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# Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments

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What is an equitable acquittal court-martial? The simplest answer: when the government proves the case against the accused and the panel acquits. Most often it happens at a special court-martial.<sup>1</sup> It has very little to do with reasonable doubt or anything quite so esoteric; rather, the accused is seen as a victim instead of a perpetrator. The crime is generally not a very serious one when viewed among the host of possibilities, but the consequence, ruining the career of an otherwise excellent soldier, may appear to violate a sense of fairness. In today's military environment, if the panel returns a verdict of guilty for what is a relatively minor offense, they have already fashioned a seemingly harsh and inappropriate result for the accused.

In the recent past, the consequences of a special court-martial were not so severe. A soldier could receive a special court-martial, serve the sentence, and be returned to duty to continue his career or "soldier" his way out with an honorable discharge. In the post-Vietnam era Army, with retention rates high and recruitment of volunteers supplying the Army's needs, a conviction is almost automatically used either to bar reenlistment or for elimination. This has caused a lack of appropriate disciplinary actions for soldiers, frequently noncommissioned officers, that have good records and end up before special courts-martial for relatively minor offenses. The hiatus results in the "equitable acquittal." This result is in some measure attributable to the right of the soldier to either refuse nonjudicial punishment under Article 15, Uniform Code of Military Justice,<sup>2</sup> or to refuse a summary court-martial.

In comparison to the flexibility of sentencing that is found in civilian courts, the range of sentencing possibilities in courts-martial is very limited; particularly in special courts-martial where minor offenses are tried. In what may be called the "era of abuse," *i.e.*, "child abuse," "spousal abuse," "drug abuse," *etc.*, cases involving less severe abuse violations are presenting court-martial panels and military judges with difficult sentencing decisions.

As more social science professionals advocate various sentencing alternatives to traditional retribution, including retraining or therapy to remove the cause of the abuse, the sentencing structure of courts-martial makes such dispositions, whether appropriate or not, almost impossible

without incarceration.<sup>3</sup> Additionally, with the increase in the number of families within the military and the emphasis on family life, the military justice system is confronted with ever more difficult questions about appropriate sentences for the minor offenses of a career soldier with a family. Left without suspension powers, probationary sanctions, rehabilitative therapeutic programs, work release, *etc.*, and with the strictures of UCMJ 58(a),<sup>4</sup> the sentencing authority is relatively limited.

The purpose of this article, however, is not to address the appropriateness of the sentencing possibilities in courts-martial, but to provide the author's opinion of a method based upon the author's experience for predicting and preparing those cases that have a high probability of an "equitable acquittal." Trial counsel and staff judge advocates who are able to predict the potential of an acquittal are in a much better position to lessen, if not remove, any command shock from such panel decisions. Defense counsel who recognize these cases will know the necessity of advising their clients on the favorable results that are more likely to come from a panel. Additionally, defense counsel who foresee the favorable equity in a given case scenario better understand the necessity of working on the findings as opposed to the sentence which is almost certainly going to be lenient if there is a conviction. Both sides are in a better position when they recognize such a case to advise their respective clients and possibly work out alternate dispositions that not only serve the needs of the military society and the individual soldier, but also remove the gamble that a client (government or accused) must face when insisting on a court-martial.

The following case scenarios are factual and resulted in equitable acquittals. They are presented for the purpose of more clearly illustrating the term "equitable acquittal" and to point out similarities that foreshadow the result. The factual information supplied is limited to that purpose and may not be sufficient for second guessing how the case was tried.

*Case #1:* The accused was a black staff sergeant with eleven and one-half years of service. He was charged with assault and battery on a specialist four white female by slapping her in the face. He had been offered nonjudicial

<sup>1</sup> Cf., Memorandum for Judge Advocate's Workshop, Criminal Law Division, Office of the Judge Advocate, Europe, 19 Nov 85, at 2 (USAREUR's fiscal year 85 regular special courts-martial acquittal rate was twenty-five percent. Obviously, all were not equitable acquittals as defined, but the statistic lends analogous support.).

<sup>2</sup> Uniform Code of Military Justice, art. 15, 10 U.S.C. § 815 (1982) [hereinafter cited as UCMJ].

<sup>3</sup> See generally B. Galaway, *Social Services and Criminal Justice*, Handbook of the Social Services 250-80 (1981), for a good summary of various penology philosophies.

<sup>4</sup> UCMJ art. 58(a) provides:

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes—

(1) a dishonorable or bad-conduct discharge;  
(2) confinement; or  
(3) hard labor without confinement;

reduces that member to pay grade E-1, effective on the date of that approval.

punishment and summary court-martial, both of which he rejected in favor of a special court-martial with an enlisted panel.

The victim worked for the accused. She was an average performer, undisciplined, and manipulative. Her appearance in court was marginal and her testimony was not without problems. Another reliable witness, however, corroborated the slap to the extent that he saw a black hand reach out from behind a door and strike the victim in the face. He could not identify the perpetrator.

Another witness testified that she saw the victim's glasses fly off her face and go down the steps. The evidence as a whole was very convincing that the sergeant struck the victim, even though he claims that if he hit her, and he never admitted that he did, it was an accident while struggling with the victim to open a door she was holding closed.

This struggle took place at the door after the staff sergeant found her in the barracks eating what appeared to be an unauthorized early lunch (1030) rather than being on the job. He ordered her back to work, she argued with him, and they had the confrontation at the door.

The accused's general work environment told more about the acquittal. The staff sergeant was a male nurse working in a dispensary beset with problems. A weak leader, a female captain nurse, was in charge, and testimony at the trial indicated that the staff sergeant was the only "Army type" working in the dispensary. The captain was under charges for a false official statement involving an unauthorized ID card to replace an overstamped one. Although this did not come out at trial, it was indicative of her leadership in the dispensary. She depended upon the staff sergeant to run the dispensary, not in medical terms, but from a military perspective. The victim was a general nuisance, untrustworthy, and had received prior nonjudicial punishment as a result of the accused's efforts to have her disciplined.

The accused's impeccable military uniform at trial correlated with everything that was said about his superb performance of duty. Two panel members were excused based upon very favorable opinions they had of the accused, developed while receiving care for their families in the dispensary. The testimony was clear that the accused was a disciplinarian, somewhat frustrated with the lackadaisical and unmilitary operation of the dispensary. Although the accused was firm, he was fair. He was acquitted.

*Case #2:* The accused was a sergeant first class with over fifteen years of service. He was charged with communicating a threat, assault with a knife, and assault and battery, all involving the same victim, a specialist four. The accused had a sharp appearance, was a Vietnam veteran with a Purple Heart, and was articulate when he testified. His record was not unblemished: he had received nonjudicial punishments three times. The defense counsel did a beautiful job of not opening the door, thus never allowing the government to introduce this evidence.

The evidence revealed that during a field training exercise the specialist four victim refused to obey when the accused ordered him to move a truck. Other evidence showed this was not the victim's first undisciplined act with the sergeant first class. Profane, disrespectful language always accompanied the specialist four's disobedience. Apparently the accused, having reached his saturation point, pulled the specialist four from the truck and slammed him against the truck. The victim also claimed that the accused slashed at him with a knife and threatened, "If you press charges against me, I will kill you." Evidence revealed that the accused did own a knife.

The specialist four's appearance was average at best, and while his testimony covered all the necessary elements, it was not a superb performance. It was essentially believable, however, and corroborated.

A sergeant who witnessed the incident testified for the government, corroborating the specialist four's testimony, but the defense impeached his testimony with a prior inconsistent statement wherein he denied seeing the incident. At trial this witness stated the accused threatened him also if he should tell anyone what had happened, thus accounting for the inconsistency.

In addition to the sergeant's corroborating testimony, the company commander's driver testified that he also saw the accused slam the specialist four against the truck.

The accused denied everything or interpreted the events in such a way as to make it appear that he was only doing his job. The officer panel reached a verdict—not guilty.

An interesting postscript to this case: After the trial was over and the handshaking subsided, the accused told the trial counsel, "I've learned my lesson. I'm never going to carry a knife again. I'm throwing mine away." Two weeks later at a local bar he stabbed a fellow soldier in the back—both were drunk. Once again the victim, not seriously hurt, was a disgusting character as a soldier. This time, the government decided on administrative action. The accused was discharged for misconduct<sup>5</sup> and the victim was subsequently discharged for unsatisfactory performance.<sup>6</sup>

*Case #3:* While equitable acquittals usually occur at special courts-martial, they sometimes occur at general courts-martial involving officers. Because of the limitations on sentencing applicable to special courts-martial, general courts-martial usually try officers.<sup>7</sup>

The accused was a major, an aviator, serving as the secretary of the general staff (SGS) of a division. He served in Vietnam and his awards and decorations included the Silver Star. His dress and bearing were impressive. The division commander considered the accused to be an excellent soldier. Because of his demonstrated potential, he was encouraged to obtain a college degree to make himself more competitive for promotion.

A subsequent Officer Efficiency Report (OER), on which the division commander was the senior rater, reflected in the senior rater's section that this officer continued to do an outstanding job with the immense responsibilities of the

<sup>5</sup> Dep't of Army, Reg. No. 635-200, Personnel Separations-Enlisted Personnel, chapter 14 (5 July 1984) [hereinafter cited as AR 635-200].

<sup>6</sup> AR 635-200, chapter 13.

<sup>7</sup> See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(c)(2)(A) [hereinafter cited as R.C.M.].

SGS, while at the same time attending college in the evenings to obtain his degree (paraphrased). The OER was all any officer could want.

The life of the major was not, however, quite as sterling as it seemed. A specialist four female clerk that worked in the division headquarters revealed a relationship that threatened to undo all of the major's good works.

The major, who was married with children, was accused of having an affair with the specialist four. She was telling all because she was mad at him for breaking off the relationship and for no longer protecting her from unpleasant duties as she claimed he had been doing in the past. Furthermore, she claimed he had never attended college. Instead, he used the time and the local college parking lot for his rendezvous with her.

The division commander obviously was not in a position to handle the case and it was transferred to another convening authority. From what transpired in the case it was apparent that the major's superiors thought the case would be resolved with nonjudicial punishment. The other convening authority, who now had the case, disagreed as to the appropriateness of the disposition and an Article 32, UCMJ, investigating officer was appointed to hold a hearing and investigate the charges.

The Article 32 hearing did not go particularly well for the government. Needless to say, the major's superiors were reluctant to support what appeared to be the makings of an embarrassing general court-martial. After the Article 32 hearing, the defense counsel informed the trial counsel that their client was willing to accept nonjudicial punishment. Even though the Article 32 hearing was not exactly what the trial counsel would have liked, sufficient evidence pointed to grounds for a trial. The offer of nonjudicial punishment was discussed, but the division commander now in charge of the case decided to convene a general court-martial.

The day of trial arrived, a court of senior officers was empanelled, and the prosecution began.

If ever a woman could make a provocatively sexual impact on a panel, this specialist four did, turning the head of every panel member. She wore an obviously-too-tight mint green Army dress to cover her well-proportioned body. Her testimony, which she intimated was for vindictiveness, revealed the major's adultery, lying about college attendance, "making out" in the division conference room, covering up her indiscretions at work, and his removing competent enlisted personnel from the division headquarters staff who happened to incur the specialist four's disfavor. Her testimony was corroborated to the extent that no record existed of him ever having made even an application to the college, much less having attended. An OER also supported this college fabrication, although the author of the statement could not remember the source of the information. The division chief of staff testified that the major had obviously lied to him about attending college.

Another witness testified she saw an occasion of "making out" in the conference room. The major testified it was only a birthday kiss. Records revealed that all of the enlisted personnel whom the specialist four testified she wanted removed were in fact removed at the behest of the major. Testimony also revealed the opinion of others that those removals were unfair to the individuals concerned.

Every major aspect of the specialist four's testimony was corroborated except for the numerous acts of sexual intercourse. Her sexual promiscuity was also before the court, in addition to her erratic and exasperating duty performance. Manipulation and deviousness were clearly her *modus operandi*. The testimony of the division commander and the assistant division commander favored the accused; however, not in any specific way other than duty performance. One general officer stated that the lawyers had caused the case to become a court-martial; obviously ignoring his own contribution to the case disposition.

During panel deliberations on findings, the usual "court-house" banter of spectators espoused an overwhelming consensus that the major was guilty. Even the military judge indicated that reasonable doubt about the major's shenanigans no longer existed in view of the evidence.

After some time the panel reached a verdict—"Of all the charges and their specifications—Not Guilty."

