be fielded unless it is thoroughly documented and the responsible agency has committed resources to maintaining and enhancing the system. The same principle applies to systems developed for a personal computer.

[18] Memorandum, USALSA (JALS–IM), 31 May 1985, subject: Enhancement to the Court-Martial and Disciplinary Information Management System (CDIMS). The "door stop" report is the name given by critics to the Quarterly Report on Disciplinary Activity in the Army. The report was approximately two inches thick and was largely ignored, in the author's opinion, because of its size and format.

[19] For an explanation of JAG 2 Report, *see* Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, chapter 15 (1 July 1984).

[20] In the author's opinion, the target date may slip one or more years depending upon the ability to fund technical automation studies on system design and communications this fiscal year and justify the estimated three million dollar cost. Currently, the proposed system is the subject of a professional automation study on requirements and USALSA has requested large amounts of funding in FY87/88. When the system can be funded, it will be a significant step toward standardization within the military justice community.

[21] MJCR is Form RCS JAG-72, prepared by USALSA.

[22] MACOMs typically track military justice statistics by general court-martial convening authority within the command. Often the statistics are gathered using parallel systems to the JAG Corps system because information is not current enough for MACOM needs. The OTJAG Criminal Law Division uses statistical information for its three primary responsibilities—reporting, policy and oversight, to include preparing for Article 6 visits (Uniform Code of Military Justice art. 6, 10 U.S.C. § 806 (1982)) and responding to congressional inquiries. The divisions within USALSA perform a variety of advocacy and management roles in the military justice system which require operational and statistical information. TJAGSA needs statistical information to prepare instructional materials and prepare for General Officer Legal Orientation (GOLO) and Senior Officer Legal Orientation (SOLO) programs. The Claims Service has documented a need to compare courts-martial and disciplinary statistics with claims information to evaluate policies, plans, and programs.

processes, and to improve mission performance of each activity. On 19 January 1984, the executives of the U.S. Army Criminal Investigation Command, U.S. Army Military Police Operating Agency, and USALSA signed a Memorandum of Understanding to conduct an information system plan (ISP) study for automation of the Criminal Justice Information System (CJIS).[23] The study is now in the draft stage.[24] USALSA plans envision that an integrated system should be operational in 1991.[25]

Because current opportunities exist to improve case management at the Army Court of Military Review, USALSA is installing an automated case management system which will be operational in May 1986.[26] It will provide real-time management information on case processing before the court, the Court of Military Appeals, and the United States Supreme Court. The system will eliminate fifteen redundant manual systems in the Army court, Clerk of Court, DAD, and GAD.

The new case management system also will contain the MJCR and processing times information.[27] Significantly, the system will capture information characterizing the offense and the victim.[28] The Office of The Judge Advocate General, Criminal Law Division, will assign and delete characterization codes to respond to changes in management or advocacy interest and emphasis. Examples of factual characterizations include sexual harassment, fraternization, related to drug and alcohol, related to law of war, barracks larceny, and other pre-defined factual patterns. The new system will also improve analysis by providing means to compare information from our system with more detailed information on the offense or accused contained in the Criminal Investigation Command and Total Army Personnel Database systems.

USALSA also envisioned a need to provide SJA offices with a uniform means to track cases and collect statistics, and in 1985 developed a Model Military Justice Office System.[29] This system tracks current cases, develops statistics, and prepares various reports. It also prepares the monthly JAG 2 Report. The Model Military Justice Office System will save many thousands of hours programming similar systems and preparing statistics the old fashioned way. USALSA is absolutely committed to maintaining and enhancing this system. As of 1 January 1986, twenty-two JAG Corps activities have obtained copies of the software and/or documentation from USALSA.

Administrative Support Systems

During the recent professional automation study of Trial Defense Service (TDS) and Trial Judiciary, it became apparent that many labor-intensive manual systems could be eliminated and streamlined through the use of modern technology. Each office needs integrated personnel, travel, and training systems. Another common need is electronic mail. Each USALSA office has demonstrated a need for electronic mail. It will take many years to implement a JAG Corps communication system.[30] In the interim, JAG Corps offices can take advantage of local developments. For example, the Office of the Judge Advocate, USAREUR, will soon have the capability of communicating with OTJAG through OPTIMIS, the HQDA electronic mail system,[31] USALSA is experimenting with a voice mail system in TDS,[32] and datafax machines are being used increasingly to transfer documents between legal offices.

Word processing is becoming more widely used by JAG Corps officers, and the current trend is to integrate attorney workstations into the office network or operate off the office minicomputer or microcomputer. This permits officers to obtain documents from the files electronically and create or edit work product. The same terminal is used for legal research, communication to other attorneys and clients, case management, and litigation support tasks. USALSA is planning to provide such integrated administrative support systems to field TDS and TJ offices. This capability will permit SJA, TJ, and TDS personnel to share the operational features of the trial and appellate level case management system to prepare documents and reports concerning cases.

Education and Training

TJAGSA and USALSA provide education and training for JAG Corps attorneys and legal administrators on military justice and management of cases. Computer-aided instruction programs operating on a personal computer may provide high quality instruction. The advantage over videotape technology is that the computer will interact with the student. TJAGSA is actively exploring this technology.

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[23] Memorandum, HQDA (PEMP–O), 30 Jan. 1984, subject: The U.S. Army Criminal Justice Information System, and 1st Ind, ACSC–PSP, 5 Mar. 1984.

[24] Briefing by Colonel Robert R. Brookshire II, CJIS ISP Team Leader, to USALSA Executive (16 Dec. 1985). The draft ISP contains a model system as an illustration of the nature of the system requirement. SJA offices will be provided a copy of this document, because it will serve as justification for acquisition of equipment and software for military justice functions in the SJA office.

[25] The initial decision on an integrated system for Army law enforcement, criminal investigation, legal and confinement functions will be made during the spring of 1986. In the author's opinion, Army executives will find initiation of this project difficult, because the decision may terminate a number of automation projects or force delay or modification. Nevertheless, the long-term benefits from sharing information are clear and CJIS is consistent with Army policy in this regard (*See generally* Dep't of Army, Draft Reg. No. 25–5, Information Management for the Sustaining Base (Jan. 1985). A number of states and cities have undertaken or are planning similar projects.

[26] The software is DOCKETRAC by INSLAW, Incorporated which is the most widely used court software package in use today. For information on the project contact USALSA (JALS–IM).

[27] Processing times information is contained in the record of trial on Dep't of Defense Form No. 490.

[28] *See generally* Memorandum, DAJA–CL 1984/5464, 22 Jun. 1984, Subject: Military Justice Information Requirements. This system will permit executives to track cases by factual characteristics of the offense and the victim, and respond to common inquiries. TJAGSA instructors, OTJAG action officers, counsel in TCAP and Trial Defense Service and military judges will be able to identify JAG Corps officers serving as counsel or military judge in a similar case and discuss that case with them. Procedures can be developed to permit access from SJA offices.

[29] Memorandum, USALSA (JALS–IM), 31 May 1985, subject: Automation of Military Justice Systems.

[30] For information, contact LTC Daniel L. Rothlisberger, IMO, OTJAG.

[31] Memorandum, AEAJA–X, 25 July 1985, subject: USAREUR Automation.

[32] Voice mail is a computer-controlled message service provided by Defense Telephone Service, Washington, D.C.

Both TCAP and TDS are interested in using this technology in CLE programs and trial preparation.

TJAGSA is planning a computer learning center in the new addition to its building. This center will permit students to utilize the equipment and software available in the field, including standard military justice systems developed by USALSA and legal research databases. In the meantime, TJAGSA provides information to students on the model JAG Corps legal systems currently available and training for the graduate course students on WESTLAW and LEXIS. The automated legal research vendors provide training to military and civilian attorneys within DOD under DOD billing arrangements.

Conclusion

The imagination of the JAG Corps attorney is the limit.[33] Automation will change the way we research, share work product, prepare records of trial, conduct trials, manage cases, and support our attorneys and judges. JAG Corps attorneys are beginning to enjoy the fruits of early labors to master automated technologies and create ways to share information and data input responsibilities more widely. Many problems will be presented to managers, and great flexibility is required, but the advantages are beyond question. It is clear that the JAG Corps is on the threshold of the information revolution.

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[33] *See* L. Polansky, Technology in the Courts of the United States (unpublished manuscript), which includes an imaginative press release on The Information System Supported Court House in the Twenty-First Century (Wednesday, June 22, 2020).

USALSA Report

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How Aggravating Can You Get?

The Expanded Boundaries for Admission of Aggravation Evidence Under R.C.M. 1001(b)(4)

Captain Michael S. Child
Training Officer, TCAP

Introduction

The introduction of aggravation evidence during presentencing is a vital concern of trial counsel, whether trying a contested case or a guilty plea pursuant to a pretrial agreement limiting sentence.[1] The accused is entitled to an individualized sentence, but society is entitled to an appropriate sentence. It is trial counsel's responsibility to introduce all evidence which could assist the sentencing authority in imposing an appropriate sentence.

The boundaries for the admission of permissible aggravation evidence have been expanded under the presentencing provisions of the 1984 Manual for Courts-Martial.[2] The boundaries under the 1969 Manual[3] were more narrow because of the "President's decision to utilize a more restricted sentencing procedure in our military justice system than that operat[ed] in the federal civilian criminal courts."[4] Nevertheless, the United States Court of Military Appeals refused to interpret paragraph 75*b* of the 1969

[1] For other discussions of uncharged misconduct evidence, *see* Thwing, *Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal,* The Army Lawyer, Jan. 1985, at 46; Child, *Use of* Modus Operandi *Evidence in Sex Offense Cases,* The Army Lawyer, Feb. 1985, at 30.

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter cited as MCM, 1984, and R.C.M., respectively]. R.C.M. 1001(b)(4) provides:

> *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly related to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

[3] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 75*b* [hereinafter cited as 1969 Manual].

[4] United States v. Boles, 11 M.J. 195, 200 (C.M.A. 1980). Nevertheless, the 1969 Manual was "promulgated by the President in an effort to bring military sentencing procedure in line with practice in federal courts." *Id.* at 198 n.5. The drafters attempted this by adding a new paragraph, 75*d*, which allowed for the introduction of personnel records reflecting an accused's past conduct and performance. The substance of paragraph 75*d* of the 1969 Manual is found in R.C.M. 1001(b)(2) of the 1984 Manual.

Manual in a "formalistic fashion,"[5] which ignored common sense. Paragraph 75*b* on its face, appeared to allow aggravation evidence after findings only where a guilty plea has been entered. In *United States v. Vickers,* the court realized that to

> interpret the [1969] Manual to allow [aggravation] evidence—irrelevant on the merits, but highly relevant on sentencing—after findings in a guilty-plea case, but to prohibit it in a contested case, would present the anomaly that the admissibility of relevant *sentencing* evidence would be determined by an accused's plea.[6]

Thus the court held that however findings of guilty were reached, paragraph 75*b* allowed the trial counsel to "present evidence which [was] directly related to the offense for which an accused [was] to be sentenced so that the circumstances surrounding that offense or its repercussions [could] be understood by the sentencing authority.[7] The court reached this common sense conclusion because it found that the drafters and the President did not intend to "differentiate between guilty-plea cases and contested cases."[8]

Under R.C.M. 1001(b)(4), trial counsel may introduce into evidence "any aggravating circumstances [1] directly relating to or [2] resulting from the offenses of which the accused has been found guilty." The discussion to this rule is helpful because it spells out that the evidence may relate to a financial,[9] social, psychological,[10] and medical impact on or cause to any person or entity who was the victim of an offense. This rule is not meant to exclude evidence as to impact on discipline or the effect or amount of the drugs charged. Additionally, R.C.M. 1001(f) provides that the court may consider as aggravation any "evidence properly introduced on the merits before findings, including: (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and (B) Evidence relating to any mental impairment or deficiency of the accused." Three recent cases deal with these provisions.

Army Court Takes the Lead

In *United States v. Harrod,*[11] the government introduced evidence, via a stipulation of fact, that the accused often smoked marijuana in his off-post apartment, had purchased marijuana from more than one civilian supplier before, and had a customer list of at least eleven other soldiers at the time he was apprehended. Appellant was convicted of only one instance of possession with intent to distribute, and one instance of wrongfully possessing drug paraphernalia.

In deciding that this evidence was admissible under R.C.M. 1001(b)(4), Senior Judge Raby, writing for the court, made several important observations. First, Judge Raby concluded that aggravation evidence "need not directly establish the guilt or innocence of the accused if it otherwise meets the requirements of RCM 1001(b)(4)."[12] Next, he observed that in "promulgating the [MCM], 1984 . . . the President intended to greatly expand the types of information that could be presented to a court-martial during the adversarial presentencing proceeding."[13] Finally, the judge concluded:

> [After] carefully consider[ing] the President's intent . . . together with the concerns of the . . . Court of Military Appeals as reflected in *Vickers* and *Gambini,* we believe that military judges and court members are intended to have access to substantially the same amount of aggravation evidence during the presentencing procedure as is available to federal district court judges in presentencing reports. This access is to be circumscribed only as provided by the MCM rules applicable to this adversary process.[14]

Judge Raby also reached a conclusion which, while accurate, could mislead some trial judges into restricting admissibility. He concluded that "under RCM 1001(b)(4), any act of misconduct admissible on the merits of a contested case would also be admissible in aggravation following a plea of guilty subject to the balancing test of [Mil. R. Evid.] 403."[15] This cautious application of the new rule to the facts at hand should not be misconstrued to mean that aggravation evidence is admissible in a guilty plea case *only* if it would have been admissible on the merits of a contested case.

Twenty days after Judge Raby's *Harrod* opinion, the Court of Military Appeals released *United States v. Martin,*[16] which used an analysis similar to Judge Raby's. Unfortunately, this analysis is also similarly capable of being misinterpreted by the overly cautious. The court in *Martin* was asked to decide a certified issue from the Air Force Judge Advocate General which was almost identical to the issue in *Harrod*. The Air Force court, however, had reached a conclusion exactly opposite to the Army court in *Harrod.*

In *Martin,* the Air Force court concluded that in guilty plea cases, uncharged misconduct was never admissible

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[5] United States v. Wright, 20 M.J. 518, 520 (A.C.M.R. 1985).

[6] 13 M.J. 403, 406 (C.M.A. 1982).

[7] *Id.*

[8] *Id.*

[9] United States v. Hood, 12 M.J. 890 (A.C.M.R. 1982). It is permissible for trial counsel to establish the fair market value of the property the accused stole, including the black market value of the same items.

[10] United States v. Wilson, CM 442268 (A.C.M.R. 9 Aug. 1982). An expert witness may testify as to the pain and suffering undergone by the victim of an aggravated assault. *See also* United States v. Shreck, 10 M.J. 563 (A.F.C.M.R. 1980).

[11] 20 M.J. 777 (A.C.M.R. 1985).

[12] *Id* at 779.

[13] *Id.*

[14] *Id.* at 780 (discussing *Vickers* and United States v. Gambini, 13 M.J. 423 (C.M.A. 1982)).

[15] *Id.*

[16] 20 M.J. 227 (C.M.A. 1985).

during presentencing, even where it would have been admissible had the case been contested, because it would serve only "to convince the court that the accused is a bad man."[17] Apparently, the Air Force court concluded that Mil. R. Evid. 404(b) applied equally to presentencing, and that such evidence could hardly be of much relevance because the accused, by pleading guilty, admitted all the elements necessary for conviction. The court therefore held that, balancing the minimal relevance of the evidence against its clear potential for prejudice, its exclusion was required under Rule 403. In effect, the Air Force court presented the Court of Military Appeals with the converse of *Vickers*. In *Vickers*, the court removed the artificial restriction against the admission of aggravation evidence not admitted during the merits of a contested case. In *Martin*, the court struck down the similarly artificial restriction against the admission of aggravation evidence in a guilty plea case which would have been admissible had the case been contested.

Judge Cox authored the lead opinion in *Martin*, and quickly dispatched this erroneous restriction. Because the specific certified issue concerned the application of Mil. R. Evid. 404(b), however, Judge Cox *answered* the issue with reference to Mil. R. Evid. 404(b), and thereby once again left unclear the issue of Rule 404(b)'s application to presentencing. Again, Rule 404(b) applies only to the findings of a court-martial. During findings, Rule 404(b) prohibits evidence of uncharged misconduct, except in certain limited situations, from being considered by the court "in order to prevent the conviction of the accused for a specific crime because he generally has the reputation of being a 'bad man.' "[18] This "consideration is *removed* once the accused has been convicted."[19] in fact, as Judge Cox noted, the "purpose of the presentencing portion of a court-martial is to present evidence of the relative 'badness' or 'goodness' of the accused as the primary steps toward assessing an *appropriate* sentence."[20]

Judge Cox therefore concluded that "to the extent the Court of Military Review held that Mil. R. Evid. 403 automatically bars introduction of aggravating evidence relating to offenses of which an accused has been found guilty after he has pleaded guilty, it was in error."[21] Just as in *Vickers*, Judge Cox held that "[r]eceipt of sentencing evidence which otherwise meets the admissibility tests of the rules and Manual is not dependent on the character of the accused's pleas."[22]

Judge Cox, like Senior Judge Raby, left the issue of the applicability of Rule 404(b) to presentencing somewhat unclear by finding the challenged aggravation evidence admissible because it met "both the sentencing rules and Mil. R. Evid. 404(b)."[23] While this evidence was certainly permissible aggravation evidence because it could not have been admissible on the merits under Rule 404(b), it did not have to meet this standard to be admissible.