Case #4: The accused was a staff sergeant, "supply-type," with over ten years of active service, and married with children. He ran a division headquarters company supply operation. While not overly impressive as a soldier in terms of dress and appearance, he was extremely amiable and well-liked. His record reflected some past indiscretions that resulted in nonjudicial punishment, but nothing in recent years. His *forte* was getting supplies when and where needed. He did not know how to say "No," but did know how to "make" the military supply system work. As a result of "making" the supply system work, he faced charges of wrongful appropriation, loss of government property, etc. The government's evidence did not reveal even a hint of self-aggrandizement other than the favorable reflection of always being able to meet the supply requests.

The sergeant had on several occasions traded supplies with an Air Force detachment. This previous trading established a good "working" relationship, so he then borrowed some supplies from the Air Force detachment. When the Air Force came to reclaim their borrowed supply items, they discovered their loan had turned into a permanent arrangement; the supplies were missing. The subsequent investigation revealed other supply discrepancies with property either mislocated or missing and supply records very much out of order.

While the evidence blatantly revealed the "indiscretions" of the accused, it also revealed a level of mismanagement that was not unheard of within supply channels in the division. The long-term existence of such mismanagement, even before the supply sergeant took over, gave the appearance that the likeable supply sergeant was being unfairly singled out for prosecution. Naturally, the defense counsel did all he could to enhance this image of his client. Favorable defense testimony also pointed out how essential the supply sergeant's responsiveness had been to mission accomplishment.

The government rebutted this evidence with essentially, "Yes, but he's a crook in doing his job." The verdict of the panel, which included enlisted members—Not Guilty!

All of the foregoing cases had several common traits concerning the people involved. First, it was possible for the panel members to view the accused as victims. Second, all of the accused appeared as excellent soldiers with either unblemished records, very old blemishes that could be

attributed to youth, or blemishes that could not be shown prior to sentencing unless the defense opened the door, which it did not. Third, where there was a victim or a very essential witness for the government, that person presented an unfavorable character from a military point of view. This undesirable government witness, always a prosecutor's concern in any case, is an asset of tremendous impact in the equitable acquittal case—for the defense! At least one of five descriptions usually fits this witness: poor performer and undisciplined soldier; routinely belligerent and physically aggressive; chronic liar; sexually promiscuous (female); or devious and manipulative. The accused, on the other hand, was, except for the incident in question, a "straight arrow." Finally, each accused had a tremendous amount to lose if convicted: years and years of good service, income for family support, and a coveted retirement in the not too distant future, all of which the panel members could relate to in a most intimate way.

Reducing the charges in the above cases, you find in both Case #1 and Case #2 an NCO that has had his fill of disobedience; in Case #3 an officer having an indiscreet affair with an enlisted woman and lying to cover up his indiscretion; and in Case #4 an NCO who chose expediency over the rules, which his superiors probably inadvertently encouraged with pats on the back.

A lot of "mere" humanity is involved in such behavior. This is something that distinguishes this criminal activity from the more harsh crimes of murder, rape, and robbery, for example. These latter crimes are human, naturally, but include a measure of inhumanity. Therefore, the defense and the prosecution must consider the nature of the crime as well as the accused in each case, because therein lies fertile ground for cultivating the sympathy necessary for an acquittal.

### Prosecutorial Considerations

When the government is confronted with the possibility of an equitable acquittal, certain decisions and analyses should be made and shared with the convening authority. Decisions that lead to an acquittal, regardless of whether the accused is actually guilty, can have serious consequences for a unit's morale if it creates the perception of unfairness or vindictiveness in a highly visible trial.

In analyzing and making decisions about a case, the prosecution team must guard against thinking that what they know about the accused is what everyone at trial will know about the accused. Commanders do not always understand that the image of the accused they see and the facts of the case they know may not be what the court will see and know. The rush to recommend a court-martial should be tempered with the professional advice of a realistic lawyer. A realistic lawyer in this regard is one who understands that the rules of evidence limit the scope of examination in a court-martial and may drastically reduce the possibility of a conviction. Furthermore, the realistic lawyer knows a command decision to prosecute is far removed from a judicial decision to convict. Failure to give this advice or even

discuss realistic possibilities with the command may result in a tremendous shock if the panel acquits the accused.

The detrimental effect on the command can be twofold: the command can either lose faith in the SJA and the lawyers involved, or the command may lose faith in the military justice process. One need not be involved in criminal matters for a long period of time before realizing that prosecutorial discretion is necessary because firm and fast rules requiring prosecution in every situation of alleged criminal activity are not only unrealistic, but also it can be unfair.

The following are some of the initial questions that the government should address when confronted with a possible equitable acquittal case:

1. What are we trying to accomplish in our resolution of the matter?
2. Do we think it will be accomplished if the accused is acquitted?
3. Is some punishment for the wrongdoing a priority? If so, we must realize that a court-martial does not assure punishment under some circumstances, even though we (the government) have a factually sufficient case.
4. Should an alternate disposition be utilized to assure some punitive action?
5. How important is it to send a message to others within the command concerning this criminal behavior?
6. Will a court-martial send the best message?
7. Will it hurt or help in sending this message if the panel acquits the accused?
8. Under the circumstances of the case, do we have a choice, *i.e.*, is the victim's status such that it deserves command support in spite of a possible acquittal (*e.g.*, female, trainee, or racial minority)?
9. Is the accused's status such that a court-martial is mandated?

In addressing these questions, it is important to remember that an acquittal can demonstrate fairness and nurture a better concept of the military justice system within the military community. Therefore, going forward with the case may have this intangible value, even without a conviction.

If the decision to prosecute is made, the SJA and the chief military justice must ensure that the trial counsel they select to prosecute the case appreciates the criminality of the accused's conduct and the necessity of upholding the law for the purposes of discipline within the military. An SJA would be wise to query his or her trial counsel to ensure that he or she has this attitude. The trial counsel's personal convictions can impart an important psychological message to the panel members about the detrimental nature of this behavior in the military.<sup>8</sup> In this regard, detailing two trial counsel to the case might project the importance of the case to the panel.

An equitable acquittal situation is certainly not a case when a "wimpy" prosecution effort will carry the government's burden. It is necessary for the trial counsel to

<sup>8</sup> See generally Anthony & Vinson, *The Closing Argument: Application of the Attribution Theory*, Trial Dipl. J., Spring 1984, at 33-36 (jurors want to be able to justify their verdict) [hereinafter cited as Anthony & Vinson]; Barnum, *Effective Communication*, Trial, Dec. 1984, at 42-46 (importance of the attorney's style of communication at trial) [hereinafter cited as Barnum].

reassure the panel through the assertiveness of his or her prosecution effort that the panel, in convicting this individual, is upholding the law and doing justice. Trial counsel must internalize an attitude which reflects the true nature of a military society that desires to eradicate these undisciplined and illegal traits from its soldiers' behavior.<sup>9</sup> It is not an easy task to represent the government in these cases. They demand a great deal of personal energy, much of it from sensitive, visceral reaction, the result of good pretrial preparation and internalized values about the necessity of military discipline.

In preparing the case, it will become obvious that the accused's military character is the most significant defense asset. The accused's duty performance or prior service indicative of his or her military character may not be relevant to the issue of guilt or innocence of the alleged crime. Therefore, trial counsel will want to prevent its introduction into evidence on the merits. A motion *in limine*<sup>10</sup> or an objection may prevent defense counsel from introducing military character evidence. Do not be surprised, however, if the military judge denies a motion *in limine* or overrules an objection to military character evidence.<sup>11</sup>

The application of Military Rule of Evidence 404(a)(1)<sup>12</sup> to military character evidence requires the military judge to err on the side of admitting evidence of the accused's good military character.<sup>13</sup> Also, military judges know that prohibiting military character evidence portends significant potential for reversal.<sup>14</sup>

People, for whom the justice system functions, are not viewed in a vacuum in a trial setting and properly so, given the complexity of the human experience. However desirable it may be to remove all tangential matters from consideration, a prosecutor better prepare to meet an accused as he or she really is. This does not mean to forego attempts to exclude or limit military character evidence. Failure to challenge the relevancy of military character evidence, depending upon the charges, may constitute a serious oversight.<sup>15</sup> If the judge rules the accused's good military

character admissible, the trial counsel should be prepared to rebut this. There are a number of effective methods that might be used.<sup>16</sup>

Preparing to prosecute the equitable acquittal case requires detailed preparation of three areas: *voir dire*, opening statement, and closing argument. At these junctures of the trial, the trial counsel must counteract the defense's attempt to create a sense of moral indignation, reiterate the need for discipline in the military, and help the panel members justify, from a fairness point of view, a finding of guilty. The trial counsel has the evidence of guilt; he or she must encourage a spirit of conviction. At all three of these junctures, the trial counsel has an advantage of going first, to give momentum to the government's case, and to place the emphasis so that the defense must defend rather than create an offensive.

Never pass up the opportunity to *voir dire* the panel.<sup>17</sup> It is the government's chance to speak to the members, build rapport, and ascertain the panel's expectations about what the government must do to prove its case. This is also an opportunity to get over the initial nervousness that comes before every trial with members. Initial questions should be very simple and straightforward, e.g., "How many of you have previously served as members of a court-martial panel?" Such questions may have marginal utility for the underlying purpose of preparing the panel for the government's case, but they can help ease the trial counsel into the flow of the case. Trial counsel's air of confidence is important. Initial nervousness, combined with complex, convoluted questions of the panel, will detract from this air of confidence. These questions are easily identified because they require rephrasing, explanations, and sometimes the judge's intervention to clarify. Keep initial questions simple, not because of stupidity, but because of smarts!

After initial introductory questions, trial counsel should cover expectations concerning the government's burden of proof, any possible misunderstanding about proving elements of the crime (e.g., constructive possession,

<sup>9</sup> The recent Navy spy scandal (Walker-Whitworth) may have illumined another government concern in the possible equitable acquittal case. The trend toward more leniency or tolerance in small quantity drug offenses, even in the military, can reflect itself when noncommissioned officers are tried for "minor" drug offenses (the author has presided over two such cases in the past 18 months, one a staff sergeant, the other a sergeant first class, and both ended in equitable panel acquittals). The realization that drug abuse creates "a situation ripe for exploitation by Soviet spies" (testimony before Senate committee reported in *The Stars and Stripes*, June 29, 1985, at 1, col. 1) should encourage a more vigorous prosecution in possible equitable acquittal cases involving NCOs and drugs.

<sup>10</sup> R.C.M. 906(b)(13).

<sup>11</sup> See generally *Navy Court Fires Torpedo at the Court of Military Appeals*, *The Army Lawyer*, Apr. 1985, at 37-38; *COMA Returns Fire*, *The Army Lawyer*, July 1985, at 35-37; *The Vandelinder Assessment*, *The Army Lawyer*, Oct. 1985, at 18-19.

<sup>12</sup> Mil. R. Evid. 404(a)(1) provides:

(a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

<sup>13</sup> See *United States v. Vandelinder*, 20 M.J. 41, 45 (C.M.A. 1985), where the court stated "[a]dmittedly, a diversity of views may exist as to the precise limits of 'good military character.'"

<sup>14</sup> See *Vandelinder*; *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985); *United States v. Klein*, 20 M.J. at 26 (C.M.A. 1985); *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985); *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984); *United States v. McNeil*, 17 M.J. 451 (C.M.A. 1984); *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1983); *United States v. Thomas*, 18 M.J. 545 (A.C.M.R. 1984) (all holding military character evidence pertinent). *But see infra* note 15.

<sup>15</sup> See *United States v. McConnell*, 20 M.J. 577 (N.M.C.M.R. 1985); *United States v. Fitzgerald*, 19 M.J. 695 (A.C.M.R. 1984); *United States v. Lutz*, 18 M.J. 763, 771 (C.G.C.M.R. 1984); *United States v. Court*, 18 M.J. 724 (A.F.C.M.R. 1984) (in *Court* the trial counsel used a motion *in limine*). The above cases held military character evidence inadmissible.

<sup>16</sup> See generally Gilligan, *Character Evidence*, 109 Mil. L. Rev. 83, 93-99 (1985).

<sup>17</sup> See R.C.M. 912(d) and discussion; see generally Law Scope, *Voir Dire Struggle*, A.B.A.J., Sept. 1985, at 28 (conflict about procedure and use of *voir dire*). See also McShane, *Questioning and Challenging the "Brutally" Honest Court Member: Voir Dire in Light of Smart and Heriot*, *The Army Lawyer*, Jan. 1986, at 17.

permissible inference, or circumstantial evidence), and any possible questions or expectations about the proper use of documentary or tangible evidence in the case (e.g., photographs, bank statements, drugs, or diagrams). Television and movie trials enhance lay expectations about this type of evidence. Panel members expect and desire to see such evidence but may not understand its significance. Ask any question that may help to clarify the government's proper role and proper burden in the court-martial in contrast to the panel's expectations.

Trial counsel should then follow-up with the primary questions in individual *voir dire*. These questions go to the heart of the equity burden the government faces. Generally speaking, asking such questions of the entire panel prevents the more in depth, candid answer and personal assurance the government is seeking; therefore, utilize individual *voir dire* in this area.

If future retirement or retirement benefits already earned loom large in the case, ask the members individually, "How will the fact that the accused is almost (or is) retirement eligible (or retirement benefits may be affected, etc.) affect you in deciding this case?" The point here is to deal with the most difficult issue up front, in an honest and forthright matter. To ignore it is to ask for an acquittal.

Trial counsel must determine the questions on a case by case basis depending upon the facts. The following questions are suggestions that may apply:

1. "The accused is a senior noncommissioned officer. The crime is assault on a private without serious injury (or possession of a small amount of marijuana, etc.) Do you feel that because of the accused's status and/or what he stands to lose, that a court-martial is too severe for the alleged offense?"

2. "Do you believe that a decision to prosecute should be determined to some extent by what the individual might lose if convicted?"

3. "Do you believe every NCO should be given a break for a first offense if it is not a major offense such as robbery, rape or murder? Where would you draw the line?"

4. "Do you feel you can decide the guilt or innocence of the accused without regard to how it might affect his family? Can you reserve all family considerations until after you have decided guilt or innocence?"

5. "Do you have difficulty accepting that our military society requires higher standards of conduct than our civilian sector? Do you believe such high standards are as necessary in peace as in war?"

6. "The accused has been awarded the Silver Star (Soldier's Medal, wears the Combat Infantry Badge, etc.) What consideration will you give that in deciding his guilt or innocence?"

7. "The accused has an impressive record of duty performance. How will you consider his duty performance in determining his guilt or innocence?"

8. "Do you understand that the government does not have to prove motive, that is, why the accused committed the crime? In view of what the accused would lose if convicted, can you refrain from trying to second guess why he might or might not have committed the crime if his motive is not shown?"

9. "A general officer (brigade commander, etc.) will testify for the accused today. Will you give any more

consideration to his testimony than to other witnesses? Do you believe it is possible, because of the higher echelon at which a general officer works, that he justifiably may have motives for testifying that go outside the courtroom and beyond the issue of the trial? Do you fear because of general officer involvement in the case that your decision may adversely affect your career?" (These questions should have been asked in example Case No. 3)

10. "The accused's wife will testify today. Would you be upset if the government extensively cross-examines her? Even if she started crying and the government continued to press her concerning her testimony?"

11. Explain law and equity to the members. Then ask, "Can you decide this case on the law and set aside equitable considerations until the sentencing phase of the trial?"

The answer to most of the questions is a foregone conclusion. A commitment, however, extracted from the panel members to uphold the higher standards of the military, to uphold the law in spite of the accused's status, and a commitment to weigh the evidence and not the equities involved, can get the panel in the proper mental attitude to hear the government's case. Trial counsel should, of course, remind the panel of these commitments in the closing argument.

Following *voir dire*, the prosecution's opening statement should be a clear and concise statement of the government's proof. Do not overstate the case. Just as the trial counsel expects to hold the panel members to their statements on *voir dire*, they will no less hold the trial counsel to opening statements about the proof.

Do not go over each witness' expected testimony. Simply tell a story about the real-life human drama which the evidence will reveal. Make the necessary connections of the evidence, creating a logically and sequentially related picture for the panel. Point out how a certain piece of evidence will prove a particular element if it may be unclear. For example, say, "The government will offer \_\_\_\_\_, to prove (or explain) that the accused did (or knew) \_\_\_\_\_, an element of the offense." This may be reiterated at the time of presenting the evidence to the panel and again during closing argument.

The opening statement must be written out prior to trial. This aids the trial counsel's important reflection process about the case. It is a means of reviewing the case, both strengths and weaknesses, and better prepares the trial counsel to deliver the statement effectively. Once the trial counsel has become adequately familiar with the opening statement, he or she should outline the information and use the outline as an aid in presenting the statement to the panel. Rehearsal will remove a need to read the statement.

Do not worry about what the defense counsel is going to say in his or her opening statement. The defense would like nothing better than to put the government on the run and thereby shift positions. The opening statement is not the place to anticipate or counter the defense case. Rather, it is the opportunity to establish a favorable impression of the government's case. The opening statement should emphasize the evidence which is sufficient for conviction.



In the possible equitable acquittal case, evidence is not the problem. The problem is overcoming the tendency of laypeople to ignore the law and substitute their sense of equity. A prosecutor can counter this tendency in the opening statement by referring to the accused as "the accused, a senior noncommissioned officer," or, "the accused, a soldier of seventeen years," or "the accused, a commissioned officer," giving proper intonation and emphasis to communicate to the panel a sense of "how could the accused, of all people, do something like this—he should know better!"

In the closing argument, the trial counsel must, in addition to summing up the evidence, give the panel moral support to do a difficult task—convict the accused! Experienced trial counsel should remember that they have become calloused to such situations in comparison to the average panel member. A trial counsel must guard against "tunnel vision" incurred from focusing only on the evidence of guilt. The panel members' involvement in the case is from a broader perspective and they will treat the case accordingly.

The commander who orders the trial and the SJA do not see the whole case when they engage in their decision-making process. They properly have communal interests beyond this particular case. In most instances, they do not have all the evidence which the defense will introduce. A trial counsel therefore must guard against projecting the commander's and the SJA's attitudes upon the members. Also, remember that it is easy to see the merits of a prosecution when you do not have to try the case.

The tone of the closing argument is generally a matter of individual style. While histrionics may not be necessary, it is certainly imperative for the trial counsel to portray a sense of personal conviction about the merits of the government's position. An attitude of lawyerly aloofness is a losing proposition.

Certain forms of argument should be avoided. First, do not engage in a vitriolic attack on the accused. The crime generally will not warrant it, his past record will not support it, and the panel will resent it. They probably already feel sorry for him. You may, of course, attack what he did in committing the crime. Second, do not say or infer that this is the worst crime ever. That is not the truth. The panel may turn you off if you attempt to make more of it than the evidence shows. Third, do not insinuate that the Army will come apart at the seams if the panel does not convict the accused. The panel knows better and may give the rest of the argument the same weight as this insinuation deserves. Finally, do not mention punishment in closing argument. The court members may already feel that conviction is punishment, so avoid reemphasizing the point.

One method of arguing the case is to raise the consciousness of the members to a level above this particular case. Remind the panel that they are not being asked to draw the line on what is or is not criminal activity as a matter of law. Congress has already done that through the UCMJ when it determined that such conduct constitutes a crime. While conviction may represent a serious personal reversal for the

accused, conviction nevertheless comports with the law. Either we are a society of law, with the necessary respect to uphold it, or we drift with a degree of uncertainty. Soldiers need to know where they stand, otherwise discipline becomes a matter of caprice. The noncommissioned and commissioned officers are the standard bearers for not only upholding the law, but also for showing that it applies in their own lives as well. Unfortunately, for the accused in particular, and our military community in general, the accused ignored his responsibilities in this regard.

An argument along these lines, recalling the members' commitments made during *voir dire*, is one method of attempting to make the members feel comfortable or justified in returning a verdict of guilty. The defense will be playing for sympathy. Trial counsel needs to focus on the reality of the crime and the military ideals that conviction represents.

The closing argument must be written out several days before trial. After reflection and rehearsal of the argument, reduce it to an outline. Make the outline so that space remains to jot down additional points that come to mind before or during trial. Stay mentally flexible regarding the final product. Unforeseen trial matters may require some change of strategy, but do not wait for the trial to decide your closing strategy. Develop a closing argument before trial and adjust, otherwise the result will be less well connected, more defensive in nature, and less persuasive.

Use the rebuttal argument time to highlight the government's main points. Do not attempt to reargue the case, as this would be improper rebuttal. Avoid pettiness over small points in the defense counsel's argument and resist a defensive posture. Remember, the military panel is a "blue ribbon jury" and they will know if the defense avoids the more damaging facts of the case.

The bottom line in dealing with a panel, for all trial lawyers, is to be open, honest, and forthright in presenting the case.

One final thought regarding charging in these cases. The government usually "shotguns" the charge sheet in these cases, obviously hoping to "hang their hat" on something for a conviction. Also, although absolutely unadmittable, multiplicitous charging sometimes suggests that, with so many charges, the government wishes to make the accused look a little tarnished.<sup>18</sup> Multiplicitous charging, unless it is necessary because of true exigencies of proof, only advertises the weakness of the government's case, or, more precisely, the difficulty of the government's case. Forthright charging, developing a theme for the case to support the charges,<sup>19</sup> thereby narrowing the scope of the trial, is a better tactic for the government to follow in an equitable acquittal situation.

### Defense Strategy

Defense counsel in the possible equitable acquittal case has obvious advantages. To ensure the full use of these advantages at trial, defense counsel must do a thorough job of pretrial preparation.

<sup>18</sup> See, e.g., *United States v. Sturdivant*, 13 M.J. 323, 329-30 (C.M.A. 1982).

<sup>19</sup> See generally Colley, *Friendly Persuasion*, *Trial*, Aug. 1981, at 41, 43 (first objective in trial advocacy is to focus jury on crux of the case) [hereinafter cited as Colley].

Presenting the best possible defense begins with the accused's appearance and, of course, defense counsel's own dress.<sup>20</sup> The client's uniform must be immaculate. Every ribbon must be correctly positioned, the haircut must be well within Army standards, and the accused must sit tall and erect. A dress rehearsal in the courtroom will help to make the accused appear relaxed and natural during the trial. If the accused's family is an asset in terms of appearance, i.e., attractive wife or well-groomed husband, "cute" children who can sit still, then serious consideration should be given to their presence in the courtroom. Let the panel see who gets hurt if they convict the accused. Remember, it is the concept of unfairness the defense needs to enhance.

Never ask for an immediate trial. Take all the time necessary for preparation. Time is almost never a government asset. If a victim is involved, make sure that any and all blemishes or credibility reducing characteristics of the victim that can properly be brought before the court are indeed brought before the court. This requires full and complete preparation, and that means legwork. Defense counsel must talk to people to get the full story. Looking through the personnel file and talking to the first sergeant is not enough. Talk to people who work with the victim, visit the scene of the alleged incident, talk to neighbors, and prepare for cross-examination of the victim. This intense preparation for cross-examination of the victim cannot be stressed too much.

Defense counsel must know every good thing his or her client has ever done and analyze how best to present his information to the panel. The client's blemishes must also be identified in order to guard against exposure at trial or to counter any negative information that may come out during trial.<sup>21</sup>

Generally, the accused has an outstanding prior service record. When this is not the case, the defense counsel should give serious consideration to a motion *in limine* to prevent past infractions or uncharged misconduct from prejudicing the accused.<sup>22</sup> Make sure that the information on past infractions or misconduct of the accused is something the prosecution knows or probably knows before exposing your information with a motion. The information may no longer be in the accused's file. The information may never have been in the accused's file. The prosecution may not have done their "homework" to interview the witness who knows the conduct.

Support the motion, if one is necessary, with a written brief submitted prior to trial. This will ensure the best possible consideration of the motion at trial and preserve it more adequately for appellate review. Additionally, writing out the motion will clarify the issue in the defense counsel's own mind in preparation for arguing the motion.

If the motion to preclude unfavorable information is granted, be careful not to "open the door," thereby defeating the whole purpose of the motion. Be sure to caution any witness that may inadvertently "open the door" to uncharged misconduct or prior misconduct simply because the witness did not realize what he or she was doing.

Three vitally important points of trial preparation are *voir dire*, opening argument, and closing argument. This applies equally to defense counsel as to trial counsel. The defense counsel must prepare for effective *voir dire*, and the best place to begin this preparation is to acquire information about individual panel members. One method is to have each panel member fill out a general information questionnaire prior to trial.<sup>23</sup> Using this knowledge, make *voir dire* an opportunity for the panel to get to know the defense counsel, to build rapport with the panel, and to ensure the removal of panel members who give any appearance of bias or inflexible attitudes that might hurt the client.<sup>24</sup> As a defense counsel in an equitable acquittal case, it is the author's opinion that the sentencing phase of the trial should never be mentioned during *voir dire*, opening argument, or closing argument. Do not give the panel a reason to believe the defense thinks sentencing is going to be a part of the trial.

Tailor *voir dire* to fit the facts and equities involved. Feel out the members regarding the client's potential loss if they convict. Question the panel members about their desire for retirement and its importance to them. Inquire if they are family men or women; how many children they have. Ask them if they believe a justice system, built upon the best of intentions, can sometimes be unfair because the human element is so intangible and difficult to incorporate in a system. Ask if law should serve mankind or man the law.