Three and one-half months after *Martin* was decided, Senior Judge Yawn, also of the Army court, wrote the opinion in *United States v. Arceneaux*,[24] and cleared up any misunderstanding about Rule 404(b)'s applicability while also setting forth a simple two-step inquiry for determining whether aggravation evidence was admissible under R.C.M. 1001(b)(4). In *Arceneaux*, Judge Yawn concluded that evidence of prior misconduct, first raised by the accused during the providency inquiry, was nevertheless permissible aggravation evidence under R.C.M. 1001(b)(4).

In *Arceneaux*, the appellant, a staff sergeant, advised the military judge during providency that he had used a private first class as his agent in selling marijuana during the two months before the charged distribution. Before applying the two-step inquiry, Judge Yawn laid to rest the issue of Mil. R. Evid. 404(b)'s applicability when he concluded that "in a guilty plea case, when [aggravation] evidence *might serve no useful purpose prior to findings*, evidence of prior misconduct may nonetheless serve as a proper and useful function during the sentencing phase of the trial."[25] Judge Yawn then reiterated Judge Raby's assertion in *Harrod* that R.C.M. 1001(b)(4) broadened admissibility to allow in the same kind of information found in federal presentence reports, "but . . . within the protections of an adversarial proceeding, to which the rules of evidence apply, although they may be relaxed for some purposes."[26]

Judge Yawn then set forth the two-step inquiry that must be satisfied before the introduction of aggravation evidence. First, the military judge must be satisfied that the evidence is relevant, *i.e.*, that the evidence is important to the determination of a proper sentence. Second, the military judge must determine whether the balancing test of Mil. R. Evid.

[17] *Id.* at 228 (quoting United States v. Martin, 17 M.J. 899, 901 (A.F.C.M.R. 1984)).

[18] *Id.* at 229 n.3.

[19] *Id.* at 229 (emphasis added).

[20] *Id.* at 230.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 230 n.5.

[24] 21 M.J. 571(A.C.M.R. 1985).

[25] *Id.* at 572.

[26] *Id.* (*quoting Harrod*, 20 M.J. at 779). Does compliance with the Mil. R. Evid. mean compliance with Mil. R. Evid. 404(b)? No. Compliance with the Military Rules of Evidence means only that evidence to be introduced must be relevant to sentencing, and trustworthy and reliable in what it purports to show. For example, uncharged misconduct directly related to the offense would be admissible if it could actually be shown to have occurred. If this misconduct could be shown only by resort to hearsay testimony not within a recognized exception, however, it would be excludable on that basis. Likewise, "paper" exhibits, not properly authenticated, could be excludable for not complying with the Mil. R. Evid., even though the exhibits might be highly relevant to presentencing.

403 requires its exclusion.[27] In determining relevance, Judge Yawn concluded that there were three areas of relevance to sentencing, corresponding to three "permissible objectives of the sentencing process."[28] These three areas were the rehabilitation of the offender, the protection of society from the offender, and the deterrence of the offender.[29] Judge Yawn then concluded that the evidence concerning the junior enlisted agent was admissible because it had a "direct bearing upon appellant's rehabilitative potential."[30]

United States v. Witt

Five weeks after *Arceneaux* was decided, Senior Judge Raby once again interpreted R.C.M. 1001(b)(4). Judge Raby's opinion in *United States v. Witt*[31] followed the reasoning of Judge Yawn and also made it clear that admissibility under Mil. R. Evid. 404(b) was not required to introduce relevant aggravation evidence. Finally, because the facts of *Witt* required the application of the expanded boundaries of R.C.M. 1001(b)(4), Judge Raby was able to demonstrate just how expansive it was, rather than only predict how expansive it would be.

In *Witt*, the accused entered a plea to the wrongful distribution of LSD. Pursuant to the pretrial agreement, a stipulation of fact was introduced with a great deal of aggravation evidence. The stipulation stated that shortly after the distribution, the purchaser ingested the LSD. The purchaser then went back to his barracks and, after drinking some beer with his roommates, took a knife and assaulted them. All of the injuries caused by the purchaser's assault were included in the stipulation. Furthermore, the trial counsel called the purchaser to the stand to explain that he had never assaulted anyone before, and that while he believed pressure had caused the assault, he admitted that the beer and the LSD had contributed to his conduct. In addition, the trial counsel introduced a stipulation of expected testimony from a psychologist who was also an alcohol and drug control officer. This stipulation explained the common effects of LSD, and then offered the opinion that the purchaser's "behavior could have been caused by the effects of LSD consumption."[32]

The Army court sanctioned the admission of all of this evidence. None of it would have been admissible on the merits under Rule 404(b) had the case been contested.[33] Before addressing the specific bases for admission under R.C.M. 1001(b)(4), Judge Raby advised trial practitioners that in "interpreting what type of evidence is 'directly related to' a given offense, this court will *liberally construe* R.C.M. 1001(b)(4) to comply with the President's intent in promulgating the presentencing rules in the MCM, 1984."[34] Judge Raby then reiterated the position he set forth in *Harrod* that the President intended to "greatly expand" the parameters of permissible aggravation evidence.[35] Finally, in recognition of the *Arceneaux* opinion and its three areas of relevance for presentencing, Judge Raby cited *Arceneaux* in observing that any evidence "directly related to an offense is admissible if relevant."[36] Nowhere in *Witt* did Judge Raby mention Rule 404(b).

Before concluding that the assaultive conduct of the purchaser was "directly related to" appellant's distribution of LSD, Judge Raby defined what a direct relation actually meant. He explained that the phrase required only a showing that there was a "*reasonable linkage between the offense and alleged effect thereof.*"[37] Judge Raby specifically rejected any idea that the offense had to be the only or the primary cause of the effect. Thus, he held that facts "sufficient to constitute proximate cause are not required; neither is a so-called 'but for' test."[38] Here, a "but for" test could have excluded the results of the purchaser's assaultive behavior because the purchaser placed primary emphasis upon "pressure" as the cause of his conduct; the purchaser opined that the LSD, as well as the beer, were simply contributing factors. After finding the reasonable linkage that showed the purchaser's assaultive behavior was "directly related to" the accused's LSD distribution, the Court also found the behavior relevant to an appropriate sentence, without stating any specific basis of relevance.

In deciding *Witt*, the Court also offered guidance upon the issue of the forseeability of the effects caused by an accused's offense. The "tort concept of 'foreeability' is not applicable to the provisions of R.C.M. 1001(b)(4)."[39] Thus, if an accused's offense directly causes an effect relevant to an appropriate sentence, it does not matter that the accused testifies that he did not realize or that he should not have been reasonably expected to realize, that his crime would cause that effect. In an exercise of appellate caution, however, the Court specifically found "forseeability": drug

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[27] 21 M.J. at 572. The second question of this two step inquiry seemed to impose a *sua sponte* duty upon the military judge to apply the balancing test of Rule 403. In United States v. Witt, CM 447616 (A.C.M.R. 5 Dec. 1985), Judge Raby observed that the Army court, since *Arceneaux* and *Harrod*, had modified those holdings to the extent that they "required the military judge to apply *sua sponte* the [Mil. R. Evid.] 403 balancing test before admitting evidence in aggravation. The burden is, instead, on the defense counsel to make a timely and specific objection, [to] trigge[r] the application of the [Mil. R. Evid.] 403 balancing test by the military judge." *Witt*, slip op. at 6 n.2.

[28] 21 M.J. at 572.

[29] *Id.*

[30] *Id.* (citing *Wright*, 20 M.J. at 520); United States v. Pooler, 18 M.J. 832, 833 (A.C.M.R. 1984). Of course, one other permissible objective of sentencing, and thus, relevant basis for aggravation evidence, is general deterrence. United States v. Lania, 9 M.J. 100 (C.M.A. 1980).

[31] CM 447616 (A.C.M.R. 5 Dec. 1985).

[32] *Id.*, slip op. at 4.

[33] *Id.*, slip op. at 5 (emphasis added).

[34] *Id.*

[35] *Id.*

[36] *Id.*, slip op. at 8 (citation omitted).

[37] *Id.*

[38] *Id.*, slip op. at 9 n.8.

[39] *Id.*, slip op. at 9.

"dealers know or reasonably can be expected to know" that "people who ingest drugs can on occasion react in a bizarre, dangerous, and violent manner, and that this behavior is often unpredictable".[40]

Conclusion

The trial counsel should be aggressive in presenting all the information that would be helpful to the sentencing authority. This would include the following: (1) information "directly related to" the offense of which the accused has been found guilty; (2) the repercussions of these offenses; and (3) evidence of other acts of misconduct that may have been admitted during the case for a limited purpose. The various areas to be explored as to admissibility under theories (1) and (2) are set forth in the discussion to R.C.M. 1001(b)(4). The evidence considered important during sentencing is not dependent upon the plea or its admissibility during the case in chief.

[40] *Id.*

Uncharged Misconduct on Sentencing: An Update

Captain Stephen W. Bross
Defense Appellate Division

The Court of Military Appeals and Army Court of Military Review have recently decided several cases involving Rule for Courts-Martial 1001.[1] These cases have made significant changes in the use of uncharged misconduct as aggravation evidence. Because the changes broaden admissibility, defense counsel seeking to exclude uncharged misconduct will face greater challenges during the sentencing proceedings. This article analyzes the recent cases involving the admissibility of uncharged misconduct on sentencing and provides the trial practitioner with recommendations for dealing with uncharged misconduct. The article is designed to update the analysis and guidance presented in an article on this subject which previously appeared in *The Advocate.*[2]

The Leading Cases

The Court of Military Appeals has seldom addressed the use of uncharged misconduct on sentencing. The last opinion directly on point, *United States v. Gambini,*[3] was published in 1982, and advanced a fairly restrictive approach to the use of such evidence on sentencing. The most recent case from the court may, however, signal a new approach.

In *United States v. Martin,*[4] the Court of Military Appeals held that in a guilty plea case, Mil. R. Evid. 403 did not automatically bar the use of evidence of uncharged misconduct on sentencing that would otherwise have been admissible on the merits under Mil. R. Evid. 404(b). The accused in *Martin* pled guilty to offenses of sexual misconduct with a child. During the providency inquiry, the government offered a stipulation of fact which referred to an act of suspected child abuse occurring nine years earlier. Despite defense objection that this evidence of uncharged misconduct was inadmissible under Mil. R. Evid. 403, the entire stipulation was admitted. In the initial appellate review of the issue, the Air Force Court of Military Review held that the stipulated evidence of misconduct, although admissible on the merits under Mil. R. Evid. 404(b), served no purpose in a guilty-plea case other than to convince the court that the accused was a bad man.[5] This holding was consistent with earlier Air Force cases.[6]

On appeal,[7] the Court of Military Appeals reiterated its holding in *United States v. Vickers*[8] that aggravation evidence directly related to the charged offenses as a surrounding circumstance or repercussion was admissible—irrespective of pleas. Writing for the court, Judge Cox concluded that the relaxed sentencing rules under the prior Manual for Courts-Martial[9] were intended to permit the best evaluation of the accused by the sentencing authority in assessing a truly appropriate sentence. Thus, in a guilty-plea case, evidence of uncharged misconduct may be relevant on sentencing, as long as it "meets the admissibility tests of the rules and the Manual."[10] The court disagreed with the lower court's analysis and expressed the view that uncharged misconduct *can* sometimes satisfy the sentencing rules, even in guilty-plea cases.

Under *Martin,* the threshold requirement for admissibility of uncharged misconduct was that it must be probative of a fact permitted by the sentencing rules (*i.e.,* it must be proper aggravation evidence). If it does have aggravating qualities, and if it is also admissible under either the Military Rules of Evidence (including Rule 403) or "the more relaxed rules for sentencing,"[11] it may be considered by the sentencing authority. Judge Cox considered the evidence challenged in *Martin* and concluded that it met both requirements; it was "relevant to prove lack of mistake or motive or predisposition to commit the alleged offenses and tended to aggravate them."[12]

[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001 [hereinafter cited as MCM, 1984, and R.C.M., respectively.]

[2] Vint, *Defense Strategies for Uncharged Misconduct on Sentencing,* 16 The Advocate 105 (1984) [hereinafter cited as Vint].

[3] 13 M.J. 423 (C.M.A. 1982).

[4] 20 M.J. 227 (C.M.A. 1985).

[5] United States v. Martin, 17 M.J. 899, 901 (A.F.C.M.R. 1983).

[6] United States v. Schreck, 10 M.J. 563 (A.F.C.M.R. 1980), *petition denied,* 10 M.J. 327 (C.M.A. 1981); *see also* United States v. Keith, 17 M.J. 1078 (A.F.C.M.R.), *certificate for review filed,* 18 M.J. 97 (C.M.A. 1984).

[7] The issue was certified to the Court of Military Appeals by the Air Force Judge Advocate General pursuant to Uniform Code of Military Justice Art. 67(b)(2), 10 U.S.C. § 867(b)(2) (1982) [hereinafter cited as UCMJ].

[8] 13 M.J. 403 (C.M.A. 1982).

[9] Manual for Courts-Martial, United States, 1969, (Rev. ed.) para. 75c(3) and Mil. R. Evid. 1101(c), [hereinafter cited as MCM, 1969]. Note that while this case arose under the MCM, 1969, the court also discussed R.C.M. 1001.

[10] United States v. Martin, 20 M.J. at 230.

[11] *Id.* at 230 n.5. While the court cites these "relaxed rules" as an alternative to the Military Rules of Evidence, it does not explain how or when they apply.

[12] *Id.*

Chief Judge Everett concurred in the result in *Martin* and carefully analyzed the nature of aggravating evidence.[13] He reasoned that evidence of an accused's motive or other state of mind at the time of the offense often could be admissible on sentencing as an aggravating circumstance surrounding the offense. When such evidence qualifies as an aggravating circumstance, it meets the standards prescribed under the sentencing rules. If it also falls within Rules 404(b) and 403, then it is admissible without regard to the type of plea in precisely the same manner as other aggravating evidence under *Vickers*. The proper inquiry, as described by Chief Judge Everett, is "whether the uncharged misconduct tends to establish aggravating circumstances that, however proved, would be admissible for sentencing purposes under the rules the President has prescribed for courts-martial."[14] He noted, in discussing the application of Rule 403, that the probative value of uncharged misconduct is diminished in a guilty-plea case because it is not needed to prove guilt.[15] He reviewed the facts of the case and found that the uncharged misconduct was not relevant to an aggravating circumstance, and therefore did not qualify as a proper aggravating matter. Chief Judge Everett found, however, that the evidence of uncharged misconduct did not prejudice the accused as to sentence and concurred in Judge Cox's disposition of the case.

Three weeks prior to *Martin*, the Army Court of Military Review adopted an approach to the admissibility of uncharged misconduct on sentencing which appears to conflict with both *Martin* and the intended effect of the sentencing rules. In *United States v. Harrod*,[16] the accused pled guilty to wrongful possession of marijuana with intent to distribute and wrongful possession of drug paraphernalia. A stipulation of fact and two sworn statements of the accused were received into evidence without objection during the providency inquiry. These exhibits detailed an extensive history of uncharged drug use, possession, and sale.

The Army court observed that the sentencing rules in the MCM, 1984, were intended by the President to "greatly expand" the information that could be presented to a court-martial. It focused on one sentence in the analysis of R.C.M. 1001 which states that R.C.M. 1001 is intended to permit "the presentation of *much of the same information* to the court-martial *as would be contained in a presentence report*, but it does so within the protections of an adversarial proceeding, to which rules of evidence apply, although they may be relaxed for some purposes."[17] Based on this expression of the President's intent, the court concluded that military judges and court members were allowed to have access to information substantially similar to that available to a federal district court judge in a presentence report.[18] It then held that, in a guilty-plea case, any uncharged misconduct that would otherwise be admissible on the merits is also admissible under R.C.M. 1001(b)(4) in aggravation on sentencing, subject only to the balancing test of Rule 403.[19] The Army court determined that the challenged evidence would have been admissible to prove guilty knowledge, criminal intent, opportunity, motive, and preparation, and was more probative than prejudicial. Absent such grounds for admissibility, the court believed that waiver doctrines could have been applied, as the defense counsel made no objection and thereby failed to challenge admissibility under Mil. R. Evid. 404(b).[20] Although *Harrod* has been frequently cited,[21] it has not yet been re-examined in light of *Martin*.