Introduce questions of situational ethics. "Would you want to enforce a law in a given situation if it produced an irrational result?" "Do you believe it is possible to uphold the spirit of the law and yet unintentionally violate the letter of the law?" Help the members to think about what defense is going to ask them to do—acquit the accused in spite of the law!

The foregoing are suggestions for questions during *voir dire* that may help to discover valuable information about the panel members. At the same time, questions of this nature will also set the defense theme of the case.

Always use the opportunity after the government's opening statement to present the defense's opening statement.<sup>25</sup> It is a chance for defense counsel to give the panel a favorable version of the facts prior to the presentation of the government's case, it interrupts the prosecution's momentum, and can sometimes put the government on the defensive. Never say something that cannot be reasonably and logically derived from the evidence. Make the opening

<sup>20</sup> See Armstrong, *Packaging the Lawyer's Product*, *The Army Lawyer*, Dec. 1979, at 15, 16-17.

<sup>21</sup> Cf., *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985); see also Gilligan, *Application Falsehoods as Basis for Impeachment*, *The Army Lawyer*, Feb. 1986, at 50.

<sup>22</sup> R.C.M. 906(b)(13); see Gilligan, *Uncharged Misconduct*, *The Army Lawyer*, Jan. 1985, at 16-17.

<sup>23</sup> R.C.M. 912(a)(1).

<sup>24</sup> See, e.g., Johnson, *Voir Dire in the Criminal Case: A Primer*, *Trial*, Oct. 1983, at 61-65; Wood, *Preparation for Voir Dire*, *Trial Dipl. J.*, Spring 1985, at 17-19.

<sup>25</sup> See Klieman, *A Checklist for Opening Statements*, *Trial Dipl. J.* Summer 1985, at 34-38.

statement one that the panel members can easily follow, as they are hearing the information for the first time.

Write out your statement and practice it. Know the statement well enough that it does not have to be read.<sup>26</sup> Do not anticipate the prosecution's statement; an incorrect guess about what the prosecution will say can leave the defense with no prepared statement or one that becomes incoherent because of the gaps.

Do not let the government dictate the case strategy. Defense counsel is in the driver's seat and must maintain that position from the beginning of the trial all the way to the deliberation on findings. It is through *voir dire* and the opening statement that defense counsel can gain and enhance the natural momentum that is available in such a situation.

In addition to preparing for *voir dire* and opening statement, defense should prepare a closing argument.<sup>27</sup> Defense counsel must ensure that the panel's tough decision is not made any easier by the closing argument. The closing argument should make it excruciating for them to decide for anything other than an acquittal. Point out the inequities in the situation. Enhance the favorable image of your client. Do not point out any positive aspects of the government's case and then attempt to minimize them through argument. Point out the positive aspects of the defense's case! Once again, do not anticipate what trial counsel will argue, not only because trial counsel's argument may be totally different from what might be expected, but also because a good trial counsel is not likely to give the defense many useful points to use for the client's position.

In developing the closing argument, you must concentrate on a logical sequence and give a logical explanation of the favorable circumstances of the case so that the panel members will have sufficient cause to feel good acquitting the accused. Avoid arguing that the panel should acquit your client because he did not commit the offense. In an equitable acquittal case the proof is usually in that your client did commit the offense. The panel will acquit only for a reason other than innocence. Give them something to hang their hat on other than a conviction. Do not be afraid to wave the flag and remonstrate about justice!

A word of caution to defense counsel in those situations when nonjudicial punishment is offered to their client. The best possible advice to your client is to accept the nonjudicial punishment. The reason: absolutely nothing can be guaranteed at a court-martial. The most sensible advice in view of this lack of any guarantee is the conservative position of accepting the nonjudicial punishment. Any allegation involving either a weapons violation or a security violation should be given very cautious consideration as a potential equitable acquittal case. Even though the infraction may be minor, the command reaction is generally major, an attitude panel members usually share. If the client insists, of course, a trial has the possibility of vindicating the accused's feeling of unfairness. The defense

counsel, however, must guard against taking an ego trip and recommending that the client demand a trial because an acquittal is not a certainty and the client has a lot riding on the decision.

One final caveat concerning officer cases when an equitable acquittal may result. In one actual case, the panel found the accused officer not guilty; however, he did not act to retrieve his previously submitted resignation. His resignation was approved. Be aware of this possibility when advising the accused about the ramifications of submitting a resignation prior to trial. A resignation request may not be acted upon prior to trial, and it will not necessarily suspend the court-martial proceeding.<sup>28</sup>

### Conclusion

And so it goes through a wealth of experimental data, now thousands of experiments old, showing that people reason intuitively. They reason with simple decision rules, which is a fancy way of saying that, in this complex world, they trust their gut.<sup>29</sup>

Equitable acquittals entail frustration because of the gamble both sides share. Well prepared counsel remove much of the frustration in disposing of the case because both sides are in a position of understanding.

Trial counsel can feel good about his or her work when the case has been well prepared, the command knows the possibilities, and realistic goals or policies are attainable without having to "win" the case. Defense counsel can likewise appreciate the client's position and vice versa when alternate dispositions have been discussed or sought, when the client understands the uncertainty of a panel trial, and full preparation has been conducted to give acquittal a higher degree of probability.

The persuasiveness and courtroom skills of counsel can influence these trials more so than most criminal trials because equity underlies whatever decision the court reaches. Adequate pretrial preparation, which cannot guarantee a certain outcome, makes for fewer surprises and takes the sting out of undesirable results. Those who do not plan for the role of equity in a court of law are awaiting a new experience.

<sup>26</sup> See generally Colley, *supra* note 19, at 44 (perception of jury depends upon what they are prepared for); Barnum, *supra* note 8, at 43-44 (jury verdicts are often consistent with jury's first impression).

<sup>27</sup> See, e.g., Baldwin, *Jury Argument—How to Prepare and Present a Winning Closing Argument*, Trial, Apr. 1984, at 58-60, 62, 64; Interview with Jacob Stein, *The Closing Argument*, Trial Dipl. J., Spring 1985, at 8-11; Anthony & Vinson, *supra* note 8, at 33-34.

<sup>28</sup> See generally Dep't. of Army, Pam. No. 27-21, Legal Services—Military Administrative Law, para. 6-10c(4) (1 Oct. 1985).

<sup>29</sup> T. Peters & R. Waterman, Jr., In Search of Excellence 63 (1982).

# Structured Settlements: A Useful Tool for the Claims Judge Advocate

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You have received a tort claim in the amount of \$1,000,000 against the United States alleging medical malpractice at the installation hospital. You immediately notify the U.S. Army Claims Service (USARCS)<sup>1</sup> and proceed with a preliminary investigation, to include gathering medical records and identifying witnesses. After discussing the claim with USARCS, you receive their permission to fully investigate and, if appropriate, settle the claim.<sup>2</sup> Your investigation substantiates the claimant's allegation that his wife underwent a cholecystectomy, suffered cerebral hypoxia secondary to interoperative hypoventilation, did not awaken from the anesthesia, is comatose, and is not expected to recover consciousness. Through the use of medical experts, you have determined that the proximate cause of the patient's injury was improper administration of anesthesia during surgery; therefore, the United States is liable. You now have to assess damages and settle the claim. In the not so distant past, you would have negotiated settlement with one approach—the lump sum settlement. That, however, is not the only way to settle a claim. The structured settlement is gaining more and more recognition, and deservedly so.<sup>3</sup>

In fiscal year 1985, 1837 Federal Tort Claims Act claims were filed against the Army. This represented \$2,246,593,732.67 in total damages sought by these claimants. Of this number, 687 claims were denied and 369 were settled for a sum of \$23,862,078.89. Structured settlements were used in a number of the settled claims, and the USARCS intends to use them more and more to reach administrative settlements.<sup>4</sup>

Why use the structured settlement? This article will try to answer that question by discussing what a structured settlement is, its advantages and disadvantages, and what, if any, federal judicial recognition has been given to structured settlements, so that the field claims judge advocate will be more familiar with this innovative approach to resolving claims.

A structured settlement is nothing more than a promise to pay a series of future payments to the claimant in lieu of a lump sum settlement.<sup>5</sup>

It is a form of deferred income payment made to a plaintiff over his or her life expectancy and beyond. It may be very simple, covering a specific period of years, or it may involve a complex structure. It typically will be designed to include or compensate for several of the following elements:

1. injuries;
2. medical expenses;
3. pain and suffering;
4. care, comfort, support, guidance;
5. education fund;
6. lump sum at death to spouse;
7. inflation-fighting escalation clause; and
8. attorney's fees.<sup>6</sup>

The nice thing about using a structured settlement is that it can be tailored to the specific needs of the claimant and his or her family. Appendix A contains an example of a settlement agreement. Unfortunately, even if you decide that a structured settlement is the better approach to resolving a claim, you still have to "sell it" to the claimant and the claimant's attorney. Sometimes this is not an easy task. Therefore, you have to know the advantages and disadvantages of the structured settlement.

## Advantages and Disadvantages

There are several advantages to the claimant of a structured settlement. First, it permits an individual to live off a secure, lifetime stream of income.<sup>7</sup> The claimant does not have "to assume the costs and risks of managing an investment portfolio and, [more importantly,] will be prevented from prematurely dissipating the settlement funds."<sup>8</sup> Usually the claimant is ill-equipped to handle the investment management of a large lump sum payment received from settlement of a claim. "Sadly enough, it is estimated that

<sup>1</sup> Dep't of Army, Reg. No. 27-20, Claims, para. 4-10c (3) (18 Sept. 1970) (C18, 15 Jun. 1984) [hereinafter cited as AR 27-20].

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The US Army Claims Service is responsible for the monitoring and settlement of such claims [claims in which demand exceeds \$5000] and will be kept informed of the status of the investigation and processing thereof. Direct liaison and correspondence between the US Army Claims Service and the field claims authority or investigator is authorized on all claims matters, and assistance will be furnished as required. AR 27-20, para. 4-10c(3) (emphasis added).

The claims judge advocate must also keep in mind that settlement of any claim in excess of \$25,000 requires the approval of the Department of Justice (DOJ). 28 U.S.C. § 2672 (1982); AR 27-20, para. 4-15. Therefore, any settlement with a claimant is tentative upon DOJ approval. In all cases in which litigation is likely, e.g., final denial of a claim, or upon rejection by the claimant of a partial allowance, and further efforts to reach settlement are not considered feasible, a copy of the letter sent to the claimant informing him or her of the action will be furnished to HQDA (DAJA-LT) Washington, D.C. 20310. AR 27-20, para. 4-10h(2).

<sup>3</sup> Fewer than 3,000 cases settled in 1979 used structured settlements. In 1983, over 15,000 cases at a cost of \$1.5 billion were resolved with structured settlements. Denninger, Bellamy, & Terue, *Anatomy of a Structured Settlement*, Case & Com., Feb. 1985, at 26.

<sup>4</sup> Letter from Joseph H. Rouse, Chief, General Claims Division, U.S. Army Claims Service to Major Phillip L. Kennerly (November 13, 1985). Twenty-six claims were resolved by structured settlement.

<sup>5</sup> Danninger, Johnson & Lesti, *Negotiating a Structured Settlement*, A.B.A.J., May 1984, at 67 [hereinafter cited as Danninger, Johnson & Lesti]; What You Have Always Wanted to Know About Structured Settlements and Were Afraid to Ask (JMW Settlements, Inc., 1984) (unpublished manuscript).

<sup>6</sup> Dombroff, *Beware of Lump Sum Settlements*, *Compleat Law.*, Summer 1984, at 16 [hereinafter cited as Dombroff].

<sup>7</sup> *Id.*, Danninger, Johnson & Lesti *supra* note 5.