Analysis

The *Martin* result, even though based on the MCM, 1969, is consistent with R.C.M. 1001(b)(4), which was in turn derived from *Vickers*.[22] The basis for the result—that uncharged misconduct can be relevant and admissible aggravation evidence even in a guilty plea case—is not on its face an unreasonable conclusion, particularly when examined using Chief Judge Everett's analysis.[23] The *Harrod* result, however, appears to be inconsistent with the intent of R.C.M. 1001(b)(4) and contrary to the *Martin* analysis. Under *Harrod*, uncharged misconduct that would have been admissible on the merits is automatically admissible for sentencing purposes. It imposes no requirement for a separate determination that the evidence is probative of one or more facts permitted by the sentencing rules. This analysis is contrary to *Martin*, which requires at the outset that the uncharged misconduct be relevant under the sentencing rules. Only after such relevance is established may one proceed to the second necessary inquiry and ask whether the misconduct is (or would have been) admissible on the merits under the Military Rules of Evidence. The court in *Harrod* may have reasoned that, as a matter of equal treatment, the court in a guilty plea case should be able to consider the same uncharged misconduct (whether or not "aggravating" under the sentencing rules) that would have been available had the case been contested. This analysis ignores the concept of relevance, because evidence that is

[13] *Id.* at 231 (Everett, C.J., concurring).

[14] *Id.* at 233.

[15] *Id.* at 232.

[16] 20 M.J. 777 (A.C.M.R. 1985).

[17] *Id.* at 779–780 (emphasis supplied by the court).

[18] *Id.* at 780.

[19] *Id.*

[20] *Id.* at 780–81.

[21] United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985); United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); United States v. Green, CM 447246 (A.C.M.R. 25 Nov. 1985).

[22] *See* R.C.M. 1001(b)(4) analysis.

[23] The conclusory language of the principal opinion in *Martin*, 17 M.J. at 230 n.5, that the challenged evidence "was relevant to prove lack of mistake or motive or predisposition to commit the alleged offenses and tended to aggravate them" gives little guidance as to the exact analysis. In contrast, the analysis of Chief Judge Everett provides guidance to the practitioner and satisfies the need for a reasoned explanation of *how* uncharged misconduct "tends to aggravate" an offense.

neither relevant on the merits (due to the guilty plea), nor relevant on sentencing, may nonetheless be admissible under *Harrod* for consideration on sentencing. Moreover, the approach in *Harrod* enlarges the scope of admissibility of uncharged misconduct beyond that which was intended by the drafters of R.C.M. 1001. This conclusion is supported by examining the drafters' commentary to R.C.M. 1001, the cases cited with approval by the drafters, and the nature of the federal presentence report. These factors will be discussed separately.

The Drafters' Commentary to R.C.M. 1001

The analysis to R.C.M. 1001 goes well beyond the statement of intent that a court-martial be allowed to consider much the same information as would be contained in a presentence report:

> The presentation of matters in the accused's service records . . . provides much of the information which would be in a presentence report. Such records are not prepared for the purposes of prosecution (*cf. United States v. Boles,* 11 M.J. 195 (C.M.A. 1981)) and are therefore impartial, like presentence reports. In addition, the clarification of the types of cases in which aggravation evidence may be introduced (see subsection (b)(4) of this rule) and authorization for the trial counsel to present opinion evidence about the accused's rehabilitative potential . . . provide additional avenues for presenting relevant information to the court-martial. . . .[24]

Although the rule was designed to allow some evidence similar to that in a presentence report, it is evident that the drafters believed that this goal could largely be attained by the presentation of impartial entries in service records. In analogizing to presentence reports, they did *not* intend to open the floodgates for receipt of uncharged misconduct. To the contrary, they made it clear, in the commentary associated with subsection (b)(4), that: "This subsection does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances directly relating to or resulting from an offense of which the accused has been found guilty."[25]

This commentary suggests that the President and the MCM drafters did *not* intend to "greatly expand" the admissibility of uncharged misconduct on sentencing to the limits delineated by the court in *Harrod.* The *Harrod* conclusion that all Rule 404(b) uncharged misconduct is *per se* aggravating and admissible bypasses the expressed intent of the drafters. The court's failure to fully address the drafters' commentary is perplexing, particularly in view of earlier cases from the Court of Military Appeals acknowledging the controlling effect of the President's power to make restrictive sentencing rules.[26]

Cases Cited by the Drafters

The drafters cited with approval three cases[27] that imposed substantial limits on the use of uncharged misconduct on sentencing. *United States v. Rose* held that two uncharged acts of sexual misconduct which occurred immediately after the charged act were part of the *res gestae* and could be considered without limitation on sentencing. *United States v. Peace* held that testimony on the accused's poor attitude and rehabilitation prospects was impermissible.[28] The court in *Peace* stated:

> The type of aggravating matter in question must go to the particular offense of which an accused has been convicted, not to general denigrations of the accused or to unrelated incidents. Unrelated anti-social acts may be shown through prior convictions or personnel records entries. The drafters would have served no purpose in specifying these two modes of presenting evidence, with all the safeguards attached, if the Government could present a general denigration in any event, unhampered by the stringencies of proof required for an actual conviction.[29]

In *United States v. Taliaferro,* a search produced numerous bad checks written by the accused. The government did not use all of the bad checks in preparing court-martial charges. Instead, it offered the remaining two bad checks as evidence of uncharged misconduct. The court cited *Peace* in

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[24] R.C.M. 1001 analysis.

[25] R.C.M. 1001 analysis (citations omitted).

[26] In United States v. Boles, 11 M.J. 195, 200–01 (C.M.A. 1981) (citations omitted), the court stated:

> Nevertheless, this general policy [of easing restrictions on admissibility of sentencing evidence] must be construed in light of the President's formal decision to utilize a more restricted sentencing procedure in our military justice system than that operating in the federal civilian criminal courts. His rule-making in this matter should not be deliberately frustrated by regulatory artifice or ambiguity, or either's exploitation by the trial counsel or a commanding officer.

In United States v. Warren, 13 M.J. 278, 283 (C.M.A. 1982), the court ruled "[h]owever, unless both the letter and the spirit of the limitations in [MCM, 1969] paragraph 75 are met, evidence of an accused's misconduct may not be received in evidence for consideration in sentencing. *See United States v. Boles,* 11 M.J. 195 (C.M.A. 1981)." The President, of course, is required under UCMJ art. 36(a) to fashion court-martial rules which, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." It is equally clear, however, that as long as an MCM, 1984 provision dealing with a rule of evidence or procedure does not conflict with the Constitution, other law, or another such provision, it is a valid exercise of authority and has the force and effect of law. United States v. Kelson, 3 M.J. 139 (C.M.A. 1977); United States v. Johnson, 19 C.M.A. 464, 42 C.M.R. 66 (1970); United States v. Montgomery, 20 C.M.A. 35, 42 C.M.R. 227 (1970); R.C.M. 1001, even when interpreted restrictively pursuant to the totality of the drafters' comments, does not generate any such conflict. Conversely, the court in *Harrod* did not indicate that the drafters' intent had to be interpreted expansively to avoid such challenge.

[27] United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978), *petition denied,* 7 M.J. 56 (C.M.A. 1979); United States v. Taliaferro, 2 M.J. 397 (A.C.M.R. 1975); United States v. Peace, 49 C.M.R. 172 (A.C.M.R. 1974).

[28] This specific result has been changed by R.C.M. 1001(b)(5), which permits introduction of opinion evidence concerning past performance and rehabilitation potential.

[29] 49 C.M.R. at 173 (citations omitted).

holding that the two additional checks could serve no purpose under Rule 404(b) and were useful only to show that the accused was a bad man.[30]

The *Harrod* analysis appears to depart from the more restrictive approaches used in *Taliaferro* and *Peace*. The *Harrod* decision does not discuss the cases cited with approval by the drafters, and consequently would seem to be a fair subject for challenge in the Court of Military Appeals.

The Federal Presentence Report

As *Harrod* indicates that courts-martial should receive substantially the same evidence as would be found in a federal presentence report, it is instructive to examine the content of these reports. Federal Rule of Criminal Procedure 32(c)(2) provides:

> (2) Report. The presentence report shall contain—
> (A) any prior criminal record of the defendant;
> (B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;
> (C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and
> (D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

The Rule directs the presentence report to focus on the repercussions of the offense and the circumstances surrounding it, *i.e.*, the *res gestae*. Thus, to whatever extent it *was* intended that court-martial sentencing evidence approximate that contained in a federal presentence report, the reference to the federal rule should not justify a major expansion of the evidence that can be submitted on sentencing. It is true that the federal courts routinely consider evidence of uncharged misconduct during sentencing.[31] As one court explained, however, this practice is not without limits: "Implicit in all of those cases [permitting extensive additional information, including uncharged misconduct] is the assumption that the sentencing judge has broad discretion to decide for himself not only the relevance but also the reliability of the sentencing information."[32] Presumably, the federal judge's exercise of discretion is guided by experience and knowledge of legal principles. The policy rationale underlying the federal practice is absent in courts-martial whenever members adjudge the sentence, however, because only military judges are presumed to know and correctly apply the law.[33] The drafters of the military rules were plainly aware of this distinction between the federal and military systems:

> Sentence procedures in Federal civilian courts can be followed in courts-martial only to a limited degree. Sentencing in courts-martial may be by the military judge or members. The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports. . . .[34]

The drafters were aware of the distinction between the systems and apparently accepted it. This is inconsistent with the *Harrod* interpretation of an intent to "greatly expand" admissible sentencing evidence. Such an expansion would discourage jury sentencing, thus lessening the distinction between the systems.

These three areas of analysis—the drafters' comments, the cases cited by them, and the precise nature of the presentence report—strongly support the conclusion that *Harrod* carries the law of uncharged misconduct on sentencing further than was intended in the MCM, 1984. The more reasoned approach is that set forth in *Martin*, notwithstanding the fact that it considered the similar MCM, 1969 provisions then in effect. As long as the Court of Military Appeals is willing to consider the drafters' restrictive intent when it analyzes the "facts" permitted by the sentencing rules, and the probative value of uncharged misconduct in proving or disproving those facts, the result will be legally sound and fair.

Defense Counsel Strategy

Much of the prior guidance appearing in *The Advocate* for dealing with uncharged misconduct is still pertinent. Although *Harrod's* analysis is suspect, it cannot be ignored by defense counsel. The following recommendations should help counsel oppose introduction of uncharged misconduct and enhance the potential for success on appeal. This discussion assumes that counsel have discovered all potential uncharged misconduct in the case by conducting thorough pretrial interviews and investigations.

1. Consider the uncharged misconduct when the choice of forum is made. While the existence of the uncharged misconduct should by no means control the decision about forum, defense counsel can make a more persuasive argument that prejudice will outweigh probative value when members are considering the evidence. Counsel can argue that the members lack the legal training and experience of the military judge and are more likely to misuse the evidence. Of course, the members will consider the unfavorable evidence if this argument fails, and counsel may not wish to take this chance. In this regard, there appears to be no prohibition against deferring the choice on forum until after a decision on the admissibility of the questioned evidence.

2. Be aggressive in negotiating the contents of stipulations of fact. The Army court is willing to accept the parties' agreement in such stipulations, and it is not likely to consider a claim first raised on appeal that inadmissible matters were included.[35] Even if the government demands inclusion of uncharged misconduct under *United States v.*

[30] 2 M.J. at 398.

[31] United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979).

[32] *Id.* at 1138.

[33] United States v. Montgomery, 20 C.M.A. 35, 42 C.M.R. 227 (1970).

[34] R.C.M. 1001 analysis.

[35] United States v. Marsh, 19 M.J. 657 (A.C.M.R. 1984).

Sharper,[36] raise the issue at trial and move for redaction of the adverse material. Do not give the appellate courts an opportunity to apply waiver.

3. Object at every possible stage of the proceedings, preferably in the form of motions *in limine*. The Army Court of Military Review has indicated that the military judge need not *sua sponte* perform a Rule 403 analysis in the absence of defense objection.[37] Discuss the analysis to R.C.M. 1001 and 1001(b)(4) in arguments supporting your motions and objections. Distinguish *Harrod*, if possible, and construe *Martin* strictly in light of the drafters' comments. This will preserve the error for appellate purposes.

4. Trial counsel tend to use the "shotgun" approach when asked to justify the introduction of uncharged misconduct as being admissible on the merits under Rule 404(b). They will assert that the evidence is (or would have been) relevant on several issues. Defense counsel should respond that the evidence is *not* relevant on *any* possible issue. Begin the attack by forcing the trial counsel to explain in detail the inferential links between the misconduct and one of the ultimate factual issues such as intent, motive, or opportunity. This serves two purposes. First, if the proper basis for admissibility is to show identity, preparation, or the like, the misconduct may not have any aggravating quality under the sentencing rules. The *Harrod/Martin* conflict can then be highlighted. Second, the trial counsel may be unable to develop a satisfactory chain of inferences between the misconduct and *any* of the Mil. R. Evid. 404(b) "pigeonholes." Even if the evidence is ultimately admitted, the existence of a prior, focused ruling may limit the Army Court of Military Review in its analysis.

As an alternative to the basic Rules 404(b) and 403 arguments on admissibility, consider stipulating to the existence of an intent or knowledge element in the charged specifications.[38] If the government refuses to stipulate, an unequivocal offer to stipulate maintained in good faith throughout the proceedings should be enough, under federal court precedents,[39] to remove the issue from the case and thus render proffered uncharged misconduct irrelevant to any contested issue. Obviously, this stratagem is more useful in a contested case, but the possibilities in a guilty plea case should be considered. Under *Harrod*, the military judge will have to determine how Rule 404(b) issues would have been resolved had the case been contested. Logically, that analysis should take into account the likely defense strategy. Who knows better than defense counsel how the case would have been tried? And, if defense counsel can produce documents prepared in good faith during trial preparation, recording bargaining sessions with or representations to trial counsel, or file entries on strategy about issue stipulations, he or she can bolster the argument that uncharged misconduct would not have been relevant or admissible had the case been contested. Thus, defense counsel may be able to anticipate the *Harrod* issue in a case with significant uncharged misconduct and prepare the case against admissibility almost from the beginning. Of course, the Army Court of Military Review may ultimately hold that the applicable standard is evidence that could have been admitted on the merits under "any conceivable scenario," rather than evidence that would have been admitted on the merits under the "most likely scenario." As long as this question remains unresolved, counsel should make the best record possible.

5. Some of the cases have presented a careful analysis of uncharged misconduct as it may reveal the accused's attitude or state of mind about his or her offenses.[40] This is probably the most defensible analysis under the Rules and prior case law, and will present defense counsel with the greatest challenge in arguing that uncharged misconduct does not, in some fashion, explain the accused's state of mind at the time of the offenses. This is one basis upon which *Harrod*, if limited, may be considered to be consistent with *Martin*, *i.e.*, uncharged misconduct under Rule 404(b) that illuminates the accused's state of mind in relation to the charged offenses may be received, subject to Rule 403. Such factors as dissimilarity of the charged and uncharged offenses, the number of uncharged acts, the lapse of time between the charged and uncharged offenses, and the vagueness or clarity of the evidence of the uncharged misconduct, are relevant in attacking the usefulness of the evidence to show the accused's state of mind at the time of the offenses.[41] Consider Chief Judge Everett's example in *Martin* of the distinction between a drug sale as a favor and one as part of a large business.[42] If there were only a few uncharged drug sales, defense counsel should assert that any marginal relevance to state of mind at the time of the charged offenses is far outweighed, as in *United States v. Gambini*,[43] by the "tremendous potential for prejudice."[44]

[36] 17 M.J. 803 (A.C.M.R. 1984).

[37] United States v. Green, CM 447247 (A.C.M.R. 25 Nov. 1985); *United States v. Harrod.*

[38] *See* Vint, *supra* note 2, at 113.

[39] United States v. Webb, 625 F.2d 709 (5th Cir. 1980); United States v. Mohel, 604 F.2d 748 (2d Cir. 1979); United States v. DeVaughn, 601 F.2d 42 (2d Cir. 1979); United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979). *See also* Gilligan, *Uncharged Misconduct*, The Army Lawyer, Jan. 1985, at 1, 7–8.

[40] United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); United States v. Martin, 20 M.J. at 231 (Everett, C.J., concurring); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

[41] It could conceivably be argued that the accused's state of mind up to and including the date of trial is relevant, and uncharged misconduct subsequent to the charged offenses is therefore relevant if admissible under Rules 404(b) and 403, and R.C.M. 1001(b)(4). The cases considering state of mind, however (*supra* note 40), both factually and in terms of analysis, do not look beyond the date of the charged offenses in considering state of mind relevant on sentencing. The result in United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985), is distinguishable as it involved the application of R.C.M. 1001(b)(2), a separate avenue for introduction of aggravation evidence not necessarily related to the accused's state of mind. In any event, the analysis of "other" acts of misconduct under Rule 404(b), when the state of mind at the time of the charged offenses is pertinent, permits consideration of uncharged acts occurring both before and after the charged offenses. United States v. Beechum, 582 F.2d 898 (5th Cir.) *cert denied*, 440 U.S. 920 (1978); United States v. Hill, 13 M.J. 948 (A.F.C.M.R.), *petition denied*, 14 M.J. 291 (C.M.A. 1982). The subsequent misconduct is viewed more restrictively; its probative value must be more carefully established. United States v. Hill, 13 M.J. at 950 n.1.