<sup>8</sup> Danninger, Johnson & Lesti, *supra* note 5.

more than half of the claimants squander their award themselves or lose it to family, friends, and unscrupulous or even well-intentioned advisors,"<sup>9</sup> and all within a very few years after they receive the award.<sup>10</sup> "A properly structured settlement not only prevents the rapid dissipation of the award, but also provides the stream of payments . . . to the claimant."<sup>11</sup>

Second, the amounts periodically paid out to the claimant are tax-free. The Periodic Payment Settlement Act of 1982<sup>12</sup> amended section 104(a) (2) of the Internal Revenue Code<sup>13</sup> "to exclude from gross income damages for personal injuries or sickness, whether paid as a lump sum or periodically."<sup>14</sup> All payments to a claimant, either principal or interest, are exempt from taxation if structured according to Code requirements.<sup>15</sup>

The Act was designed to codify existing law contained in revenue rulings; therefore, four rulings merit brief discussion. In Revenue Ruling 65-29,<sup>16</sup> a lump sum payment was exempt from taxation, but not interest income earned from the sum.<sup>17</sup> In Revenue Ruling 77-230,<sup>18</sup> a trust established by the United States to pay for claimant's medical expenses was found to be tax exempt.<sup>19</sup> Revenue Ruling 79-220<sup>20</sup>

provided that "if damages are paid periodically and the injured person has no right to their discounted present value or any control over investment of the present value, then each periodic payment is excludable, including earnings on the fund."<sup>21</sup> Finally, in Revenue Ruling 79-313,<sup>22</sup> when a "plaintiff never had constructive or actual receipt of the present value of the payments, they were exempt under section 104(a) (2)."<sup>23</sup>

In light of the above Revenue Rulings and their codification in the Periodic Payment Settlement Act of 1982, it is important, when structuring a settlement for the claimant, for the claims judge advocate to ensure that the claimant has no constructive or actual receipt of the present value of the damages, but that he or she is entitled only to each periodic payment as it comes due. The claimant should not be designated as the owner of the annuity, nor given the right to designate the beneficiary of the annuity. Furthermore, the claimant should not have control over or the right to direct the investment of the funding medium, nor power to accelerate or retard any period payment, nor increase or decrease its amount.<sup>24</sup>

The tax advantages to a claimant can be insignificant or substantial, depending on the claimant's tax rate. The

<sup>9</sup> Innovative Approaches to Structuring Settlements (JMW Settlements, Inc. 1984) (unpublished manuscript) [hereinafter cited as Approaches].

<sup>10</sup> Cleary, *Structured Settlements: A Variation on a Theme*, For the Def., Jan. 1984, at 25.

<sup>11</sup> Approaches, *supra* note 9, at 1.

<sup>12</sup> Pub. L. No. 97-473, reprinted in 1982 U.S. Code Cong. & Ad. News (97 Stat.) 4599. For a discussion of this act, see U.S. Army Claims Service, *Changes to IRC Confirm Tax Free Status of Personal Injury Damages in Structured Settlements*, The Army Lawyer, June 1984, at 50 [hereinafter cited as *Changes to IRC*].

<sup>13</sup> (a) In General—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include —

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness.

I.R.C. § 104(a) (2) (Prentice-Hall 1985).

<sup>14</sup> Staller, *The Periodic Payment Settlement Act of 1982*, Prac. Lawyer, April 15, 1983, at 25 [hereinafter cited as Staller].

<sup>15</sup> Many plaintiff's attorneys argue that their clients could take a lump sum payment, invest it in municipal bonds, and receive more tax-free income than by accepting a structured settlement. This is a very valid point. The counterpoints are:

- a. Virtually all bonds have a feature that allows the municipality to call the bonds back. This would normally happen when interest rates go down, which means that the individual could not get the same high return.
- b. The value of a portfolio will decrease or increase according to interest rates.
- c. The maximum life of most municipal bonds is 30 years, which again highlights the fact that any portfolio must be managed. Who will guarantee the performance.

Approaches, *supra* note 9, at 17.

<sup>16</sup> 1965-1 C.B. 59.

<sup>17</sup> Staller, *supra* note 14, at 26.

<sup>18</sup> 1977-2 C.B. 214. See *Changes to IRC*, *supra* note 12, at 50.

<sup>19</sup> The net income and, if necessary, the corpus of the trust were to be distributed to provide for the plaintiff's medical expenses. Net income in excess of expenses was to be accumulated and, upon the plaintiff's death, the corpus and undistributed income were to revert to the United States. Furthermore, since the income of the trust could be accumulated for future distribution to the United States, the trust was a grantor trust, whose income would ordinarily be taxed to the grantor, but in this instance, the income was not taxable since the United States is not subject to any tax.

Staller, *supra* note 14 at 26.

<sup>20</sup> 1979-2 C.B. 74. See *Changes to IRC*, *supra* note 12, at 51.

<sup>21</sup> Dombroff, *supra* note 6, at 18. The defendant's insurance company, which had purchased a single premium annuity contract from a second insurance company, was the owner of the annuity and had the right to change the beneficiary. Under the settlement agreement, the plaintiff was entitled to monthly payments for 20 years, with payments to be made to the plaintiff's estate if he died earlier. The plaintiff relied only on the general credit of the insurance company for his payments. As the plaintiff has no rights in the annuity, which was merely an investment by the insurance company to fund the obligation, the plaintiff did not have actual or constructive receipt of the lump sum that was used to purchase the annuity. Consequently, each monthly payment was excludable in full from the plaintiff's income under section 104(a) (2). Staller, *supra* note 14, at 27.

<sup>22</sup> 1979-2 C.B. 75. See *Changes to IRC*, *supra* note 12, at 51.

<sup>23</sup> The defendant's insurance company was obligated to make 50 annual payments to the plaintiff, each payment five percent larger than the previous one. The plaintiff was not entitled to accelerate any payment or increase or decrease its amount, and the insurance company was not required to set aside any assets to secure its obligation to the plaintiff, the plaintiff possessing only the rights of a general creditor against the insurance company. Staller, *supra* note 14, at 28.

<sup>24</sup> *Id.*

claims judge advocate, after a thorough investigation of the claim, will know what the tax rate is and how much weight to give to stressing the tax advantages of a structured settlement.

The third advantage of a structured settlement is that it allows the United States to provide a substantial package of benefits for a claimant's long-term care or support or both. Such a package can involve any of the following:

1. an initial lump sum payment to cover lost wages and medical expenses incurred to the settlement date;
2. funds for rehabilitation of a severely impaired person, for specific medical equipment, such as a wheelchair or prosthetic device, or to make alterations to the [claimant's] home, such as a wheelchair ramp;
3. a deferred or immediate annuity contract to provide income based on an appraisal of the claimant's or decedent's lost earnings payable periodically for life or for a certain number of years and guaranteed for a period certain;
4. a medical annuity sufficient to provide for ongoing treatment and future medical expense;
5. an educational annuity providing funds for dependent children's education and technical training;
6. a reserve annuity that would pay a single sum at some future date to cover extraordinary expenses or a death benefit for survivors; [and]
7. attorney's fees either paid immediately or structured.<sup>25</sup>

Fourth, the United States benefits because a structured periodic payment settlement saves dollars immediately by reducing the cost of the claim. An example of a structured settlement that illustrates this point is presented in the next section.

Finally, structured settlements can benefit both the United States and the claimant's attorney by the United States structuring attorney's fees as part of the total settlement package.<sup>26</sup>

There are disadvantages as well. One major disadvantage is that "once there is agreement on a payment schedule, that schedule is fixed. This can have ill effects in situations in which future medical or other expenses are not anticipated correctly by the fixed payment schedule."<sup>27</sup> To avoid such repercussions, the claims judge advocate must thoroughly investigate all potential future expenses and take them into consideration in preparing a settlement offer. Another disadvantage is the possibility that the insurance carrier, from which the United States purchases an annuity to fund the structured settlement, may become insolvent.<sup>28</sup>

## How Are They Structured and Funded?

As previously discussed, one of the advantages of a structured settlement is that it can be tailored to the specific needs of an individual claim. These needs are determined by evaluation of the claimant's situation by the claims judge advocate. The claimant will usually expect a lump sum up front payment at the time of settlement to cover certain needs, such as lost wages, present living expenses, past medical expenses, and attorney's fees. Other items, such as pain and suffering, rehabilitation expenses, education or technical training for the spouse or dependent children, future medical expenses, future wages, and future reserve for extraordinary items or death benefits to heirs can be structured.

The following example is illustrative of what can be accomplished with a structured settlement. Notice the cost savings to the United States:

Baby Doe is brain-damaged as the result of a vehicle collision where the United States is at fault. The child is 5 years old, but now he has the mind of a 2 year old and will not improve. His life expectancy is 75 years and he will need constant care. An economist has rendered the following report:

Item	Annual costs
Medical	\$1200
Medical Equipment	
(5-16)	\$4500
(16-L)	\$4200
Therapy	
(5-18)	\$1200
(18-L)	\$3500
Attendant	
(5-18)	\$25,000-35,000
(18-L)	\$60,000-80,000
Non-recurring	
Housing	\$45,000
Medical Procedures	\$4,000

Claimant's attorney has indicated that this claim has a judgment value of \$5,000,000, and he has demanded that amount. The claims judge advocate determines approximate settlement value at \$2,000,000.

### THE STRUCTURED OFFER

1. Up front payment—\$200,000
2. Legal fees—\$336,930
3. Step rate annuity (a settlement in which the periodic payments increase in the future by a predetermined amount on a predetermined date). This payout is guaranteed for 20 years regardless if claimant lives the 20 years (guaranteed payments for a fixed number of years is an option).

<sup>25</sup> Dombroff, *supra* note 6, at 18.

<sup>26</sup> Telephone interview with Thomas D. Walsh, Vice President, JMW Settlements, Inc., Washington, D.C. (Jan. 21, 1986); Danninger, Johnson & Lester, *supra* note 5, at 69; Letter from Patrick J. Hindert to Captain Patrick Tyrrell (August 26, 1980).

<sup>27</sup> Danninger, Johnson & Lesti, *supra* note 5.

<sup>28</sup> This disadvantage is not as threatening as it might first appear. Although it should not be totally disregarded, there are methods employed by states and USARCS to minimize this possibility. A large number of states have what are known as reinsurance pools, whereby all insurance companies doing business in a state will assume a pro-rata share of an insurance company that becomes insolvent to pay off the insolvent company's policies. Some states have funds set up to pay a set amount on obligations of insolvent companies. Insurance companies doing business in such states "kick in" payments to this fund. Another method of protection against insolvency is to purchase reinsurance. By this method, one insurance company will sell an insurance policy that covers payment of annuities written by another insurance company if the insurance company who initially undertook the annuity becomes insolvent and cannot make the payments called for in the annuity. The United States will not pay the premium for such insurance; it is paid by the claimant. Besides these various methods, USARCS, to avoid the possibility of insolvency, requires that structured settlements brokers use only annuity carriers who receive a minimum of an A+ rating from *Best's Insurance Reports*. Telephone interview with Thomas D. Walsh, Vice President, JMW Settlements, Inc., Washington, D.C. (Jan. 21, 1986).

Years schedule	Payment stream	No. of Yrs paid	Payout	Cost to U.S.
1-13	\$5,000	13	\$780,000	\$424,495
14-20	\$10,000	7	840,000	128,350
21-life	\$10,000	50	6,000,000	73,050
Guaranteed Payout			\$1,620,000	
Total Payout			\$7,620,000	
Total Cost				\$625,895

4. Lump Sum Payments (to combat inflation or to pay for expected expenses).

Amount of lump payment	Paid in "X" years	Cost to U.S.
\$225,000	5	\$132,075
250,000	10	80,500
250,000	15	44,250
250,000	20	24,250
250,000	25	16,500
250,000	30	11,250
250,000	35	7,750
250,000	40	5,250
Payout \$1,975,000		Total cost \$321,825

Payout Summary		Cost Summary	
1. Up front	\$200,000	1. Up front	\$200,000
2. Legal fees	336,930	2. Legal fees	336,930
3. Step rate	1,620,000	3. Step rate	625,895
4. Lump sums	1,975,000	4. Lump sums	321,825
Guaranteed payout	\$4,131,930	Total cost	\$1,484,650
Payout over expected life	\$10,131,930	Medical trust	200,000
Plus \$200,000 Medical Trust		Final cost to U.S.	\$1,684,650 <sup>29</sup>

Notice that the cost to the United States was less than the \$2 million settlement value, yet the payout to the claimant exceeded the \$5 million judgment value. This structured offer more than meets the needs of the child. The periodic payments provide for lost future income, pain and suffering, and loss of enjoyment of life. The medical trust will cover the projected medical expenses.<sup>30</sup> Appendix B is an example of a reversionary medical trust. This is but one example of a structured settlement offer. The same set of facts could produce numerous other settlement offers based on approximately the same final cost to the United States. The flexibility of structured settlements is limited only by the imagination of the claims judge advocate.

To assist the claims judge advocate in preparing this extremely versatile tool, there are several reputable structured settlements brokers who have the expertise that enables

them to offer a variety of structuring techniques and services.<sup>31</sup> The USARCS makes ready use of the services they provide.

How are structured settlements funded? There are several methods used. A private corporation responsible for injuries to an individual may choose to make direct payments to the injured person from its general corporate funds. Such payments are secured only by the future financial well being of the corporation. Properly established, the direct payment settlement may offer some tax advantages to the corporation, however, it may be difficult to negotiate and may burden the corporation with administration of the payment schedule.<sup>32</sup> The United States does not use this method because only a single payment is permitted in settlement of a claim.<sup>33</sup> Another method of funding is a trust. The United States could fund a trust to handle the periodic payments. It can contain reversionary features as well, e.g., medical reversion to cover future medical expenses. But, it too has some disadvantages, e.g., the need for an administrator, and large amounts of money required to fund the trust.<sup>34</sup> A third method is the annuity settlement. Here the United States purchases an annuity policy from a life insurance company. The insurance annuity is a guarantee by the insurance company to make periodic or deferred payments to the claimant or annuitant and his or her beneficiaries for a specific period of time.

An annuity settlement offers many advantages both to the claimant and the [United States]. The funds are invested and managed for the claimant by professionals, and periodic payments are automatically made to him by the insurance company. Because the insurance annuity is a guarantee from a major carrier [and monitored for compliance by the Department of Justice], many claimants and their counsel feel more secure with this type of settlement, and this security enhances the [United States'] bargaining position."<sup>35</sup>

Purchase of the annuity<sup>36</sup> by the United States does not require it to handle the payment schedule, but, because the United States purchases the annuity from a private insurance company, it has to ensure that a reputable quality company is selected.<sup>37</sup> This is where the structured settlements broker provides additional service. Besides planning a structured settlement offer, the broker knows which life insurance companies can handle the settlement package,

<sup>29</sup> This example is based on The Jones Case (JMW Settlements, Inc., 1984) (unpublished manuscript) (used with permission). This case is illustrative of the type of settlement package that can be designed by an attorney and structured settlements broker. The dollar amounts, both for payout and cost to the defendant, will vary from case to case and from insurance carrier to insurance carrier. The United States was incorporated into the example to demonstrate the type of settlements a claims judge advocate can use to resolve a claim.

<sup>30</sup> The USARCS uses reversionary medical trusts in cases where claimants have suffered serious injuries, e.g., brain-damaged infant, and medical costs in the future are needed but actual costs are unclear. Upon the death of the injured person, the principal plus accrued interest will revert to the United States. This prevents unjust enrichment to claimant or claimant's beneficiaries. Medical trusts can be funded by a lump sum amount at the time of settlement or by using an annuity.

<sup>31</sup> The structured settlements broker is not compensated by the United States for services provided. The insurance company who sells the annuity pays the broker a one-time commission—a percentage of the cost of the annuity, e.g., 4%.

<sup>32</sup> Approaches, *supra* note 9, at 3.

<sup>33</sup> Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972).

<sup>34</sup> Klinger, Structured Settlements (Jan. 9, 1984) (unpublished manuscript). The USARCS does not usually employ a trust as a means of funding periodic payments; however, a reversionary medical trust is often a part of a structured settlement that is funded by an annuity.

<sup>35</sup> See Approaches, *supra* note 9, at 4.

<sup>36</sup> The USARCS will, at various times, purchase more than one annuity to meet the needs of a claimant in a structured settlement, e.g., one annuity to fund periodic payments to replace lost wages and a separate annuity to fund a reversionary medical trust. Still there is only one payment made by the United States to settle the entire claim. It is out of that one payment that all annuities are purchased.

<sup>37</sup> The USARCS requires that insurance carriers from which annuities are purchased receive a minimum of an A+ rating from *Best's Insurance Reports*.

what they will charge for the annuity, and their financial rating. Only the most financially secure life insurance companies are selected.

"The cost of an annuity premium is based on the age, sex, and life expectancy of the claimant or individual or both who is to receive the money."<sup>38</sup> The insurance company will request copies of all medical records of the annuitant and beneficiaries and evaluate them to determine the final cost to the United States.<sup>39</sup> Normally, the structured settlements broker will handle all these requirements for a claims judge advocate and provide him or her with the best possible quote (cost of the annuity). The preceding example illustrated the quotes to the United States made by one life insurance company. Other methods of funding include bonds and portfolio settlements (purchase of a high yielding portfolio of institutional quality corporate securities). The USARCS explores all these methods and selects the method of funding most beneficial to resolving settlement of a claim.

### Considerations for Negotiating a Structured Settlement.

From our previous discussion, you are now equipped to respond to the major questions raised by the claimant's attorney when you approach the subject of a structured settlement. For example, we have already discussed the following questions:

1. What is a structured settlement?
2. How does a structured settlement benefit the claimant?
3. What should you look for in a structured settlement?
4. How is the structured settlement funded?
5. How real are the tax advantages of a structured settlement?
6. Is a structured settlement really better than what the claimant could do with a lump-sum settlement?
7. How secure is a structured settlement?

It is important in negotiating a structured settlement to convince the claimant's attorney to focus on the structured settlement meeting his or her client's needs. Get the attorney's input into damages. Does your offer meet the claimant's projected needs?

One major concern of the claimant's attorney, though not necessarily mentioned in settlement negotiations, is his or her fee. How is it calculated? You need to be prepared to

discuss this too. As you know, fees received by the claimant's attorneys are contingent on the settlement they obtain for their clients. This contingency fee is typically stated as a percentage of the amount received, and is limited by federal statute.<sup>40</sup> Claimant's attorney may argue that his or her fee should be based on the total cash payout of the structured settlement. It is quite clear, however, that the USARCS will not negotiate the attorney's fees based on this approach as it could often lead to a situation that is too speculative and could require the United States to pay more money to the attorney than it costs to purchase the claimant's annuity.<sup>41</sup> The USARCS bases an attorney's contingent fee on the total cost of the settlement which is inclusive of attorney's fees.<sup>42</sup> The private sector seems to follow a similar practice.<sup>43</sup> As a negotiation technique, the USARCS can structure attorney's fees rather than provide for a single payment as part of the initial lump-sum payment made to a claimant. Structuring attorney's fees offer several advantages that may expedite settlement of a claim: possible larger payout to the attorney, money management, and deferral of taxes. "Because the attorney does not enjoy the same tax advantage as the [claimant], this method is advantageous only if future payments come in years when the attorney is in a lower tax bracket."<sup>44</sup> It is important from the standpoint of not jeopardizing this tax advantage that the USARCS initiate discussions with the claimant's attorney about structuring fees and controlling the payment plan; otherwise it may be determined that claimant's attorney has "constructive receipt" of the fees and therefore all attorney's fees are taxable when the initial fee is paid rather than when each payment is received according to the future payment plan.<sup>45</sup>

What happens when the claimant's attorney wants to know the present value to the United States of the structured settlement and/or insists that the present value to the United States be the cash settlement value the attorney has placed on the claim? Keep in mind that it is the task of the claimant's attorney to obtain the best possible settlement for his or her client. To do so, the attorney must compare the present value of the structured settlement to his or her best estimate of the claim's settlement value. Approaches to this two-part question vary. The claims judge advocate, as previously mentioned, should get claimant's attorney to focus on the needs of the claimant. Does the structured settlement offer meet these needs? If the attorney agrees that the claimant's needs have been met by the offer, then you are most likely focusing on attorney's fees as the sticking point in negotiations and there may be a little room to

<sup>38</sup> Approaches, *supra* note 9, at 7.

<sup>39</sup> Danninger, Johnson & Lesti, *The Economics of Structuring Settlements*, Trial, June 1983, at 42 [hereinafter cited as *Economics*].

<sup>40</sup> 28 U.S.C. § 2678 (1982). Attorney fees are limited to 20% of the recovered amount when a claim is settled administratively. The attorney fee, if settled in claimant's favor after complaint is filed, is 25% of the award.

<sup>41</sup> *Economics*, *supra* note 39.

<sup>42</sup> To figure attorney's fees, first determine the amount the claim should be settled for disregarding the attorney's fees, then divide that sum by .8. The quotient is the total cost of the settlement including attorneys fees. For example, if the claim should be settled for is \$400,000.00 exclusive of attorney's fees, divide \$400,000 by .8. The quotient is \$500,000.00. That is the total cost of the claim, and \$100,000 of that amount are attorney's fees.

<sup>43</sup> Basing attorney's fees on the cost found judicial support in *Merendino v. FMC*, 438 A.2d 365, 368 (N.J. 1981), a contingent fee application in which the plaintiff's counsel suggested that "value" of \$472,722 rather than "cost" of \$399,600 be used as the basis for the fee. "I find that the lower figure is the correct one, which represents the actual present value of the settlement," the court said. "The marketplace cost is the acid test in a case like this . . . rather than calculation of 'value' that involves interest rate estimates for the future." See Danninger, Johnson & Lesti, *supra* note 5.

<sup>44</sup> Danninger, Johnson & Lesti, *supra* note 5, at 70. It is USARCS practice in this situation to let claimant's attorney discuss the structure of attorney's fees with the structured settlement's broker after the claim is settled.

<sup>45</sup> Telephone interview with Thomas D. Walsh, Vice President, JMW Settlements, Inc., Washington, D.C. (Jan. 21, 1986).



maneuver. Keep in mind that claimant's attorney has to convey to the claimant any offer made, and, if the structured settlement is fair, it puts the attorney in the difficult position of explaining to the client why the offer should be rejected. Reiterate the advantages of this type of settlement versus the lump sum settlement, especially the tax advantage.

One supporting argument for not telling the [claimant] the [present value] is that it may jeopardize the tax status of the settlement. If the [claimant] knows the [present value], he then may be construed to have constructive receipt of the funds, and the structured settlement annuity simply becomes one investment alternative and thus taxable.<sup>46</sup>

If the claimant's attorney still insists on knowing the present value, suggest that he or she have an economic expert analyze the offer.<sup>47</sup>

Another question that may come up which you, as the claims judge advocate, want to consider is how you can combat inflation in a structured settlement.

The most effective method for a structured settlement to counter inflation is to combine monthly payments that grow by a given percentage each year with a series of single-sum payments. For example, a settlement could pay \$1000 per month for life, growing at [three] percent per year (\$1000/month this year, \$1030/month next year, and \$1060.90 the next) plus \$5000 in five years, \$10,000 in 10 years, and \$20,000 in 15 years. Even if the recipient squanders the five-year payments, there still will be protection against at least [three] percent inflation per year. Should inflation average more than [three] percent per year, the five-year payments would be available to spend or invest as needed.<sup>48</sup>

Application of a growth rate to periodic payments will have a tremendous effect on payout to the claimant, but a very small effect on cost to the United States.<sup>49</sup> Again, the structured settlements broker can provide you with figures to help analyze your settlement offer.

There is no substitute for actual *face-to-face* negotiation with a claimant and claimant's attorney. A claims judge advocate can read numerous articles on negotiation techniques, but it is only by actually negotiating that he or she develops a negotiating style, and this style will vary from negotiation conference to negotiation conference. Regardless of a particular style or technique, there is no

substitute for preparation and part of preparation to negotiate is to understand the "pros and cons" and the "ins and outs" of your settlement offer. This is especially true when using a structured settlement.

### Judicial Recognition: Is There Any?

The government, especially the USARCS, welcomes settlement discussions and nonjudicial disposition of tort claims. Public policy dictates that meritorious claims should be settled. It is evident that Congress contemplated compromises and nonjudicial settlements of tort claims.<sup>50</sup> Army Regulation 27-20, chapter 2 states that all actions involving a tort claim against the Army should be directed toward a just settlement of a claim. "There should be no attempt to circumvent the payment of just claims."<sup>51</sup>

In meritorious claims, USARCS attorneys will generally encourage settlement discussions. This, of course, does not mean that they wait at their offices with checkbook in hand ready to pay out the taxpayer's money just as soon as the claimant's attorney presents a demand. On the contrary, when the circumstances require it, USARCS attorneys can be as tough as, if not tougher than, any insurance defense lawyer. Unlike many defense lawyers representing private defendants, USARCS attorneys are not as much concerned with settling a claim at the lowest possible sum as they are with effecting substantial justice and settling a claim fairly. Claims judge advocates should follow this objective approach in evaluating and settling a tort claim:

Structured settlements allow the claims judge advocate to achieve this goal while reducing the amount of money damages the United States has to pay to equitably compensate and care for the needs of the claimant. With such an option you would think that Congress would have provided for it.<sup>52</sup>

It has been held that the [Federal Tort Claims Act] contemplates a lump-sum payment and therefore the court has no authority to establish a judicially supervised trust for the benefit of a claimant with the Government providing the corpus in amounts that fluctuate according to claimant's needs. On the other hand, the Act does confer broad settlement authority upon the Attorney General and agency heads, and the Justice Department has interpreted this authority to empower it and the federal agencies to utilize so-called structured settlements.<sup>53</sup>

While it appears that structured settlements are an acceptable alternative to a lump-sum settlement of an administrative claim under the Federal Tort Claims Act,

<sup>46</sup> Danninger, Johnson & Lesti, *supra* note 5, at 70; see also Staller, *supra* note 14.