[42] 20 M.J. at 232 (Everett, C.J., concurring).

[43] 13 M.J. at 423 (C.M.A. 1982).

[44] *Id.* at 429.

6. Pay particular attention to prejudicial effect under Rule 403. Because the Court of Military Appeals will apply an "abuse of discretion" standard to the military judge's ruling,[45] the time to make the most persuasive showing of prejudice is at trial. Remember that the potential for prejudice outweighed probative value in *Gambini* and in Chief Judge Everett's opinion in *Martin.* Think through and specifically articulate the inferences which support prejudice. Consider whether the uncharged misconduct will be inflammatory.[46] If the only discernible prejudice is the tendency to show that the accused is a "bad person," attack the probative value of the evidence; minimize its tendency to prove aggravating facts under the sentencing rules.

7. Trial counsel are usually unable to resist arguing the uncharged misconduct to the sentencing authority.[47] Ask the military judge to specify the basis for the admissibility of uncharged misconduct, and request that trial counsel be limited in argument to that specific ground. Do not hesitate to object if trial counsel argues or infers that the uncharged misconduct shows the accused to be a bad person who deserves enhanced punishment.[48] Counsel must always weigh how much attention counsel draws to the misconduct by objecting, or by requesting instructions. Once again, however, counsel should be careful not to create the basis for invocation of waiver without good reason.

Summary

While the recent developments in the law of uncharged misconduct have broadened the scope of admissibility, there are still many avenues available for challenging this type of evidence on sentencing. Effective defense advocacy will require vigilance—uncharged misconduct must be anticipated, objections must be made and supported whenever proper, trial counsel's arguments must be carefully monitored, and inferences about "state of mind" must be minimized. This is an area which requires the exercise of defense counsel imagination, ingenuity, and creativity. Aggressive advocacy will help keep the sentencing authority from improperly considering uncharged misconduct.

[45] *Martin*, 20 M.J. at 230 n.5.

[46] United States v. Roberts, 18 C.M.A. 42, 39 C.M.R. 42 (1968).

[47] United States v. Boles, 11 M.J. 195 (C.M.A. 1981).

[48] *Id.*, United States v. Gambini, 13 M.J. at 427.

DAD Notes

Beginning with this issue, The Advocate *section of* The Army Lawyer *will periodically include this feature. This section will primarily feature short articles discussing appellate court decisions having an impact on trial practice. It may also include suggestions to trial defense attorneys about effective or innovative tactics or techniques appearing in records of trial reviewed by appellate defense counsel. Contributions for this section of* The Advocate *are welcome and may be sent to the Editor,* The Advocate, *Defense Appellate Division, USALSA, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.*

Once Is Not Enough

A recent case before the Army Court of Military Review illustrates the importance of objecting to an error each time it arises despite previous adverse rulings by the military judge, *United States v. Eads.*[1] This case involved a fight among the accused, his two friends, and three other soldiers. On cross-examination, the trial counsel asked one of the accused's co-actors about nonjudicial punishment (Article 15) he received for the incident. Defense counsel's objection to this question was overruled. Later the trial counsel conducted a much more extensive cross-examination of the other co-actor concerning his complicity in the matter and the nonjudicial punishment he received.

The Army Court of Military Review ruled that these questions constituted error, but held that the objection was waived as to the second co-actor due to failure of the defense counsel to object. The court then went on to evaluate the preserved error and found it to be harmless.

Although the defense counsel recognized and objected to the error as soon as it arose, he failed to restate his objection when it reoccurred. While renewing the objection may not, in light of the appellate court's finding of harmless error, have changed the result, a timely objection in another case may preserve error that will result in a finding of prejudice on appeal. Moreover, making the second objection will also give the military judge an opportunity to review the earlier ruling in light of subsequent testimony. If the objections are overruled in a trial before court members, defense counsel should be prepared to submit special instructions to limit the prejudicial impact of the questionable evidence. Captain James McGroary.

Stipulate at Your Peril

Does defense counsel have the right to litigate the admissibility of certain statements made by his or her client after these statements have been included in a stipulation of fact required as part of a pretrial agreement? The Army Court of Military Review, in *United States v. Rasberry,*[2] recently answered this important question in the negative. In *Rasberry,* the accused made several unwarned statements to members of his chain of command prior to trial. These statements were included in a stipulation of fact signed by the parties. Prior to entry of pleas, the defense counsel moved to excise the unwarned statements from the stipulation as having been obtained in violation of his client's rights under Article 31 of the Uniform Code of Military Justice. The military judge refused to entertain the motion and advised the accused that he did not have to enter into the stipulation of fact but that failure to agree to the contents of the stipulation would operate to cancel the pretrial agreement. The accused consented to the stipulation as written and thereafter entered pleas of guilty.

Chief Judge O'Roark, writing for the Army court, held that the military judge did not err in refusing to give the defense an opportunity to litigate the admissibility of portions of the stipulation. The court cited three factors in reaching this conclusion: the sentence limitation in the pretrial agreement was highly favorable; the pretrial agreement did not require the defense to give up a significant right; and there was not a fair risk that the accused was denied due process because the inferences from the evidence indicated that no rights warnings were in fact required. The court's express reliance on these three factors gives *Rasberry* limited precedential value. Indeed, one question left open is whether the government may insist on including aggravating matters in stipulations which would otherwise be clearly inadmissible.

Despite its limited future applicability, there is always the potential that *Rasberry* will be broadly interpreted to entirely foreclose the defense from contesting aggravating matters included in stipulations. This interpretation, though exceeding the scope of the *Rasberry* decision, is consistent with other cases holding that, when negotiating pretrial agreements, the government can require an accused to stipulate to aggravating matters relating to the offenses to which he is pleading guilty.[3] These cases give the parties more leeway in negotiating stipulations of fact and minimize the role of the military judge in controlling the contents. As a practical matter, the decisions will benefit the government because they broaden the scope of aggravating matters which may properly be included in the pretrial agreement.

The lesson for the trial practitioner from these cases is to try to exclude as much unfavorable information from stipulations as possible at the outset. Counsel should become familiar with the decisions in this area, including *Rasberry,* and point to any distinguishing factors when negotiating the contents of stipulations. Counsel should explore the possibility of including in the pretrial agreement a provision

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[1] SPCM 21484 (A.C.M.R. 26 Nov. 1985).

[2] SPCM 21242 (A.C.M.R. 17 Dec. 1985).

[3] *See, e.g.,* United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985); United States v. Marsh, 19 M.J. 657 (A.C.M.R. 1984); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

that the admissibility of certain portions of an agreed-upon stipulation will be determined by the military judge.[4] Although the government has the option to refuse to consider this clause in a plea bargain, defense counsel should attempt to have it included, particularly where the admissibility depends on constitutional questions such as improper searches or involuntary statements. A stipulation to this effect would promote judicial economy. If hard bargaining fails to achieve a satisfactory stipulation, the client should be fully advised that attempts to convince the military judge to intervene and excise portions of the stipulation will probably not succeed. Captain Joe Tauber.

Clerk of Court Notes

Orders of the Court

In the first eleven months of 1985, the Army Court of Military Review issued more than 100 orders. Aside from orders routinely inviting the filing of briefs in cases remanded by the Court of Military Appeals (20), the most numerous category consisted of orders specifying additional issues to be briefed in cases under active review. In 19 such orders, the court specified 37 issues for additional briefing by counsel.

Twelve orders directed appointment of appellate counsel in cases in which the accused initially had waived counsel. In general, those were cases in which possible appellate issues were seen or the adequacy of the advice given concerning appellate rights was questionable in the light of *United States v. Palenius,* 2 M.J. 86 (C.M.A. 1977). In a few cases, appellate counsel, having confirmed the accused's desire to proceed without counsel, subsequently withdrew.

Seven orders denied petitions for extraordinary relief, five remanded cases for post-trial sanity proceedings, and five remanded cases for Rule for Courts-Martial (R.C.M.) 1112 review upon the accused's withdrawal of the case from appellate review. Three orders abated all proceedings *ab initio* by reason of the accused's death before the conviction had become final under R.C.M. 1209(a).

Of particular interest to the field are orders to produce evidence on issues raised before the court. In one case, the court directed the Chief of the Trial Judiciary to secure a military judge's affidavit concerning his alleged conversation with the accused during a recess in the trial. A staff judge advocate was directed to obtain from the trial counsel and the Chief, U.S. Army Trial Defense Service, was directed to obtain from the trial defense counsel affidavits as to their information at the time of trial as to the nature of pretrial restraint imposed on the accused. In another case, civilian and military trial defense counsel were ordered to respond to interrogatories framed by defense and government appellate counsel concerning the accused's post-trial assertion of ineffective assistance of counsel. In the same case, the court found it necessary for a military judge to conduct an inquiry and make findings of fact as to the accused's choice of appellate counsel in view of conflicting statements in appellate exhibits filed with the court.

Finally, five orders issued by the court required that records of trial be resubmitted to the military judge for reexamination and possible correction. These were in addition to communications sent by the Clerk of Court in seventeen cases in which the record was found to be incomplete.

[4] *Cf. Sharper,* 17 M.J. at 807. By agreeing to stipulate, a party does not waive the right to contest the admissibility of objectional evidence in the stipulation. *See also* United States v. Keith, 17 M.J. 1078, 1080 n.* (A.F.C.M.R.), *certificate for review filed,* 18 M.J. 97 (1984). If trial counsel requires that the defense counsel stipulate to what is thought to be inadmissible aggravating evidence, "we recommend that trial defense counsel enter into the stipulation of fact, if true, and raise the issue of any inadmissible matters contained therein at trial for resolution by the military judge on the record."

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Table 1
Third Quarter, Fiscal Year 1985; April-June 1985

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	.50(2.00)	.40(1.60)	.64(2.56)	.76(3.04)	.89(3.56)
BCDSPCM	.47(1.88)	.44(1.76)	.55(2.20)	.44(1.76)	.55(2.20)
SPCM	.13(.52)	.13(.52)	.13(.52)	.24(.96)	-(-)
SCM	.42(1.68)	.44(1.76)	.34(1.36)	.43(1.72)	.55(2.20)
NJP	39.78(159.12)	42.10(168.40)	35.20(140.80)	39.64(158.56)	36.17(144.68)
(Summarized)	(8.29(33.16))	(9.92(39.68))	(5.53(22.12))	5.84(23.36))	5.78(23.12))

Note: Figures in parentheses are the annualized rates per thousand.

Table 2
Fourth Quarter Fiscal Year 1985; July-September 1985

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	.43(1.72)	.35(1.40)	.54(2.16)	.61(2.44)	.70(2.80)
BCDSPCM	.37(1.48)	.32(1.28)	.45(1.80)	.51(2.04)	.28(1.12)
SPCM	.10(.40)	.08(.32)	.13(.52)	.27(1.08)	-(-)
SCM	.42(1.68)	.43(1.72)	.40(1.60)	.47(1.88)	.42(1.68)
NJP	38.05(152.20)	39.65(158.60)	34.23(136.92)	39.58(158.32)	42.02(168.08)
(Summarized)	(8.11(32.44))	(9.75(39.00))	(5.03(20.12))	(6.57(26.28))	(5.51(22.04))

Note: Figures in parentheses are the annualized rates per thousand.

Table 3
Fiscal Year 1985

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	1.81	1.40	2.36	2.83	3.33
BCDSPCM	1.66	1.48	1.92	2.40	1.16
SPCM	.46	.41	.49	.96	.14
SCM	1.66	1.66	1.62	2.03	1.56
NJP	153.99	162.02	138.54	149.80	144.52
(Summarized)	(33.72)	(39.91)	(22.88)	(25.73)	(22.50)

Note: The FY 1985 geographical breakout conforms to DOD reporting requirements. "Other" includes Alaska, Panama, and Puerto Rico.

Trial Problems To Avoid

Lieutenant Colonel Michael B. Kearns
Military Judge, Fourth Judicial Circuit, Fort Lewis, WA

This article is not going to address any purely legal issues. There are enough scholarly articles delving into the mysteries of search and seizure, confessions, multiplicity, and the myriad of other issues occupying so much of a trial advocate's energies. What I would like to examine are six nonlegal problems trial counsel (TC) and defense counsel (DC) frequently encounter when their cases come to trial, and how I believe those problems can be avoided. These problems cause a trial attorney as many unnerving moments as the legal issues connected with a case, and they can unnecessarily call the attorney's competence into question.

The first problem deals with the attendance of court members at trial and belongs solely to the TC. The TC is responsible for notifying court members of the requirement to be present at trial. It reflects poorly on the TC when, due to lack of notification, some of the court members fail to report and cause a trial to be put on hold until they have been located. Such avoidable delays raise havoc with a court docket and tend to cause other court members to question the competence of the trial counsel and the SJA office in general.

Almost invariably, this problem stems from the failure of the TC *personally* to notify all court members of the need for their attendance, and to give each court member a definite time and place for that attendance. In this regard, the TC would be well advised to make a memorandum for record (MFR) of the notifications. When it is necessary to relay the notification through an intermediary in the court member's unit, the MFR should include the name and grade of that intermediary. Still, the "battle-scarred" TC will always contact such court members prior to the court date to ensure the notification was received.

The second problem can cause hypertension in a DC and occurs all too frequently. It centers around the use of a stipulation of fact in a guilty plea case. Frequently, accused stumble through or, worse yet, totally disagree with the contents of a stipulation of fact. This performance is rarely excusable. Either an accused can or cannot agree to what is contained in the stipulation of fact, but the place to determine that is in the DC's office before trial, not in court after a plea of guilty has been entered.

It is the DC's job to ensure the client understands and agrees to all the facts contained in the stipulation. This requires a line by line review of the document before trial. Additionally, the DC must be certain the client is willing to agree to facts that constitute the elements of the offense(s) to which the client is pleading guilty; otherwise the result may be an improvident plea and a lost pretrial agreement.

Although it is the duty of the DC to go over the document carefully with the client, making sure it is free of errors, this cannot be accomplished until the TC prepares the stipulation of fact. Therefore, the TC is equally responsible for seeing that this problem does not appear in court.

The entry of a guilty plea by exceptions and substitutions can quickly become a tongue-twisting embarrassment for a DC. This need not be the case. All the DC needs to do to avoid this third problem is to write out the plea beforehand, give a copy to the judge, and read it aloud in court. There is nothing demeaning about proceeding in this manner. An experienced DC will always use this method of delivering a plea by exceptions and substitutions.

An objection to the testimony of a witness or to the admission of a piece of evidence is not an infrequent occurrence during a trial. While this is not a problem in itself, one quickly develops if the offering party fails to have the law supporting its admissibility at hand. Counsel must anticipate that evidence highly damaging to the other side or whose admissibility is potentially controversial will be objected to. It is exceedingly disruptive of a trial's steady progress to have to recess so that counsel can do research that should have been accomplished before trial. Counsel should be prepared not only to cite the Military Rule of Evidence in support of their position, but also the applicable case law interpreting the rule of evidence in issue as well.

The next problem could easily be entitled, "Where's the Witness?" and surfaces in one of three ways. The first shows up when the witness does not. Only the following steps can save a counsel from certain criticism should a witness fail to appear. The witness' unit must be adequately notified of the need for his or her appearance. This is best accomplished by sending the unit a Disposition Form, or other written notice, specifying the date, time, and place of appearance, as well as uniform requirements for the witness. Shortly before trial, the written notice must be followed up by a telephone call confirming the need for the witness.

The second variation of the problem strikes the DC when the government's case ends early and there is still sufficient time in the day to begin the defense's case. The DC, however, does not have the defense witnesses present. Why? The DC erroneously anticipated the government's case taking longer and decided not to direct defense witnesses to be present at the beginning of the trial. Unless otherwise agreed to by the judge, defense witnesses should always be present on the first day of trial.

The last variation of "Where's the Witness?" is a sure way to create delay and annoy the other participants in the trial. Without prior approval by the judge, counsel releases a witness whose presence later becomes necessary. It is a risky business at best and no circumstances justify it. A little common sense can eliminate all aspects of the witness problems discussed here. Simply make sure personally that your witnesses are present on the first day of court and do not release them until you have the judge's permission.

The last problem I want to discuss is courtroom decorum of counsel. Most counsel seem to know they should stand when addressing the judge or court members or when examining a witness. Similarly, most counsel know that once the judge has ruled on a matter the issue is closed and displays of displeasure with the ruling are not appropriate. There are, however, counsel who do not realize that it is out of place to carry on a conversation, heated or otherwise, with opposing counsel when a trial is underway. Unless the military judge specifically indicates to the contrary, there should be no conversation between opposing counsel while court is in session.

This list of potential problem areas is by no means exhaustive. Nonetheless, by studiously avoiding just these six, counsel can make their lives in court less stressful and trials can proceed more smoothly.