<sup>47</sup> Danninger, Johnson & Lesti, *supra* note 5, at 70. The USARCS will disclose the cost to the U.S. of the structured settlement, if asked.

<sup>48</sup> *Id.* at 67.

<sup>49</sup> For example, the settlement of \$1000 per month for life for a 25 year old male with a 47.5 year life expectancy has an expected payout of \$570,000 and a cost of \$129,178. The addition of a three percent growth rate increases the total cash payout by \$658,825 to \$1,228,825, while increasing the cost of the annuity only \$51,201 to \$180,379. *Id.* at 69.

One point to consider in negotiations, when claimant's attorney insists on inflation coverage, is that balloon payments at certain intervals in an individual's life are usually cheaper than a set percentage growth rate. If that is true in your claim, then I recommend you offer balloon payments first to counter claimant's attorney's demand.

<sup>50</sup> 28 U.S.C. §§ 2672, 2675, 2677 (1982).

<sup>51</sup> AR 27-20, para. 2-1.

<sup>52</sup> The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), does not address structured settlements as a remedy.

<sup>53</sup> L. Jayson, *The Handling of Federal Tort Claims* § 225 (1985).

few federal courts that have addressed structured settlements as a solution to damages are split. None will come out and say that the Act authorizes them to judicially impose a structured settlement on both parties to the lawsuit.

In *Frankel v. Heym*,<sup>54</sup> the Third Circuit Court of Appeals rejected the government's request for a judicially established trust for the claimant's benefit. In *Frankel*, the claimant, a nineteen year-old female, sustained exceptionally serious injuries in an automobile collision with an Army vehicle. These injuries were almost totally disabling, requiring that she receive care and therapy for the rest of her life. The federal district court awarded damages in excess of \$1,100,000. The circuit court, in rejecting the government's contention that in the circumstances of this case the award should take the form of a judicially created trust for the claimant, stated:

Admittedly, courts of law had no power at common law to enter judgement in terms other than a simple award of money damages. . . . We agree with the district court that in administering the legislation in question a district court should not make other than lump-sum money judgements unless and until Congress shall authorize a different type of award. The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them.

The district court also alluded to the continuing burden of judicial supervision that would attend a judgement creating a life trust. This too is a consideration against the government's proposal.<sup>55</sup>

This approach was not followed by the Seventh Circuit in *Robak v. United States*.<sup>56</sup> In *Robak*, parents of a rubella syndrome child brought a wrongful birth action, alleging that the birth resulted from failure of Army doctors to diagnose the pregnant mother's rubella and inform her of the possible dangers to the fetus. The district court awarded \$900,000 in damages. By prior agreement of all parties, the award was placed into a reversionary trust. This trust was created prior to trial, filed, and made part of the record. The Robaks would withdraw money from the trust as they needed it to cover their daughter's expenses. The district court stated that "[t]his trust will provide for the future maintenance of [the child]."<sup>57</sup> While the Seventh Circuit Court did not create a structured settlement as the Third Circuit Court was requested but refused to do in *Frankel*, it did not disapprove of it either. The court noted in passing

that the reversionary trust was "established by agreement of the parties [for the benefit of the child]."<sup>58</sup> The case was, however, remanded for a new determination of damages and attorney's fees.

More recently, the Third Circuit again had the chance to comment on structured settlements. In *Godwin v. Schramm*,<sup>59</sup> a medical malpractice suit was settled for \$1,125,000 in cash plus provision for plaintiff's lifetime medical care and treatment by the Veterans Administration. In a dispute over the computation of attorney's fees, the court remarked that the use of structured settlements to resolve major tort litigation is "still in its embryonic stages,"<sup>60</sup> and that Congress probably did not have structured settlements in mind when it revised section 2678 of the Federal Tort Claims Act, in 1966, setting the limits on attorneys' fees.<sup>61</sup> Like the court in *Robak*, the court was not opposed to a structured settlement between the parties to the litigation, but because of the difficulty the court had over a determination of attorney's fees, the court felt that Congress should determine "the most efficacious method to encourage innovative forms of settlement."<sup>62</sup>

As you can see, there is not much case law addressing structured settlements in federal court under the Federal Tort Claims Act. At present, the trend of the courts is not to impose a judicially created structured settlement on the parties to the suit. On the other hand, the federal courts do not appear adverse to accepting a structured settlement worked out between the parties and presented to the court for approval. As both the Third and Seventh Circuit Courts of Appeals suggest, Congress will have to act to amend the Federal Tort Claim Act to authorize federal courts to impose structured settlements to resolve appropriate cases. Right now there is no effort being made to give judges the right to impose structured settlements in a case. Until such an event occurs, however, the USARCS will continue to employ negotiated structured settlements.

### Conclusion

"During the past five years [private] personal injury claims increasingly have been settled by means of structured settlements rather than single lump sum payments. It has been estimated that in 1982 alone, well over \$2 billion in claims were settled by means of structured settlements."<sup>63</sup> The USARCS has increased the use of structured settlements as well. There is no unique or appropriate type of case where the structured settlement should be used. It is extremely versatile and can be used in small dollar claims as well as in claims involving catastrophic injuries. Recall it is designed "to pay a series of future payments instead of a lump sum."<sup>64</sup> The needs of the

<sup>54</sup> 466 F.2d 1226 (3d Cir. 1972).

<sup>55</sup> *Id.* at 1228.

<sup>56</sup> 658 F.2d 471 (7th Cir. 1981).

<sup>57</sup> *Robak v. United States*, 503 F. Supp. 982, 983 (N.D. Ill. 1980).

<sup>58</sup> 658 F.2d at 474.

<sup>59</sup> 731 F.2d 153 (3d Cir. 1984).

<sup>60</sup> *Id.* at 158.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 160. The court did remark that there was no indication that Congress intended to prohibit structured settlements.

<sup>63</sup> Staller, *The Basics of Structured Settlements*, *Prac. Lawyer*, Jan. 15, 1984, at 75.

<sup>64</sup> Danninger, *Johnson & Lesti*, *supra* note 5, at 67.

claimant tend to dictate whether this settlement vehicle is appropriate for use. It is not every claimant or claimant's attorney that will want to accept a structured settlement to resolve the claim, even if it is in the claimant's best interest. Regardless, you, as a claims judge advocate, must know about structured settlements because it can be the best tool for resolving meritorious Federal Tort Claims Act claims.

**Appendix A**  
**Settlement Agreement**

It is hereby agreed by and between The United States of America (hereinafter, "the UNITED STATES"), by and through its attorney, \_\_\_\_\_, Washington, DC, and \_\_\_\_\_ (hereinafter "the Claimant") and his/her attorney, \_\_\_\_\_, that the parties do hereby settle and compromise the tort claim arising out of an incident occurring on or about \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_, upon the following terms:

1. As soon as it is practicable after execution of this Settlement Agreement, the UNITED STATES, in full settlement of all claims by the Claimant, will make the following disbursements:

(a) The sum of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_.00) shall be paid to the Claimant and his/her attorney, \_\_\_\_\_. Out of this amount, the attorney shall be entitled to receive a sum not to exceed twenty percent (20%) of the total and final payout cost of the settlement incurred by the UNITED STATES.

(b) The sum of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_.00) shall be deposited with the Trustee under such terms and conditions which are fully described in the Trust Agreement which is attached hereto as Exhibit 1.

(c) The UNITED STATES shall purchase through \_\_\_\_\_, an annuity from an insurance company having an A-Plus rating according to the A.M. Best Company, which insurance company will be chosen by the UNITED STATES. The annuity will be owned solely and exclusively by the UNITED STATES, and will result in the distribution on behalf of the UNITED STATES according to the following specified plan:

(1) Commencing thirty (30) days after the purchase of the annuity, monthly payments in the amount of \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_.00) per month will be paid to the Claimant during his/her life. Said monthly payments will continue to be paid during the life of the Claimant. Provided, however, that should the Claimant die prior to the one hundred twentieth (120th) monthly payment under this cause, then said monthly payments will continue to be paid to the estate of the Claimant until the one hundred twentieth (120th) monthly payment shall have been paid at which time payments under this clause shall cease.

(2) On the fifth (5th) anniversary of the annuity purchase, \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) shall be paid to the Claimant. On the tenth (10th) anniversary of the annuity purchase, \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) shall be paid to the Claimant. On the fifteenth (15th) anniversary of the annuity purchase, \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) shall be paid to the Claimant. On the twentieth (20th) anniversary of the annuity purchase, \_\_\_\_\_ and 00/100 Dollars (\$\_\_\_\_\_) shall be paid to the Claimant. Should the Claimant die prior to the twentieth (20th) anniversary of the annuity purchase, the remaining payments set forth above shall be paid to the estate of the Claimant.

2. It is expressly understood by the Claimant and his/her attorney that this Settlement Agreement is subject to approval by the Department of Justice. Further, it is expressly agreed that should the Claimant die before this Settlement Agreement is approved by the Department of Justice or prior to disbursement by the UNITED STATES of the sums referred to in paragraph 1, that this Settlement Agreement is void and of no effect.

3. In consideration of the deposit with the Trustee, the purchase of the annuity, and payment of the lump sum referred to in Paragraph 1 of this Settlement Agreement, Claimant hereby releases and forever discharges the UNITED STATES, its officers, agents, and employees from all liability, claims, and demands of whatsoever nature arising from the said incident, and Claimant agrees to indemnify and save harmless the UNITED STATES from any and all other claims, actions, or proceedings which may hereafter be asserted or brought by or on behalf of Claimant, his/her heirs, executors, administrators, assigns or successors in interest, or any other person or organization, to recover for personal injuries or death, or for contribution or indemnity, arising out of or related to the incident occurring on or about \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_, \_\_\_\_\_.

4. Claimant's attorney, \_\_\_\_\_, agrees to accept an amount as attorney fees not in excess of twenty percent (20%) of the total and final payout cost of this settlement incurred by the UNITED STATES. Upon the establishment of the trust referred to in clause 1(b) and the purchase of the annuities referred to in

clause 1(c) above, Claimant's attorney will be notified of the exact cost and the resulting determination of the maximum attorney fee allowable pursuant to 28 U.S.C. Section 2678 and this Settlement Agreement.

UNITED STATES OF AMERICA

Date \_\_\_\_\_

By: \_\_\_\_\_

Date \_\_\_\_\_

Claimant

Date \_\_\_\_\_

Claimant's Attorney

Trust Agreement

BY AND BETWEEN THE UNITED STATES OF AMERICA, AS GRANTOR, ABC TRUST COMPANY AS TRUSTEE, AND JONES MEDICAL FIDUCIARIES, INC., AS ADVISOR

WITNESS this trust agreement made this \_\_\_\_\_ day of \_\_\_\_\_, 198—, by and between the UNITED STATES OF AMERICA, hereinafter referred to as "Grantor," appearing herein through its duly authorized representative ABC TRUST COMPANY, a New Jersey banking corporation having trust powers located in Newark, New Jersey, hereinafter referred to as "Trustee," and Jones Medical Fiduciaries, a corporation of the State of Delaware having its principal office in Pittsburgh, Pennsylvania, hereinafter referred to as "Advisor."

ARTICLE I  
TRUST ESTATE

The Grantor Shall:

1. Establish this trust for the benefit of
2. Make a payment of \_\_\_\_\_ in cash to the Trustee upon execution of this Trust Agreement to be held by the Trustee under the terms and provisions of the trust herein established.

ARTICLE II  
DUTIES OF THE TRUSTEE

The Trustee accepts and agrees to hold the trust estate in trust for the benefit of the Beneficiary and to manage, invest, administer and distribute the trust estate and all accumulations upon the following terms and conditions:

1. During the lifetime of the Beneficiary, the Trust shall pay from the income of the trust, and to the extent the income is insufficient, from the principal of the trust, such amount or amounts for the Beneficiary's medical expenses at such time or times to such person or persons as it is instructed to do by the Advisor pursuant to Article III, paragraph 1. Unused income, if any, of the trust at the end of any calendar year shall be added to the principal of the trust to be held, administered and distributed as part thereof. If the amount of payment from the principal of the trust made pursuant to this paragraph shall exceed in the first year \$10,000.00 and in any one of the subsequent years 10% of the market value of the principal of the trust determined as of the last business day of the previous calendar year, the Advisor shall give notice to the Torts Branch, Civil Division, United States Department of Justice, Washington, D.C., of such fact as soon as such invasion may be anticipated prior to any expense being made. The Torts Branch, Civil Division, United States Department of Justice, Washington, D.C., shall then have 45 days to object to any such invasion of principal and the failure to so object shall be considered as approval of any such invasion of principal as aforesaid.