Trial Defense Service Note

Preparing to Defend a Soldier Accused of Child Sexual Abuse Offenses

Captain Patrick J. Bailey
Senior Defense Counsel, Fort Bliss, Texas

Introduction

One of the most difficult assignments for an attorney in the criminal defense arena is representing a soldier accused of sexually molesting a small child. Almost without exception, these cases present issues to the attorney which involve complex professional, legal, and emotional problems for everyone involved. This is especially true where the accused denies the allegations and where the alleged victim is not a close family member. This article will list and discuss various tactical considerations available to a defense counsel during the pretrial and investigation stages of a child sexual abuse case. It discusses different types of child molestation cases and several methods of resolving the issues that arise within them that must be confronted and resolved by the trial defense counsel long before trial. Defense success at trial is critically dependent upon the work done by the client and counsel from the time the allegations of abuse are first made. Before using any of these suggested tactics, an attorney should carefully consider the facts and issues in the particular case and should further carefully consider the effects of a particular tactic on the case.

The number of child sexual abuse cases being tried in the military is increasing. Any defense counsel who is assigned a child molestation case should become familiar with the general literature in the area of diagnosing and treating child sexual molesters and their victims. The attorney should also become familiar with the procedures used in the local jurisdiction for reporting, investigating, and processing child sexual abuse cases. Frequently, the Army relies on local child welfare agencies for investigation and counseling services. The personnel employed as social workers in the civilian agencies and the records they keep are a valuable resource to a defense counsel representing an accused child molester. In addition, if these agencies provide the counseling services for the accused, their employees will typically become witnesses for one side or the other at the trial.

Initial Meetings With the Client and Principal Witnesses

How the initial meetings with the client and principal witnesses are handled depends upon what information is available to the attorney. Several scenarios and issues merit discussion.

If a client seeks legal advice before being apprehended, it is essential that the defense counsel convince him that he should not make any statements to the authorities or chain of command. Many clients who have molested children are very anxious to "bare their soul" to anyone willing to listen. Also, social workers will tell them that confession is the first important step in the rehabilitation process.

Regardless of whether the client admits to the alleged conduct, an interview with the victim as soon as possible is essential. If the victim is a close relative of the client, these interviews are easily arranged. If the victim is a stranger (*e.g.*, a neighborhood child) it will be difficult, but not impossible, to arrange to speak with the child privately. The attorney should not be afraid to speak with the child even though the child has not been interviewed by social welfare and police agencies. In fact, it is best to be the first one to interview the child. The attorney should try to be as natural as possible during the interview. Many times the child is afraid of the adult interviewer and afraid to discuss an incident of child molestation. Great care should be exercised in conducting these interviews. The attorney should not show any emotional or nonverbal reaction to the conduct the alleged victim may describe. Child molestation cases involve some of the grossest human behavior imaginable. Inappropriate reactions may cause the victim to stop talking. The attorney should describe who he or she is and what his or her role in the case will be. In addition, the attorney should learn all of the factual information surrounding the incident in question. Obtaining specific details from the victim early on, before the story becomes rehearsed, will greatly aid the attorney with later case preparation both in terms of preparing cross examination and, if necessary, confronting the client with adverse evidence. In addition, if the client is really innocent and the charges are fabricated, the attorney is most likely going to discover motive to lie, if not admitted lying, at this early stage.

If the child is old enough to be interested in sexual activity, the attorney should attempt to get a sexual history from the child. Questions concerning where the child learned of sex and what experience the child has had with sex must be asked. Feelings about parents and brothers and sisters should also be explored. The attorney should treat this interview as if it was his or her last opportunity to speak with the child (it may well be). Any question, if asked properly, can be asked of a child. Many of these children have not learned the social taboos associated with child sexual conduct and thus are not ashamed to discuss sex openly if approached in the proper manner. Discovering the proper approach with a particular child can be a time-consuming process. It is best to discuss subjects unrelated to the case until the attorney discovers the best method of talking with the child about the alleged offenses.

In addition to carefully interviewing the alleged victim, interviews with the client's close family members are also essential. Care should be taken not to reveal any privileged matters to the spouse at this stage in the case. Usually, whether the victim is a stranger or the client's child, the wife is the biggest supporter. The loss of support at this stage can be devastating to the client and to the case. If the victim is a teenage daughter, questioning her brothers about her conduct and motive to lie can be very beneficial to the defense case. Always remember that the police and social welfare authorities will eventually interview the family. There are numerous advantages to interviewing these people before they are asked to give incriminating statements about your client to the police.

If the client seeks assistance after apprehension, it is essential to find out everything that has happened to him since that time. This includes discovering any statements that were made by anyone to police, chain of command, or social work agencies; determining whether any searches have been conducted; and learning whether the client is under any form of restraint. Because it will usually be impossible to interview the victim before the police and social work agencies do, the attorney should ask the child what she has been told about defense counsel when the interview is conducted. If the attorney has been described improperly, the victim (and the family) should be convinced that the attorney is merely part of the criminal justice system that will handle the processing of the case. The victim should understand that the attorney has no personal investment in the outcome of the case and that the attorney will work hard to ensure that the victim is well taken care of as the case progresses. If the client has confessed to the police, the attorney may want to tell the victim of that fact, thus assuring the victim that her credibility will probably not be attacked. If embarrassing information is needed from parents, the attorney should explain to the parents why the information is important. The attorney should try to provide some motivation for the voluntary disclosure of the desired information. For example, a case once arose where it became essential to learn whether the parents had been physically and sexually abusing their child and were thereby the cause of the child's accusations against the client. This involved obtaining their consent for the early release of psychiatric treatment files. Their consent was easily obtained once they were convinced that the release of the files (which presumably made no mention of abuse) would eliminate the need to raise the issue later in the case.

If the attorney first meets the client after charges have been preferred, all of the things discussed above should be done as rapidly as possible. The attorney should be alert to changes in statements by the witnesses, opinions given to the witnesses about the accused or the defense counsel, and the restriction status of the accused. Changes in statements made by witnesses or the accused should be documented for later use on cross-examination. Unfavorable opinion of the accused or his lawyer should be documented and, if possible, negated with favorable information. The restriction status of the accused should be noted because of speedy trial implications. The prosecutor may be unaware of restrictions imposed by lower level commanders. Any restriction on liberty should be documented.

Pretrial Preparation of Specific Case Strategies

There are several themes and issues that are routinely present in child molestation cases. Which issues arise in a particular case are typically determined by the ultimate plea of the accused.

The Innocent Accused

The most important issue the defense counsel must resolve when the accused is innocent is determining why the child made the allegation of sexual misconduct. Related to this is the fact that most social workers who deal with small children will testify that small children are not capable of lying about sexual acts and sexual conduct. Unless the defense counsel can find evidence which shows that the child was somehow capable of lying about the alleged conduct and has the knowledge required for detailed descriptions of sexual conduct, the client will be convicted.

In dealing with the "children don't lie about sex" expert witness, the defense counsel should determine and prepare cross-examination questions concerning the basis of the expert's opinion. The defense counsel must further find evidence which can be introduced either during the defense case or during cross-examination of the expert that shows that the premises of the witness are not applicable in the particular case. For example, if the expert's opinion is based upon a belief that the child had no exposure to sexually explicit material, and thus could not formulate a detailed fabrication of intercourse, a showing that the child routinely watched pornographic movies with her teenage babysitter would destroy the credibility of the expert opinion. If no basis of knowledge for the child can be found, the defense attorney should at least prepare cross-examination questions that will cause the expert to admit that children do lie about many of things for many reasons. Further, as a result of carefully prepared cross-examination, the expert might testify that, to a small child, the subject of sex has absolutely no special significance, and like other topics of small significance might be something a child would lie about. The attorney should at least plan to plant this seed in the minds of the court members so that it can be used during final argument.

The attorney should never rely on the cross-examination of the child to develop this type of information. While cross-examination of the child can be beneficial in many areas, calling the child a liar or attacking the child's credibility in the typical fashion will cause more harm than good. Even the most gentle cross-examination causes court members to want to protect the "helpless witness" against the nasty counsel. Attorneys need to be very careful in keeping cross-examination of the victim to an effective minimum. Careful drafting of cross-examination questions for the victim is critical. Even the most experienced attorney should not "shoot from the hip" in cross-examining the victim in a child molestation case.

Most evidence that illustrates a child's knowledge of sex and a motive to lie comes from talking with the people the child is around every day. Especially fruitful are conversations with other children who are schoolmates and neighbors of the victim. A prosecutor once encountered a case involving an eight-year-old child who accused a soldier of fondling her vagina. Conversations with her friends revealed that the children had what amounted to a porno club as they met once a week at a neighbor's house to view the latest X-rated movie rented by one child's father. Further conversations with neighbors revealed that the little girl routinely propositioned junior high school-age boys to have sexual intercourse with her. When confronted with this information, the girl admitted lying and said that she made the accusation because the accused had chased her away from the barracks one day. The discussions with the children by the prosecutor resulted in the charges being dismissed. The things seen by children these days which depict explicit sex are too numerous to mention, as are the motivations which cause children to lie. Defense counsel should let their imaginations be their guide in exploring the possibilities.

Another possible theory which merits investigation by a defense counsel concerns whether adults, in warning a child to be careful around strangers, caused the child to believe that the accused molested her. A typical case involving this defense has a fact pattern that includes a small girl playing with a male adult. The girl says that, while playing, the male threw her up in the air and grabbed her "private parts" on the way down. Another common report is that the male fondled the girl as she was seated on his lap listening to a story. A third scenario might involve horseplay in a swimming pool where the girl alleges underwater fondling of her legs, breasts or vagina. The accused claims that he has done nothing improper and that any touching was unintentional and innocent contact. Investigation into the child's background reveals no motive to fabricate the story and an interview shows that she honestly believes that the man fondled her improperly.

In such a case, the defense counsel should determine what the child has been told about child molestation. With the current rage in our society about child molesting, many adults have gone overboard in warning children to be careful about letting adults touch them. These warnings take the form of stern lectures from parents, films shown without parental consent or knowledge to preschool and elementary school children, and classroom instruction from social workers. In one case, a local police department showed a film to a group of first graders which depicted several acts of molestation committed on small girls by their fathers. One of the scenes showed a father reaching up his daughter's dress as he read her a story. A particular little girl became convinced that her father should not read her stories because that meant he was trying to molest her. After the film she reported to the police officer showing the film that her father had been molesting her for some time. When interviewed by social workers with anatomically correct dolls, she duplicated what she had seen on the film, including having the male doll reach under the dress of the child doll. In fact, the father had never molested his daughter. It was only after very careful and lengthy interviews with the child that the authorities realized that the film was the cause of the reported misconduct. Had the defense counsel not insisted that the social workers view the film and show it a second time to the child to determine whether it caused the report, the father might well have been convicted and sentenced to prison. Had the child related her story to a court-martial panel, she would have been believed. There was no doubt that she believed her father had molested her.

Parents, especially those who were molested as children themselves, often scare children with stories about what happens to little girls who allow men to touch them. Children are often subjected to stories of torture and threats of severe beatings by over-zealous parents who are trying to protect their children from the bad elements in our society. The mental stress caused by this conditioning can often cause children to make false allegations of sexual molestation. Defense counsel must interview the parents very carefully to determine what types of "monsters" they have created in their children's minds. This type of evidence can often be the cornerstone of a winning defense case.

The Guilty Accused

As with other cases, a child molestation case typically comes to the attention of the defense counsel after the accused has been apprehended and has provided a written confession to most if not all of the charged conduct. There are several things a defense counsel can do before trial to obtain a light sentence.

The first important task is to work with the accused toward entering and participating in a local treatment program. By being honest and remorseful with social workers and therapists, an accused can convince them that he is someone who can be treated successfully in the military community. Once these social workers and therapists are convinced of the accused's treatment potential, they will go to great lengths to help him avoid court-martial and jail. This type of support goes hand-in-hand with the recent Army policy which advocates keeping the soldier in the Army and in the family unit in appropriate cases. The defense counsel needs to keep a constant watch over the relationships that are built between the accused and his therapists. The accused should be constantly reminded that the therapists are the strongest part of a defense extenuation and mitigation case. Their testimony will determine the severity of the sentence in every case. A recommendation for confinement from a therapist will cause a panel to lock up an individual accused. A recommendation for no confinement, while not automatically accepted, will be given great weight by a panel.

A second major task for the defense counsel is to convince the accused's family to also enter a treatment program. Most experts in the field of child molestation agree that the problems which cause this conduct are family related. A successful treatment program for the offender must include treatment for his family. The fact that the entire family is in an integrated treatment program which is described in great detail during extenuation and mitigation makes for a persuasive argument that confinement and discharge are ineffective as punishments in a particular case.

As with all sentencing presentations, child molestation cases require that the accused be presented as an outstanding soldier. Many of these cases involve senior noncommissioned officers who have exemplary military records. Defense counsel should discover and prepare for presentation every single witness and document that says something good about the accused. No witness will testify that he or she condones child molesting, but most will be willing to otherwise describe the accused's duty performance. Many witnesses will recommend retention in the Army once they are convinced that the accused has entered a treatment program and is really getting help with his problem. In this regard, it is important for the defense counsel to remind the accused to be open and candid in reporting his treatment progress to his commanders and supervisors. Defense counsel should personally brief each significant witness as to the progress of the accused in the treatment program. Counsel should also be sure to monitor damage caused by adverse comments made to potential witnesses by the prosecutors in the case. Many times, in "woodshedding" defense witnesses, prosecutors will stretch the facts in the case or will express personal opinions about the particular treatment program the accused is in which are invalid and unfounded. Defense counsel must be prepared to correct misinformation as the case progresses toward trial.

Finally, the defense counsel must determine long before trial whether the accused's children will be called to testify. If children are to be called as witnesses, the defense counsel must start preparing them well in advance of trial. The same concerns about the child victim testifying in court are valid for the accused's children. They too are victims in this type of case. This testimony is particularly effective in cases where the victim is not related to the accused. Showing the court that there are other children who will be affected by the sentence imposed in a particular case can be an effective way to convince them that jail and discharge are not appropriate. This type of evidence lends itself toward a sentencing argument which stresses the suffering of children and asks the court to stop the suffering of all of the children in a particular case. It is very difficult for a court to hear and watch the very emotional appeal for leniency from the accused's five-year-old son and not be affected by it. In some cases, this is the most effective weapon available to the defense during sentencing. Well prepared, it can result in a sentence which includes only reduction in rank or minor forfeitures.

Conclusion

As the number of child molestation cases increases in the military, more and more defense counsel will be called upon to provide an effective defense for a particular accused. The most effective way to handle these cases is to get substantially involved the minute the case is assigned. The successful presentation of a defense, either during findings or sentencing, requires early preparation and formulation of case theories and strategies. Defense counsel who are unable to set aside personal feelings about child molesting and child molesting offenders should not undertake to defend someone accused of this type of crime. These cases require the talent and ability of a skilled professional because there are substantial dangers that an innocent soldier will be convicted and confined for a long time. Every theory of innocence must be explored and throughly investigated. The defense counsel can leave no stone unturned in the quest for exculpatory evidence.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Administrative and Civil Law Note

Outside Employment by Army Civilian Attorneys

A recent interim change to Army Regulation 690–300[1] significantly narrows and clarifies the scope of outside employment by Army civilian attorneys. Chapter 302 now contains more specific policy guidance, including a clear disfavor of outside employment.[2] Further, it states that "the outside *practice of law* particularly is discouraged."[3] In addition to general restrictions,[4] the change also requires written approval by the appropriate qualifying authority prior to the attorney engaging in the outside practice of law.[5] Even with prior written approval, an Army civilian attorney cannot practice law in violation of 18 U.S.C. §§ 203, 205, or 209 (where the U.S. is a party or has an interest in the proceedings, or actions which involve outside compensation for official services), Army Regulation 600–50,[6] Army Regulation 27–1[7] (if The Judge Advocate General is the qualifying authority), or concerning matters:

(a) Referred from his or her Army legal office;
(b) With which he or she is, or may be expected to become, involved in an official capacity; or
(c) Involving government personnel service by his or her legal office.[8]

The Army General Counsel may authorize deviations from the above restrictions only under exceptional circumstances.[9]

Finally, the change recognizes and authorizes *pro bono* work by Army civilian attorneys, subject to the restrictions of AR 690–300 (I09 1985), Federal Personnel Manual Chapter 990, and general conflict of interest guidance. *Pro bono* services must also be performed during nonduty time at no expense to the government.[10] Major Gruchala.

Criminal Law Notes

Punitive Discharge Clause in Pretrial Agreements

The accused is charged with the sale of a small amount of marijuana. He enters into a pretrial agreement that limits his punishment to a bad-conduct discharge and six months confinement. At trial his counsel argues, "Throw my client in jail, give him sufficient jail time, but please don't discharge him. Let him soldier his way back from this crime." In response, the members sentence the accused to thirty months in confinement but no discharge. The staff judge advocate must now advise the convening authority that the maximum sentence that he may approve is confinement for six months. Outraged, the unit learns that in 180 days the accused will be back in a full-duty status.

In response to the above scenario, the following clause has increasingly been appearing in pretrial agreements: *if no punitive discharge is adjudged, I may approve the entire sentence as adjudged.*

The use of the above term in a pretrial agreement has caused considerable controversy in the courts. Different panels of the Army Court of Military Review have alternatively condemned and approved the use of the clause. In *United States v. Castleberry,*[11] then-Chief Judge Suter, after surveying the decisions of the other panels, concluded the term was a permissible means of ensuring that the accused received an appropriate punishment. Senior Judge Wold, in a forceful dissent in *United States v. Cross,*[12] came to an opposite conclusion and sharply focused the debate on the use of the clause.

[1] Dep't of Army, Reg. No. 690–300, Civilian Personnel—Employment (15 Oct. 1979) (I09, 18 Dec. 1985) [hereinafter cited as AR 690–300 (I09, 1985)].

[2] *Id.*, para. 7–14*a*.

[3] *Id.*, para. 7–14*b* (emphasis supplied).

[4] *Id.*, para. 7–14*a* (formerly contained in para. 7–14*c*).

[5] *Id.*, para. 7–2*a*. Such practice "does not include teaching, lecturing or writing for publication." *Id.*, para. 7–14*b*.

[6] Dep't of Army, Reg. No. 600–50, Standards of Conduct for Department of the Army Personnel (20 Nov. 1984).

[7] Dep't of Army, Reg. No. 27–1, Legal Services—Judge Advocate Legal Services (1 Aug. 1984).

[8] AR 690–300, para. 7–14*b*(2) (I09 1985).

[9] *Id.*, para. 7–14*e*.

[10] *Id.*, para. 7–14*d*.

[11] 18 M.J. 826 (A.C.M.R. 1984), *petition denied*, 19 M.J. 315 (C.M.A. 1985).

[12] 19 M.J. 978 (A.C.M.R.), *petition denied*, 21 M.J. 87 (C.M.A. 1985).

Chief Judge Everett, while concurring in the Court of Military Appeals' order denying Cross's petition for review, joined the debate on the side of Senior Judge Wold, condemning the use of the clause unless it was clearly demonstrated on the record that the clause originated with the accused.[13] The problem with the clause, in the eyes of Chief Judge Everett and Senior Judge Wold, was that it inhibited the presentation of extenuation and rehabilitation evidence. An accused may have supervisors who feel that he has rehabilitative potential and yet be reluctant to present such evidence for fear it will increase his chances of lengthy confinement. In addition, it appears that the clause has become a contract of adhesion, being preprinted on the standard form used to request a pretrial agreement, and not a result of a meeting of the minds between the parties. This was not clear in *Cross* as the military judge failed to make any inquiry into the clause. Of course, nothing prohibits the defense counsel from drafting and submitting a separate agreement rather than using the preprinted form.

The government's purpose in including such a term seems clear: to eliminate game-playing by the defense counsel who bargains for one deal and argues for another. No appellate case has "bitten the bullet" and criticized such an argument by the defense counsel. If the government wants to keep the clause, one possibility might be to state in the pretrial agreement that the clause will not be triggered unless the defense counsel specifically argues for no discharge. That eliminates the problem of a defense counsel playing both ends against the middle, but it is uncertain what an appellate court would do with the amended clause. Faced with the clause in these terms, the military judge should inquire into the clause and, at the conclusion of the case, determine on the record if the clause will be operative.

In light of the above decisions, use of a punitive discharge clause should be limited to those situations where its inclusion results from actual bargaining between the parties. The trial counsel should ensure that the military judge determines, on the record, that the accused freely and voluntarily entered into the clause.[14] In any case, it should be removed from the standard preprinted pretrial agreement to prevent appellate argument that it is a contract of adhesion.

Trial counsel should keep in mind that administrative discharge action under the provisions of Army Regulation 635–200[15] is available in those situations where the court-martial sentence does not include a punitive discharge. The same misconduct may be the basis for the administrative discharge action.

The defense counsel who is faced with the above clause as a contract of adhesion should enter the agreement, and then raise the issue with the military judge at trial. The defense should be prepared to demonstrate that the clause is a prerequisite to a pretrial agreement, rather than the result of bargaining. The military judge has the power to strike from a pretrial agreement any provisions he or she finds offensive to public policy.[16] Major Capofari.

Uncharged Misconduct

The finding of guilt or innocence at court-martial often depends upon the admissibility into evidence of the other crimes, wrongs, or acts of the accused. This evidence, commonly called uncharged misconduct, can have devastating effects. A recent opinion by the Navy-Marine Court of Military Review is highly instructive on the rules governing admissibility of such evidence and the procedure to be followed by trial judges in ruling on the admissibility of uncharged misconduct.

Evidence of uncharged misconduct is governed by Mil. R. Evid. 404(b). The rule, while prohibiting the use of uncharged misconduct to prove the character of the accused, permits the use of such evidence for other purposes and gives a non-exhaustive list of permissible reasons for such evidence. In *United States v. Brannan,*[17] the Court of Military Appeals established the essential requirements that must be met to justify the admission of uncharged misconduct. First, the proponent must clearly establish the purpose for the extrinsic evidence, and second, the court must balance the probative value of the evidence against the danger of unfair prejudice.

In *United States v. Peterson,*[18] the accused was charged with kidnapping, rape, and sodomy. The contested evidence, which was the subject of a defense motion *in limine,* was testimony that on two earlier occasions the accused had induced women to enter his vehicle, prevented them from leaving, and took them to a secluded spot against their will. This conduct was similar to the charged offense in some respects, but dissimilar in others.

Uncharged misconduct evidence is sometimes erroneously called similar acts evidence. While the similarity between the charged and uncharged acts is a factor that goes to the admissibility of the evidence, the degree of similarity

[13] 21 M.J. at 88 (Everett, C.J., concurring in the result).

[14] The following inquiry by the military judge is suggested:

—Do you believe you could have achieved a pretrial agreement without this clause?
—Do you have favorable evidence to present on extenuation and mitigation that you will now not present due to this clause?
—Do you intend to request from the court that a punitive discharge be part of your sentence?
—Do you intend to argue to the court that lengthy confinement rather than a punitive discharge is an appropriate punishment?
—Did this clause originate with the defense? (The analysis to R.C.M. 705(d)(2) states, "It is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision so long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain." Despite this language, appellate courts still require novel provisions in pretrial agreements to "originate" with the accused.)

[15] Dep't of Army, Reg. No. 635–200, Personnel Separations—Enlisted Personnel, para. 1–19*c* (5 July 1984).

[16] United States v. Partin, 7 M.J. 409 (C.M.A. 1979); United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

[17] 18 M.J. 181 (C.M.A. 1984).

[18] 20 M.J. 806 (N.M.C.M.R. 1985).

needed depends on the purpose of the uncharged misconduct evidence. For example, to prove identity or *modus operandi*, the acts must be almost identical, while when used to prove motive, the charged and uncharged acts may be very dissimilar.

In *Peterson*, the uncharged misconduct was excluded by the trial judge, and the government appealed under R.C.M. 908. In overturning the ruling of the trial judge, the Navy-Marine Court focused on the probative value of the evidence to prove intent. As kidnapping included the element that the victim be held against her will, evidence that the accused had this intent on a different occasion was probative as to his intent during the charged offense.

In determining the probative value of this type of evidence, the trial court must carefully scrutinize the government need for such evidence. Hence it is best to wait until the defense presents its case before ruling on the admissibility of uncharged misconduct evidence. If the uncharged misconduct tends to prove an element contested by the defense, then the probative value of the evidence is great, while if the defense concedes the element and contests the case on other grounds, the prejudicial value of the evidence is apparent. Waiting until after the defense has presented its case could cause problems for the government. If the government waits for rebuttal and the military judge excludes the evidence, the trial counsel faces a difficult choice: continue with the trial and hope that enough evidence has been presented for conviction; or, appeal under R.C.M. 908, thereby delaying and interrupting the case.

The *Peterson* court also stressed that *intent*, as that term is used in Rule 404(b), is not the same as specific intent when defining the elements of a crime. Whether or not an offense is labeled a "general intent" or a "specific intent" crime is simply not determinative of whether any disputed evidence should be admissible to prove intent. If any type of innocent intent is placed in issue by the defense, it is the negation of that "innocent intent," not merely the intent found as an element of a "specific intent" crime, that makes proof of intent relevant through introduction of uncharged misconduct. Thus in *Brannan*, the denial of any knowledge about marijuana by the accused made instances of prior drug use relevant to rebut this lack of criminal intent; and in *Peterson*, the defense contention that the victim went willingly with the accused permitted government rebuttal with the proffered uncharged misconduct.[19] Major Capofari.

Application Falsehoods as Basis for Impeachment

The Court of Military Appeals' recent decision in *United States v. Owens*[20] reinforces the belief that counsel for both sides should mine the gold that might be present in applications for enlistments, warrants, or commissions. The information appearing in these forms should be contrasted with the information that may be obtained from the National Crime Information Center (NCIC). An arrest or conviction not listed in the application may be used as a basis for impeachment. Applications for enlistments, warrants and commissions are sworn statements; thus the intentional failure to list an arrest or conviction on an application would be a false official statement. For example, the NCIC information would establish counsel's good faith to ask the following questions:

1. Have you ever made a false statement while under oath?
2. Did your application to be a warrant officer list the arrest you had in 1983 and the prior conviction in 1985?
3. Were you convicted in 1985?

Questions 1 and 2 are proper subjects of cross-examination. An opponent may impeach a witness by good faith[21] questioning of the witness about specific instances of conduct reflecting on the character of the witness for untruthfulness.[22] Even though not explicitly required by Rule 608(b), the opponent must have a genuine belief that the arrest and conviction did occur. This belief would be supported by the information from the NCIC. Although the arrest or instance of misconduct might involve an instance of untruthfulness, the judge must exercise discretion in determining whether to permit this type of impeachment by using the balancing test of Rule 403. In *Owens*, the judge weighed the probative value of the evidence against its prejudicial effect against the accused.[23] When the witness is not the accused, Rule 403 applies only when there is a possible prejudicial effect to the accused.

Question 3 would be permissible under Rule 609(a)(1) if the crime was punishable by death, a punitive discharge, or imprisonment in excess of one year under the law of the forum in which the witness was convicted, and the judge determines the probative value of admitting this evidence outweighs its prejudicial effect. The question would also be permissible under Rule 609(a)(2) if the prior conviction involved dishonesty or a false statement.

If a witness denies or responds in the negative to questions 1, 2, and 3, extrinsic evidence may not be introduced except as to question 3.[24] This does not mean that the opponent is required to accept the denials.

> Mil. R. Evid. 608(b) only precluded it [the government] from introducing "extrinsic evidence" to prove this discrediting fact. . . . Such a prohibition does not mean that further cross-examination of appellant is impermissible. . . .Within reason, it [the government] could rephrase its questions in terms of the specific matters admitted so as to gradually but dramatically

[19] For a more complete analysis of uncharged misconduct and Mil. R. Evid. 404(b), *see* Gilligan, *Uncharged Misconduct*, The Army Lawyer, Jan. 1985, at 1.

[20] 21 M.J. 117 (C.M.A. 1985).

[21] *Id.* at 121 n.1. "The defense motions *in limine* filed prior to trial constituted good reason for trial counsel to believe that appellant had in fact been convicted and arrested as asserted in his questions." *See also id.* at 123. "In particular, he had a good-faith belief that appellant had previously failed to provide complete and truthful answers on his warrant-officer application."

[22] *Id.* "[T]he adverse nature of these omissions coupled with appellant's admitted interest in being selected reasonably tended to show these omissions were intentional."

[23] *Id.* at 124–25.

[24] Mil. R. Evid. 608 and 609.

induce appellant to abandon his previous more general denials.[25]

Except for the portion underscored, the following questions were held permissible in *Owens*:

Questions by assistant trial counsel:

Q. Mr. Owens, isn't it a fact that as to your application for appointment as a Warrant Officer in the United States Army and the statement of personal history attached to it, that you knowingly omitted the fact from questions 19 and 18, that you had been convicted in Daleville, Alabama, for the possession of marihuana and marihuana paraphernalia in 1976?

A. No, sir.

Q. Is it not a fact that you intentionally omitted from both of these documents the fact that you had been arrested in 1976 in Daleville, Alabama, for assault and battery <u>on your second wife, Mrs. Jennifer Conant Braun</u>?

A. No, sir.

Q. Is it not a fact that you omitted from both of these documents, the fact that you had been convicted in Enterprise, Alabama, for carrying a .22 caliber pistol in your automobile without a permit in 1976?

A. It was admitted—it was omitted, rather. I did not knowingly omit it.

Q. You did not knowingly omit it?

A. I did not omit it.

Q. Mr. Owens, isn't it a fact that you knowingly omitted all three of these matters from those two documents because you realized that if you put them in there, you likely would not become the Warrant Officer that you wanted so badly to become?

A. No, Sir. That's not true.[26]

The Court of Military Appeals has not decided whether a witness may be impeached by contradiction as to the erroneous answers to questions 1 or 2. Some of the federal courts permit the accused to be impeached under such circumstances.[27]

Owens' testimony at trial, that the killing of his wife was accidental, clearly made his credibility and character for truthfulness issues that the court members would have to resolve. By intelligent use of the records available and comparing the warrant application with the NCIC information, the trial counsel was able to show that Owens had not always been completely truthful under oath. Trial and defense counsel can both use similar methods to impeach the opposing side's witnesses and should be careful to check personnel records and applications against other information concerning the witness. Colonel Gilligan.

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[25] *Owens*, 21 M.J. at 121 n.2 (citations omitted).

[26] *Id.* at 120.

[27] *See, e.g.*, United States v. Benedetto, 517 F.2d 1246 (2d Cir. 1978). "Once a witness [especially an accused-witness] testifies as to any specific facts on direct testimony, a trial judge has broad discretion to admit extrinsic evidence tending to contradict a specific statement, even if such statement concerns a collateral matter in the case."

Legal Assistance to Survivors of the Gander, Newfoundland Tragedy

Since the occurrence of the Gander, Newfoundland tragedy on 12 December 1985, in which 248 soldiers of the 101st Airborne Division (Air Assault) at Fort Campbell died, numerous electronic messages have been sent through legal channels offering guidance and providing updates on efforts to assist survivors.

Following are messages which have been sent as of 20 January 1986, arranged chronologically. Six messages, numbered sequentially, have been sent by the Legal Assistance Office, OTJAG. The Judge Advocate General, Major General Hugh R. Overholt, has sent a message emphasizing the need for effective legal assistance to survivors, and the U.S. Army Claims Service, Fort Meade, Maryland, has sent a message giving guidance on personnel claims. The messages from OTJAG Legal Assistance have been styled "Aircraft Legal Assistance Updates."

Some offices may not have received some or all of these messages. They are synopsized here.

Aircraft Legal Assistance Update No. 1

This message, dispatched 18 December 1985, has the following date-time group: P182117Z Dec 85.

Subject: Liability of Arrow Airlines.

1. Legal Assistance Officers may be contacted by surviving family members of soldiers killed in the Arrow Airlines crash of 12 December 1985. It is possible that Arrow may consider prompt settlement of claims arising out of this tragedy. The following guidance is provided through legal assistance technical channels and is not the opinion of The Judge Advocate General of the Army or the U.S. Government.

2. In advising family members, legal assistance officers must make clear that any decision to settle is strictly personal. However, the legal assistance officer may review options available to the family member and outline alternatives available. In so doing, legal assistance officers must be aware that there is some legal precedent for the position that the $75,000 limitation of the Warsaw Convention and Montreal Agreement may not—repeat—may not apply to a soldier on a military contract flight. *See Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir. 1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965). Family members may want to consult a private attorney specializing in this area before accepting any settlement. Clients may be advised that a contingent fee arrangement is not in their best interest for a one-time consultation. The preferable approach is for consultation on a fixed fee basis, so as not to lose up to ⅓ of the offered amount should the settlement be accepted.

Guidance On Personnel Claims

This message, dispatched 19 December 1985, has the following date-time group: P191500Z Dec 85.

SUBJECT: Personnel Claims (Chap 11) By Survivors Of Soldiers Killed In Crash of DC-8 Aircraft on 12 December 1985.

1. Claims for loss and damage of property by survivors of soldiers killed in crash of DC-8 aircraft on 12 Dec 85 must be processed in an expeditious manner. In order to provide timely and uniform adjudication of these claims, under the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721, the 101st Airborne Division (AASLT) (FC-WABIAA) and Ft Campbell (FC-WOU4AA), Ft Campbell, Kentucky claims office has been designated as the sole point of adjudication and payment of all such claims.

2. Any claims office that receives a Chap. 11, AR 27-20 claim from this incident will notify the Claims Officer of the 101st Airborne Division, Captain Lee Deneke, AV 635-6428/5140, and attempt to secure as much substantiation as possible. In any event, the Claims Office will dispatch the claim within 48 hours of receipt in the most expeditious manner possible to the Office of the SJA, 101st Airborne Division (AASLT) and Fort Campbell, ATTN: Claims Judge Advocate, Fort Campbell, Kentucky 42223.

3. A survivor for purposes of filing these claims is defined in para. 11-3(5) of AR 27-20. Receiving claims offices should insure that complete information concerning the order of precedence is documented in the claims file prior to forwarding. If a mother or father is filing, it is important to establish that no spouse or children exist, or if they do exist, their intent concerning the filing of a claim.

Aircraft Legal Assistance Update No. 2

This message, dispatched 23 December 1985, has the following date-time group: P231700Z Dec 85.

Subject: Survivor Assistance Liaison.

1. This office will soon be designating legal assistance officers to serve as primary advisors to each of the Survivor Assistance Officers and the primary next of kin arising out of the crash of Arrow Air on 12 December. As an exception to policy, on 19 Dec. 1985, TJAG authorized the use of legal assistance officers to advise all primary next of kin, whether or not they would be authorized such assistance under the provisions of AR 27-3. Until formal identification of LAO's is complete you should use your current resources to fulfill this need.

2. Scope of the LAO assistance should include, but not be limited to: death benefits and gratuities due the survivors; the processing of the estate and probate of the will; notification to life insurance companies, and advice on any settlement offers and other legal recourses available to the next of kin as a result of the accident. In the latter instance, this office has been informed that Arrow's insurer is forwarding a letter offering to provide assistance to the survivors and requesting data from these survivors. This offer will be forwarded after receipt and analysis. Indications are that the insurer is interested in a prompt and direct settlement with the next of kin. The survivors may want to refrain from retaining legal counsel until such time as any

forthcoming offer may be received and reviewed. Further information and guidance will be forthcoming.

3. SJA's should contact appropriate casualty area commander immediately to determine if there are any SAO's in your jurisdiction. You are further urged to monitor this area very carefully. This will require coordination with the legal assistance officer to insure that future claims are not compromised and that the Army is not exposed to liability based on our advice. Similarly we must attempt to provide as much assistance as possible to the survivors so as to help them avoid excessive legal fees.

Aircraft Legal Assistance Update No. 3

This message, dispatched 26 December 1985, has the following date-time group: P262055Z Dec 85.

Subject: Aircraft Legal Assistance Update No. 3.

1. The two previous messages, entitled Liability of Arrow Airlines and Survivor Assistance Liaison, are renumbered 1 and 2 respectively. All future updates will be numbered serially.

2. SAO's have been requested to contact the nearest SJA Office and request designation of a legal assistance officer (LAO) to serve as a personal legal advisor to the primary next of kin (PNOK) and SAO.

3. SJA's will designate an experienced LAO to serve in this important and sensitive capacity. SJA's should work with LAO in fulfilling this responsibility. Aircraft Legal Assistance Update No. 2 authorizes legal assistance to all PNOK regardless of whether they are specifically entitled under the provision of AR 27-3.

4. SJA's will provide HQDA (DAJA-LA) the following information by message upon receipt of a request from an SAO:

A. Name, address and phone number of SAO.
B. Name, office address and phone number of LAO.
C. Name and rank of deceased soldier.
D. Name, address and relationship of PNOK.

5. LAO's may advise more than one PNOK as there appears to be no conflict of interest at this time.

6. It may be advisable to appoint a Reserve JA who is located closer to the PNOK and SAO to supplement support given by active duty LAO. SJA's will advise HQDA (DAJA-LA) in the message referred to in para. 4 above if Reserve Support is required. DAJA-LA will obtain such support.

Major General Overholt Message

This message, dispatched 27 December 1985, has the following date-time group: P271848Z Dec 85.

SUBJECT: Legal Support To Survivor Assistance Officers.

Major General Overholt sends:

1. (References to prior messages deleted).

2. The tragedy at Gander, Newfoundland on December 12, 1985 will require Judge Advocates to render legal assistance to the next of kin of the 248 soldiers killed in the Arrow Airline crash. It should also cause all Judge Advocates to reflect on whether their clients have their personal affairs in proper order.

3. Survivors of this tragedy are scattered throughout CONUS and in overseas areas. It is imperative that all Judge Advocates devote their full effort to providing quality legal assistance and advice to the primary next of kin and their Survivor Assistance Officers. I have granted an exception to AR 27-3 authorizing legal assistance to all primary next of kin of deceased soldiers. I have also directed that a legal assistance officer be designated by name to support each SAO. SJA's should be ready to respond to telephonic requests from SAO's for such a designation.

4. My office is exploring all avenues of assistance to those helping the survivors. Three messages have already been dispatched. Others will be forthcoming. We must render every possible assistance to those suffering from this tragic event. Give this the same attention you would if the survivor was a relative or a close friend.

5. This sad event should compel all SJA's to review procedures for providing for the personal affairs of all our soldiers. Examine both individual and unit preparedness to meet Army mission requirements.

Aircraft Legal Assistance Update No. 4

This message, dispatched 27 December 1985, has the following date-time group: P272120Z Dec 85.

Subject: Air Crash Legal Assistance Update No. 4.

1. Assistance to the survivors of this tragedy is a long term project. More information is being developed continually. A final resolution of all claims will be some time away. Care should be taken to avoid making any irrevocable decisions at this time. Much more information needs to be developed before lawyers or next of kin will be in a position to make informed long term decisions.

2. We must be innovative and do all possible for the survivors of this tragedy. The following information is provided to assist legal assistance officers in addressing questions which may be raised by the primary next of kin and/or surviving family members of soldiers killed in the crash of Arrow Air.

A. Legal Assistance Office, OTJAG, will:

(1) Issue information to the field concerning liability, settlement valuation, general information on complex air crash litigation, and factors to consider in hiring an attorney in these types of cases. This series of messages is part of this function.

(2) Serve as legal assistance point of contact to field JA's.

(3) Explore expediting processing of decedent's federal and state tax returns.

B. Field legal assistance officers:

(1) Will serve as primary legal advisor to SAO and provide legal assistance to NOK as appropriate.

(2) Will assist clients interested in obtaining qualified civilian legal representation. This office is evaluating this area and will be issuing further guidance in the near future.

(3) Will insure that PNOK have been advised of their right to submit claims on behalf of the deceased to the U.S. government for personal property lost in the crash.

(4) Should coordinate with courts to facilitate estate processing.

(5) May serve as an intermediary in communications between Arrow's insurer and NOK.

(6) May provide general guidance on the appropriateness of settlement, recognizing, however, that the appropriateness of damages generally cannot be determined at this early date. Actual evaluation of the monetary value of a claim should be made by personnel experienced in the areas of litigation and damages. The situs of potential litigation and the applicable law will be additional factors to consider. Further guidance in this complex and technical area will be forthcoming. The technical channel of communication may be consulted in evaluating offers of settlement.

(7) Will not interfere with any existing attorney-client relationship while performing the above functions.

C. Potential claims against Arrow Air and others.

(1) There is no conflict of interest in a single lawyer or firm representing members of a class when funds to be recovered are limited. However, claimants should be fully advised to the situation.

(2) In addition to Arrow Air, other possible defendants are: McDonnell Douglas (aircraft manufacturer); Pratt & Whitney (engine manufacturer); Rohr (thrust reverser manufacturer—if this is determined to be the cause); the aircraft owner (preliminary indications are that Arrow leases all of its aircraft); and the maintenance contractor. It can be anticipated that other potential defendants will be identified as more is discovered. In these cases liability would probably be contested.

D. Insurance coverage.

(1) We have been unable to determine with any degree of certainty the amount of liability insurance carried by Arrow, but are attempting to do so.

(2) Insurers will likely attempt early settlement and reportedly have already made offers as low as eight to ten thousand dollars.

(3) (There was no paragraph 3 in the message).

(4) If Arrow's insurance is insufficient to satisfy all claims, experienced aviation litigation firms will likely attempt to add other defendants to the lawsuit.

(5) The Warsaw Convention limits liability in international flights to $75,000; however, all information available indicates that the passengers were not issued tickets with the required notification of the limitation. For this and other reasons, it appears that the limits do not apply. The cases cited in Update No. 1 are still good guidance.

E. Attorney fees.

(1) Attorney fees in aviation accident cases may vary from 40% to as low as 15%. For example, they may be 25% if settled and 33% if it goes to trial.

(2) Some firms start at a high percent and reduce fees as the number of clients increase. If a firm does not state such a policy, a potential client can request that such a clause be placed in the retainer agreement.

(3) In cases of this nature, it is common at the settlement (payment made by insurer) that the client pays the fee plus expenses (expert fees, filing costs, transportation, etc).

(4) Costs that relate to all cases are generally divided among all clients.

(5) Most local firms who take cases will eventually retain aviation specialist firms. In such cases, each firm takes a share of the fee. (In a 30% case, the local firm may retain 10% and the expert firm 20%).

F. Recommended advice to survivors:

(1) Survivors should be strongly advised to avoid settlement before all the facts are known.

(2) Fees vary greatly—40% is much too high.

(3) There are several established aviation litigation firms who could be consulted.

(4) Survivors should consider retaining firms as a group to reduce fees. Generally a group of 10 or more would maximize savings. Further advice on the selection of attorneys will be forthcoming.

3. This office remains available to answer any questions that may arise. Likewise, legal assistance officers should keep this office informed of any developments which may affect these cases or be of interest to other LAO's in dealing with this subject.

4. This information is provided through legal assistance technical channels. It is advisory and not directory in nature. Legal assistance officers are expected to use their own personal and professional judgment in dealing with the unique facts of their situations.

Air Crash Legal Assistance Update No. 5

This message, dispatched 30 December 1985, has the following date-time group: P302201Z Dec 85.

Subject: Air Crash Legal Assistance Update No. 5.

1. SAO's have been informed of the following:

A. The Office of The Judge Advocate General, HQDA, has received correspondence from the attorney representing Arrow Air's insurer, Associated Aviation Underwriters (AAU). In summary it states that:

(1) They are prepared to provide up to $1,000 in travel arrangements, advances, or reimbursement to each family for the purpose of travel to the funerals. In an appropriate instance, they are prepared to pay in excess of $1,000, depending on the circumstances. Payment would not be charged or credited against any settlements which the families may make with Arrow/AAU. Claims may be submitted for completed travel made without the prior approval of Arrow.

(2) They are prepared to make funds immediately available for family emergencies or special needs. For example, if there is difficulty in meeting a mortgage or tuition payment, they stand ready to make funds available on a case by case basis. Again, this would not be charged against any settlement which the families may make with Arrow/AAU.

(3) They are anxious to effect a settlement of any claims against Arrow. Their stated purpose in this regard is to avoid costly litigation and attorneys fees. In looking to this final settlement, they have requested the following information.

(a) Name of deceased;
(b) Age of deceased;
(c) Permanent home address of deceased;
(d) Date of birth of deceased;
(e) Name and relationship of next of kin;
(f) Address of next of kin; and
(g) Children's names and ages.

(4) They are prepared to accept collect calls to answer questions and explain procedures for claiming reimbursement for these expenses. Such calls may be made between 0900 and 1700 hours, EST, Monday through Friday to:

Charles Collard, 212-766-1654
William Schultz, 212-766-1685
Gloria Piscitello, 212-766-1656

This information could conceivably operate for the benefit of the survivors and is therefore being forwarded. This does not—repeat—does not—constitute Army endorsement of this offer or request for information. The survivors should be advised that any communications with Arrow/AAU could conceivably lead to offers by Arrow/AAU to achieve settlement of claims. Such settlement generally is not in the best interest of the survivors at this time. They should refer any communication from Arrow to their designated legal assistance officer or their retained attorney. If the PNOK is interested in Arrow's offer, it is suggested that the SAO or the designated LAO make all arrangements with Arrow/AAU.

C. This office is working with Reserve Judge Advocate attorneys who are experienced in these types of cases. We are exploring the possibility of establishing a procedure to permit settlement of these claims on behalf of those next of kin interested in such a service. Such settlement would be directly with the insurance company. This could obviate the necessity of retaining civilian counsel and would have the benefit of obtaining the earliest possible settlement while maximizing recovery by saving attorney's fees, court costs, and other expenses associated with complex litigation. You will be advised of further developments in this area.

2. LAO's are advised that great care should be exercised in accepting any offer of assistance from Arrow/AAU. While these offers may be accepted, they should be done in a manner to keep Arrow/AAU at arms length. It is recommended that all communications be made through an attorney. If the survivor does not have an attorney, the LAO will get actively involved. If the survivor already has a retained attorney, the LAO should refrain from injecting themselves in the process. The first communication to Arrow/AAU should specify that all further communications be channeled through the appropriate attorney, and that Arrow/AAU should not communicate directly with the survivor. As prior messages have indicated, settlement should be discouraged at this time.

Air Crash Legal Assistance Update No. 6

This message, dispatched 9 January 1986, announced that a special course for legal assistance officers assisting survivor assistance officers and primary next of kin would be held at The Judge Advocate General's School (TJAGSA) on 18–19 February 1986.

The message also indicated that numerous requests have been received for appointment of Reserve Special Legal Assistance Officers to assist surviving family members located away from military installations. To facilitate the process, active duty legal assistance officers are encouraged to make direct contact with the Guard and Reserve Affairs Department, TJAGSA, as soon as the need for a Reserve legal assistance officer is identified.

Attention to Detail in Will Review and Execution

The requirement for careful attorney review of wills before these important legal documents are executed is illustrated by a recent case in which the Legal Assistance Office, OTJAG, was notified that a will prepared by a stateside legal assistance office has been denied probate.

The will was a "deathbed" will prepared for an elderly legal assistance client. The testatrix had a limited estate and no next of kin of any degree. Had she died intestate, her estate would have escheated to the state. In her will, however, she left a $10,000 bequest to her church.

The legal assistance office that prepared the will had reprogrammed and updated the standard will clauses contained in its word processing system. In the reprogramming, a required attestation clause was inadvertently deleted. The error was caught and corrected, but not before a number of wills, including the one in question, had been prepared and executed.

Upon the death of the testatrix, the civilian attorney representing the estate offered the will for probate and the probate judge tentatively declined to admit the will to probate based upon the absence of the required attestation clause. The installation where the will was prepared and the court where it was offered for probate are in the same geographic locality. The legal assistance office involved has been working with the civilian attorney who represents the estate on theories upon which the will may be admitted to probate. OTJAG Legal Assistance has been advised that the civilian attorney will request reconsideration of the denial of the admission of the will to probate.

The incident reinforces the need for attorneys to closely scrutinize all wills prepared by a legal assistance office, particularly those produced using a word processing system. A review of will execution practices at certain installations in the past revealed that, in some cases, attorneys never reviewed the wills after they had been prepared by the legal secretary, and in other cases, that no attorney participated in the will execution process.

Legal assistance attorneys should review every will or similar document prepared in the legal assistance office before it is provided to the client. Such documents must be accurate and legally sufficient in every particular. Additionally, the attorney is an integral part of the will execution process. A solemn and dignified will execution ceremony, officiated over by the attorney, stresses to the client the importance of the occasion and of the document. It also enhances the professional atmosphere of the legal assistance office. Major Hemingway.

Survivor Benefit Plan Amendments

The Department of Defense Authorization Act of 1986 (Pub. L. No. 99–145) made changes to the Survivor Benefit Plan (SBP) which legal assistance officers should be aware of. First, under the new law, the soldier will be required to obtain the spouses' concurrence if the soldier intends not to participate in the plan, or to participate in a manner which will not provide the spouse with the maximum coverage available. This change gives the spouse a veto power over the soldier who desires not to provide annuity coverage for him or her or to provide it at a reduced level. The new law does include an exception which would permit the soldier to elect no coverage or reduced coverage for the spouse when the soldier can adequately prove that the spouse's whereabouts cannot be determined, or that, due to exceptional circumstances, requiring the person to seek the spouse's consent would otherwise be inappropriate.

Second, the law now permits the soldier or retiree who wants to elect coverage under the SBP plan for a former spouse to do so under the coverage for a "spouse." Prior to passage of this provision, the soldier or retiree had to provide SBP coverage for former spouses under the category of "other persons with an insurable interest." The cost of an annuity under the "insurable interest" category is more expensive to the soldier or retiree than is coverage as a "spouse." The new law permits those who previously elected to provide coverage to former spouses under the "insurable interest" category to terminate that annuity and provide a new annuity to the former spouse under "spouse" coverage. This is obviously advantageous to those currently participating as the cost to the retiree is reduced. The law requires that any election be made within the end of the twelve-month period beginning on the date of enactment of the law (8 Oct. 1985). Additionally, the law permits persons who were participants in the SBP plan but elected not to provide an annuity to a former spouse prior to the effective date of the law (1 Feb. 1986) to elect to provide such coverage to the former spouse under the "spouse" category. Any such new election must be made before the end of the twelve month period beginning on the date of enactment of the law. Legal assistance offices should publicize these changes to personnel in their areas.

Increase in SGLI

Effective on 11 December, 1985, the amount of the Servicemen's Group Life Insurance increased from $35,000 to $50,000. The increase was originally scheduled to be effective on 1 January 1986, but Congress passed a law making it effective on 11 December 1985 to give special relief to the survivors of the soldiers killed in the Arrow Airlines crash.

Alternate Dispute Resolution

Legal assistance officers should be aware of a growing trend in communities today to use methods other than court litigation to resolve disputes. The impetus for this trend has been crowded court dockets, costs of litigation and attorneys, and the emotional trauma which accompanies adversarial litigation. Today, throughout the United States, many communities are using a variety of alternate dispute resolution systems. Frequently they use formal, court-sanctioned systems, where the court requires the parties to attempt to mediate a settlement by participating in a mediation system. In other areas the mediation system is privately run, and parties elect to utilize the mediation system prior to going to court. Alternate dispute resolution is already well known in the area of consumer law, where automobile manufacturers participate in either binding or non-binding arbitration with disgruntled purchasers of new automobiles. Legal assistance officers should investigate what systems are available in their area and utilize the systems to benefit clients. A good example of this comes from the Fort Ord area.

A nonprofit organization on the Monterey Peninsula called the Community Boards Program has been extending voluntary mediation services to the community. The Monterey Peninsula has a critical shortage of rental housing, and as a result, breeds numerous landlord-tenant problems. The Community Board offers an alternative to court litigation to resolve disputes between landlords and tenants. The board utilizes a team of trained volunteer mediators whose mission is to facilitate communication and understanding between the parties and help the parties reach a voluntary settlement of the dispute. The mediator's function is not to decide what is right or wrong, or who is guilty or innocent, but rather, to clarify the issues, open communication, and facilitate a resolution which is fair and acceptable to both parties. The parties, through the mediation, not only resolve any current problems, but also learn how to communicate with each other to resolve future conflicts without the aid of outside authorities. The board has been quite successful in resolving landlord-tenant disputes. Though landlord-tenant disputes comprise the majority of the board's cases, the board offers mediation services in other areas as well, including family disputes.

Fort Ord has actively supported the Community Board beyond simply referring clients to the board for mediation. The housing office at Fort Ord contracted with the Community Board to provide mediation training to housing office employees. Housing office personnel now assist in resolving disputes in both on-post and off-post housing disputes. The program provided intensive training and has been very successful. Mediation training has also been provided to members of the inspector general's office.

Legal assistance officers should be aware of the availability of similar mediation services in their areas and should refer clients to mediation in appropriate cases. Often disputes can be resolved quickly and inexpensively through mediation. The legal assistance officer can continue to advise the client during the mediation process to insure that any agreement which results adequately protects the client's interests. Mediation training can also be valuable to the legal assistance officer who can benefit from the additional training in communications and dispute resolution, as well as from an increased understanding of what mediation is and whom it can help. In most jurisdictions, participation in mediation does not constitute the practice of law, and legal assistance officers may participate in such programs within the guidelines of AR 27–3. Mediation can, however, pose ethical dilemmas to attorneys who act as mediators, and legal assistance officers should be aware of those dangers if they elect to participate as a mediator, rather than as an attorney-advisor to a client who is attempting to resolve a dispute through mediation. Similarly, legal assistance officers are free to participate in arbitration systems offered within the community, even though they are not licensed to practice law in that jurisdiction, as long as local law does not consider arbitration to constitute the practice of law.

Utilization of existing alternate dispute resolution systems may provide meaningful relief to many of our clientele who realistically may not be able to sue their adversaries. The American Bar Association's Special Committee on Dispute Resolution has collected and published substantial information in this area including a register of alternate dispute resolution systems functioning in the United States. More information and publications can be obtained from the Committee at the following address: American Bar Association, Special Committee on Dispute Resolution, 1800 M Street, N.W. S-200, Washington, D.C. 20036. Major Mulliken.

Tax Notes

Survivor Benefit Plan Annuities to Nonresident Alien Spouses

The Tax Notes section of the October 1985 *The Army Lawyer* contained an announcement at page 43 of a letter from the Internal Revenue Service (IRS) advising that nonresident alien spouses of deceased soldiers who are receiving payments under the Survivor Benefit Plan may be entitled to reduce the amount of federal income tax withholding on those payments depending on how much of the deceased member's service was performed outside of the United States. That comment suggested that recipients contact the U.S. Army Finance and Accounting Center to request reduction of the withholding.

The Finance Center has written the IRS to seek technical advice on this point and to obtain clear authority to reduce withholding. The Finance Center's legitimate concern is that the IRS letter which was cited in *The Army Lawyer* is not binding authority on the IRS. When the Finance Center receives guidance from the IRS, that guidance will be published in this section. Until such time as this guidance is received, nonresident aliens should seek a refund of the excess withholding on their individual tax returns.

Sales Tax Tables for Oklahoma

Taxpayers who itemize their returns and claim a sales tax deduction for expenditures in Oklahoma should be aware that the amount reflected in the Optional Sales Tax Tables published by the IRS are incorrect. Oklahoma increased its sales tax effective July 1, 1985, and that increase was not reflected in the table. Accordingly, the IRS has announced that the amount which is reflected in the existing table for Oklahoma can be increased by four percent to obtain the correct figure.

Record Keeping Requirements

The IRS recently released temporary regulations which detail the substantiation requirements for "listed property" which the taxpayer uses in a trade or business and for which the taxpayer wants to take accelerated cost recovery system deductions and an investment tax credit. These items generally include passenger automobiles and computers. The new regulations will require that any deductions be supported by "adequate records or sufficient corroborative evidence." This is a relaxation of the requirement for "contemporaneous records" which would have applied after 1984 had Congress not retroactively repealed it. Although the regulations relax the requirement for contemporaneous records, the new regulations express a strong preference for them. Without "contemporaneous records," the IRS will require other corroborative evidence with a "high degree of probative value." Accordingly, it is wise to keep contemporaneous records, which generally means keeping and annotating a log each time the vehicle or computer is used for either business or personal use.

Claims Service Notes

U.S. Army Claims Service

Small Claims Procedure—Expedited Payments

The small claims procedure contained in paragraph 11–12 of Army Regulation 27–20 has great potential for helping soldiers and their families. The cited paragraph urges the use of the small claims procedure to the maximum extent possible with a view to settling most small claims within 24 hours of their submission. It does little good, however, to process a claim in 24 hours if it takes the finance office several weeks to issue a check for payment of the claim. To aid in solving this problem, The Judge Advocate General recently asked the Comptroller of the Army for assistance. In response to this request, the Comptroller has initiated a message, subject: Improving the Small Claims Payment Procedure (061900Z Dec 85, Msg. Ident. 3661600, From: ACOA(F&A) Indianapolis, IN—DACA-FAP-PT) to all Army finance and accounting officers requesting that these claims be processed for payment as soon as possible. Personnel claims Bulletin Number 58 in the Claims Manual deals with small claims procedures and it has been amended to include a copy of this message as an enclosure. The amended bulletin will be distributed to all claims offices for insertion in the Claims Manual. In the interim, staff judge advocates should ensure that their local finance officer is made aware of this message and attempt to develop an expeditious procedure to process the payment of small claims. For more information, contact the U.S. Army Claims Service action person, Mr. James A. Mounts Jr., AUTOVON 923–7944.

Regional Claims Workshops

Regional workshops, providing hands-on training in the administration and settlement of personnel claims, will be held on 24–27 March 1986 in Kansas City, 27–30 April 1986 in Seattle, and 12–15 May 1986 in Baltimore.

The workshops are designed primarily for new claims personnel and will be held on an annual basis by the U.S. Army Claims Service to improve personnel claims adjudication and recovery by field claims offices. For more information, contact the U.S. Army Claims Service action person, Mr. Robert Frezza (AUTOVON 923–4240).

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 MACOMs 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 CLE Course Schedule

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).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	February in three year intervals
South Carolina	10 January annually
Vermont	1 June every other year
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1986 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

May 1986

1-2: KCLE, Equine Law—Syndications, Lexington, KY.

2-3: SBA, Domestic Relations Seminar, Phoenix, AZ.

2-3: GICLE, International Business Law, Atlanta, GA.

4-8: NCDA, Trial Advocacy, Boston, MA.

8-9: NYUSCE, Fundamentals of Information Processing, San Juan, PR.

8-10: ALIABA, Business Reorganizations under the Bankruptcy Code, San Francisco, CA.

8-10: GICLE, Real Property Law Institute, St. Simons, GA.

9-10: ALIABA, Computer Law Institute, Boston, MA.

12-13: NYUSCE, Fundamentals of Information Processing, Chicago, IL.

12-14: GCP, Patents and Technical Data, Washington, DC.

13-14: ALIABA, Lawyer's Speech—Effective Voice and Diction, New York, NY.

14-23: KCLE, Trial Advocacy (Intensive), Lexington, KY.

15-16: PLI, Forensic Techniques for Use in Litigation, New York, NY.

15-17: GICLE, Family Law Institute, St. Simons, GA.

16: GICLE, Law Office Economics, Atlanta, GA.

18-23: NITA, Advanced Trial Advocacy, Chicago, IL.

19-20: NYUSCE, Fundamentals of Information Processing, Boston, MA.

19-20: NYUSCE, Legal Issues in Acquiring and Using Computers, Washington, DC.

28-31: FBA, FBA Annual Convention, Orlando, FL.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 383–6516.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 775–0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988–6215.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800)CLE–NEWS; (215)243–1630.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501)371–2024.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

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

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, DC 20007. (202) 965–3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037. (800)424–9890; (202)452–4420.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415)642–0223; (213)825–5301.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608)262–3833.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, #5000, Chicago, IL 60611. (312) 944–0575.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638–0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W. Washington, D.C. 20003.

FLB: The Florida Bar, Tallahassee, FL 32301.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, D.C. 20006. (202) 337–7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676–6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, Chicago Conference Center, 29 South LaSalle Street, Suite 250, Chicago, IL 60603. (217)787–2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606)257–2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800)421–5722; (504)566–1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504)388–5837.

MCLNEL: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MNCLE: Continuing Legal Education, A Division of the Minnesota State Bar Association, 40 North Milton, St. Paul, MN 55104.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314)635–4128.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749–1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8979, Reno, NV 89507–8978.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NELI: National Employment Law Institute, 520 Tamalpais Drive, Suite 205, Corte Madera, CA 94925.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800)328–4815 ext. 225; (800)752–4249 ext. 225; (612)644–0323.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784–6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Northern Kentucky University, Chase College of Law, 1401 Dixie Highway, Covington, KY 41011. (606) 527–5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, DC 20006. (202) 452–0620.

NMCLE: State Bar of New Mexico, Continuing Legal Education, P.O. Box 25883, Albuquerque, NM 87125. (505)842-6132.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518)463-3200.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038.

NYULS: New York University, School of Law, 40 Washington Sq. S., Room 321, New York, NY 10012. (212)598-2756.

NYUSCE: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036. (212)790-1320.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

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

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700 ext. 271.

SBA: State Bar of Arizona, 234 North Central Avenue, Suite 858, Phoenix, AZ 85004.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512)475-6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080. (214)690-2377.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SPCC: Salmon P. Chase College of Law, Committee on CLE, Nunn Hall, Northern Kentucky University, Highland Heights, KY 41076. (606) 527-5380.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036, (202)337-7000.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, D.C. 20036, (202)237-7000 and University of Denver, Program of Advanced Professional Development, College of Law, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305)372-0140.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816)276-1648.

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

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

UTSL: University of Texas School of Law, 727 East 26th Street Austin, TX 78705 (512) 471-5151.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901. (804)924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104

Current Material of Interest

1. Judge Advocates Association 1985-1986 Writing Competition

The Judge Advocates Association is sponsoring a writing competition for law students, active duty and reserve military attorneys, and others interested in military law. Only papers by a single author that have not been previously published or scheduled for publication are eligible. The Association will award a cash prize of $250 for the best paper. Entries must be submitted by May 1, 1986.

The topic for this year's competition is "Constitutional Rules as Applied to Military Criminal Law." The following scope note explains the topic:

> *What is the Utility of Article III of the Military Rules of Evidence?* The Rules, 49 Fed. Reg. 17,254 (1984), incorporated constitutional law as it was known in 1980. As time passes and the Supreme Court decides new cases, the Rules leave a number of questions unanswered. For example: Does *United States v. Leon,* 104 S. Ct. 3405 (1984) "good faith exception to exclusionary rule" apply? Does *Oregon v. Elstad,* 105 S. Ct. 1285 (1985) "good faith exception to Miranda" apply to the military? What is custody? What is interrogation? Who is a suspect? What is a waiver? What is the application of *Edward v. Arizona,* 451 U.S. 477 (1981) "self incrimination and right to counsel"? What is fourth amendment coverage?

Entries must be typewritten in English, double-spaced, and submitted in triplicate. The writer's name, address, phone number, and institutional affiliation should be listed on the title page. Papers must not exceed 6000 words (about 30 typewritten pages with footnotes) and should be sent to:

Writing Competition
Judge Advocates Association
Post Office Box 2731
Arlington, VA 22202

Entries will not be returned to the author and submission of an entry gives the Association the right of first publication if the paper is selected for an award. The winning paper will be announced in August 1986 at the annual meeting of the Judge Advocates Association in New York City.

2. TJAGSA Materials Available Through Defense Technical Information Center

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

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314, telephone (202) 274–6871, AUTOVON 284–6871.

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

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

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

Contract Law

AD 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.

3. Regulations & Pamphlets

Number	Title	Change	Date
UPDATE #7	All Ranks Personnel UPDATE		1 Jan 86
AR 140–475	Real Estate Selection and Acquisition Procedures and Criteria		22 Aug 85
AR 190–8	Enemy Prisoners of War Administration, Employment, and Compensation		2 Dec 85
AR 340–21–1	Army Privacy Program—System Notices and Exemption Rules		16 Dec 85
AR 351–3	Professional Training of Army Medical Department Personnel		15 Dec 85
AR 600–20	Personnel-General Army Command Policy and Procedures	I06	23 Dec 85
AR 640–30	Photographs for Military Personnel Files		16 Oct 85
AR 700–137	Logistics Civil Augmentation Program (LOGCAP)		16 Dec 85
AR 700–5	Total Logistics Readiness/ Sustainability (TLR/S) Analysis		16 Dec 85
DA Pam 27–21	Military Administrative Law		1 Oct 85
DA Pam 360–503	Voting Assistance Guide		1986–87

4. Articles

Baker & Baldwin, *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 Ariz. L. Rev. 25 (1985).

Beres, *Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America*, 14 Den. J. Int'l L. & Pol'y 75 (1985).

Bigelow, *The Challenge of Computer Law*, 3 W. N. Eng. L. Rev. 397 (1985).

Burger, *The Need for Change in Prisons and the Correctional System*, 38 Ark. L. Rev. 711 (1985).

Burnick, *The Debt Collection Act of 1982 and Government Contracts Claims*, 32 Fed. B. News & J. 424 (1985).

Frey, *Supreme Court Limits on Non-Capital Punishment: The Politics of Proportionality*, 21 Willamette L. Rev. 261 (1985).

Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 Ind. L.J. 163 (1984–85).

Halper, *Can You Find a Fair Lease?*, 14 Real Est. L.J. 99 (1985).

Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C.D.L. Rev. 595 (1985).

Jaff, *Hiding Behind the Constitution: The Supreme Court and Procedural Due Process in* Cleveland Board of Education v. Loudermill, 18 Akron L. Rev. 631 (1985).

Letwin, *Impeaching Defendents With Their Prior Convictions: Reconsidering the Dangerous Propensities of Character Evidence After* People v. Castro, 18 U.C.D.L. Rev. 681 (1985).

Lieb, *Constructive Discharge Under Section 8(A)(3) of the National Labor Relations Act: A Study in Undue Concern Over Motives*, 7 Indus. Rel. L.J. 143 (1985).

Miller, *Self-Defense, International Law, and the Six Day War*, 20 Isr. L. Rev. 49 (1985).

Nagel, *Using Microcomputers and P/G% to Predict Court Cases*, 18 Akron L. Rev. 541 (1985).

O'Neill, *Between Consenting Adults*, 14 Phil. & Pub. Aff. 252 (1985).

Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C.L. Rev. 879 (1985).

Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 233 (1985).

Steinbock, *Drunk Driving*, 14 Phil. & Pub. Aff. 278 (1985).

Stiglitz, *Government Subrogation Rights in Tort Judgments and Settlements*, 32 Fed. B. News & J. 420 (1985).

Tedlock & Humke, *The Evolution of Joint Custody in Iowa: A Preference Emerges*, 34 Drake L. Rev. 769 (1984–85).

Van de Kamp, *The Good Faith Exception to the Exclusionary Rule—A Warning Letter to Prosecutors*, 26 S. Tex. L.J. 167 (1985).

Waits, *Work Product Protection for Witness Statements: Time for a Change*, 1985 Wis. L. Rev. 305.

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