2. Throughout the terms of the trust, the Trustee shall pay from the income of the trust, all assessments, charges, fees, taxes and all other expenses properly incurred in the protection of the trust and its administration as authorized by state law or by this Trust Agreement, including the compensation of the Advisor and itself as provided in Article X hereof.

3. Upon the death of the Beneficiary, the Trustee shall pay from the income of the trust, and to the extent the income is insufficient, from the principal of the trust, such amounts for the Beneficiary's funeral and burial expenses as it is instructed to do by the Advisor pursuant to Article III, paragraph 2.

Upon the death of the Beneficiary, the Trustee shall pay and distribute the balance of the principal and income of the trust remaining in its hands, after the payment of the amounts as directed in the foregoing paragraphs 1 and 2, and all necessary and proper administrative costs and expenses, to the Treasurer of the United States through the Torts Branch, Civil Division, United States Department of Justice, Washington, D.C.

5. The Trustee shall not be required to review the reasonableness of the payments it is instructed to make by the Advisor pursuant to Article III. No party receiving such payments from the Trustee shall be required to ascertain whether or not the instructions and directions of the Advisor have been obtained and the Trustee may be dealt with as having full and complete independent power and authority.

ARTICLE III  
DUTIES OF THE ADVISOR

The Advisor shall have the following duties:

1. During the lifetime of the Beneficiary to determine in its sole discretion what are the Beneficiary's necessary and reasonable medical expenses as defined in paragraph 4 of this Article III and the manner in

which such expenses shall be paid as set forth in paragraph 5 of this Article III and to instruct the Trustee in writing to make payment of such expenses.

2. Upon the death of the Beneficiary to determine what are the reasonable expenses for the Beneficiary's funeral and burial, including the cost of a suitable grave site and marker and to instruct the Trustee to make such payment. If such reasonable costs have already been paid, the Advisor may instruct the Trustee to make reimbursement for such reasonable costs to the personal representative of the Beneficiary's estate or to any other person who paid such expenses.

Advisor shall have sole and complete responsibility to determine what is a reasonable and necessary funeral and burial expense and shall have no responsibility or liability for such determination.

3. The instructions to be given by the Advisor under paragraphs 1 and 2 of this Article shall be in writing, shall specify the amount and method of payment, shall identify the person to whom such payment shall be made and shall state the date on which such payment shall be made.

4. *Medical expenses.* The necessary and reasonable medical expenses of the Beneficiary shall include, but not be limited to, reasonable amount incurred after the effective date of this trust for the following purposes, all for the benefit of the Beneficiary:

(a) For his care and treatment received at any hospital, psychiatric and psychological institution, nursing home, or any other health care facility including a special facility for handicapped persons;

(b) For the services of physicians, nurses, or other health care personnel. This shall not include services furnished by the parents, relatives, or non-medical personnel;

(c) For the Beneficiary's physical and rehabilitative therapy;

(d) For X-rays, drugs, medicines and medically related appliances and devices, and for any medically related insurance costs;

(e) For any special educational, psychiatric, psychological, or other services referable to the Beneficiary's medical condition;

(f) For any travel or living expenses of Beneficiary (including the services of a companion) reasonably incurred in connection with obtaining any such care, treatment or services.

In determining what is necessary and reasonable medical expense, the Advisor shall be guided by making reference to what could be allowable as a medical expense under the Internal Revenue Code and applicable rulings, regulations and case law as they existed at the time of the Advisor's interpretation, but the Advisor shall not be strictly limited to such expenses.

5. *Proof of Payment.* Medical expenses may be disbursed upon the production of satisfactory evidence as determined by Advisor in any one of the following ways:

(a) Directly for the medical expenses contemplated by this agreement, or for the cost of any insurance program covering such medical expenses;

(b) To Beneficiary; and

(c) In reimbursement to any person determined by the Advisor to have advanced funds on an emergency basis or otherwise to pay the necessary and reasonable medical expenses of the Beneficiary as defined in this Trust Agreement.

When funds in payment of the Beneficiary's medical expenses have been disbursed in accordance with this Article III, the Advisor and Trustee shall not be obligated to see to the application of the funds so paid, but the receipt by the payee shall be full acquittance to the Advisor and Trustee; provided, however, that the Advisor shall not determine to reimburse any person who claims to have advanced monies for the Beneficiary's necessary and reasonable medical expenses without satisfactory evidence that such person has actually advanced and paid the necessary and reasonable medical expenses. Neither the Advisor nor the Trustee shall incur any liability for disbursements made in good faith, that is, that does not occur through its fault or negligence.

6. *Government Benefits.* The Advisor shall not direct the Trustee to make payments pursuant to this Trust Agreement for any medical care received from any institution of the United States Government, or for which the United States Government, through medical insurance or similar government programs will otherwise make payment, except to the extent such program does not make payment. (Nothing contained in this paragraph 6 Article III shall be construed to mean, however, that the parent, guardian or custodian of the Beneficiary or the Beneficiary himself shall be obligated to utilize such government institutions or programs.)

7. *Private Insurance Benefits.* The Advisor shall not direct the Trustee to make payments pursuant to this Trust Agreement for any medical care for which any private insurance policy has been provided or for which any government, through medical insurance or similar government programs will otherwise make

payment, except to the extent such program does not make payment. This shall include but may not be limited to Medicare, Medicaid, Blue Cross, Blue Shield or any medical insurance policy issued to the Trustee for the benefit of the Beneficiary. The Trustee shall assume that the Advisor has complied with the provisions of this paragraph.

#### ARTICLE IV SPENDTHRIFT PROVISION

1. The Beneficiary or his parents or guardian shall not have the right or power to transfer, assign, anticipate, alienate, or encumber his or her interest in the trust estate created by this instrument, either as to income or principal, and neither the income nor principal shall be liable in any manner to any legal or equitable process, or to the control of creditors or others, whether in bankruptcy proceedings or otherwise, for the debts, contracts, engagements, obligations, or liabilities of the Beneficiary.

#### ARTICLE V POWERS OF THE TRUSTEE

The Trustee shall have, in addition to all those powers provided by law which are not inconsistent with the following enumerated powers and which are not inconsistent with any other provision of this trust, all of the following enumerated powers; and all the powers with which the Trustee may inherently be clothed under the laws of the State of New Jersey where not inconsistent with this trust instrument may be exercised by the Trustee in its sole discretion and without license or leave of any court;

1. To retain any property held in the trust hereunder, as long as the Trustee in its absolute discretion shall deem it advisable to do so;

2. To invest and reinvest in and to acquire by purchase, exchange or otherwise, property of any character whatsoever, foreign or domestic, or interests of participations therein (including common trust funds maintained by the Trustee), without regard to the proportion of any such property or similar property held may bear to the entire amount held without any obligation to diversity, whether or not the same is of the kind in which fiduciaries are authorized by law or any rule of court to invest trust funds. The Trustee shall attempt to invest all principal sums in excess of \$1,000.00;

3. To sell (at public or private sale, without application to any court) or otherwise dispose of any property whether real or personal, for cash or in credit, in such manner and on such terms and conditions as it may deem best, and no person dealing with the Trustee shall be bound to see to the application of any monies paid.

4. To vote personally or by proxy any shares of stock or other voting securities at any time held hereunder, and to consent to and participate in any reorganization, consolidation, merger, liquidation, or other change in any corporation, securities of which may at the time be held hereunder;

5. To manage, operate, repair, improve, mortgage, and lease for any period (whether expiring before or after the termination of any trust created hereunder) any real estate;

6. To determine in its discretion whether the premium on any investment acquired at a premium shall be amortized from income;

7. Except to the extent prohibited by law, to cause any securities to be registered in the names of its nominees, or to hold any securities in such conditions that they will pass by delivery, including the use of custodians and other depositories;

8. To employ such counsel and accounting services and to pay such reasonable compensation for accounting and legal fees as may be determined necessary for the services provided to the Advisor or Trustee in the Administration and protection of the trust estate;

9. To borrow such amounts, for such purposes (including but without limitation the payment of taxes) from such sources including itself at such rates of interest and on such other terms as it may deem advisable, and to mortgage, pledge, grant security interests in or otherwise encumber any assets of the trust hereunder as security for the repayment of any amounts so borrowed;

10. To liquidate, compromise, adjust and settle any and all claims and demands, including taxes, in favor of or against the trust hereunder, for such amounts, upon such terms, and in such manner and time as the Trustee shall deem advisable;

11. To allocate in principal all stock dividends and cash in lieu of fractional shares paid as a result of a stock dividend received on stock held in trust hereunder;

12. To distribute in cash or in kind upon any division of any trust, upon termination of any trust, or upon any distribution of principal, provided that the assets selected for the purpose of making such distribution in kind shall be valued at their respective values on the date or dates of distribution; and in making distributions in kind, to make such distributions in shares which may be composed of different kinds of property



and to allocate equal or unequal, pro-rata or non pro-rata interests in specific property to such shares without regard to differences in tax bases of any such property, and any determination of the Trustee in this respect shall be final and binding;

13. To continue to make distribution of income and/or to accumulate the same hereunder until the Trustee shall have received actual knowledge of any event which would affect such distribution and/or such accumulation of income; and the Trustee shall not be liable to any person having an interest in such continuation until the Trustee shall have received such actual knowledge; and

14. In general, to exercise all powers in the management of the trust estate which any individual could exercise in the management of similar property owned in his own right, upon such terms and conditions as to them shall seem best, and to execute and deliver all instruments and to do all acts which they may deem necessary or advisable to carry out the purposes of this agreement.

#### ARTICLE VI RESIGNATION AND REMOVAL OF THE ADVISOR AND/OR TRUSTEE

1. *Resignation.* The Advisor and/or the Trustee shall have the right to resign from office at any time upon the giving of sixty (60) days written notice of such resignation to both the Grantor and the Beneficiary, and to the guardian of the Beneficiary.

2. *Removal.* The Advisor and/or the Trustee may be removed from office by the Grantor at any time upon giving thirty (30) days written notice of such removal to the Advisor, the Trustee, the Beneficiary, and to any guardian of the Beneficiary.

#### ARTICLE VII SUCCESSOR ADVISOR OR TRUSTEE

1. *Appointment of Successor Advisor or Trustee.* In the event of the resignation or removal of or the refusal or inability to act of either the Advisor or Trustee or both, the Grantor and the Beneficiary's guardian, if any, shall mutually designate a Successor Trustee and/or Advisor to administer the trust estate, provided, however, that such Successor Trustee shall be a corporation organized under the laws of the United States or of any state thereof, with corporate power and authority to administer the trust, and which if a successor to the Trustee shall have trust assets of not less than Ten Million Dollars (\$10,000,000.00).

2. *Powers of Successor Trustee or Advisor.* Any Successor Trustee or Advisor so appointed shall be clothed and vested with all duties, rights, titles and powers, whether discretionary or otherwise, as if originally named as Trustee or Advisor. Upon every appointment of a Successor Trustee, the trust estate shall, so far as the nature of the property and other circumstances shall require or permit, be automatically transferred, so that the same may, without further act, be vested in the Successor Trustee, provided, however, that any predecessor Trustee who is succeeded by a Successor Trustee shall be obligated to execute appropriate instruments of assignment to a Successor Trustee as to all trust property within thirty (30) days after the designation of a Successor Trustee.

3. *No Liability for Predecessor Trustee or Advisor.* No Successor Trustee or Advisor shall be liable or responsible in any way for the acts or defaults of any predecessor Trustee or Advisor, nor for any loss or expense from or occasioned by, anything done or neglected to be done by any predecessor Trustee or Advisor; and such Successor Trustee or Advisor shall be liable only for its own acts or defaults in respect to property actually received by it as Successor Trustee or Advisor, provided, however, that nothing contained herein shall be deemed to discharge or release any predecessor Trustee or Advisor from liability for its acts or defaults, or for any loss or expense from or occasioned by anything done or neglected to be done by such predecessor Trustee or Advisor.

#### ARTICLE VIII ACCOUNTING

1. *Books and Records.* The Trustee shall be provided with receipts and/or itemizations for all expenses for which trust funds are disbursed under Article III and the Trustee shall maintain a system of accounting and books of account with respect to the income, expenses and property of this trust which conform to generally accepted principles and practices of trust accounting. The Trustee shall permit reasonable examination of its accounts and accounting for this trust and of its practices and procedures relating to this trust by the Grantor.

2. *Accounting; Tax Returns.* The Advisor shall render a statement of the administration of the trust estate by the Trustee under this instrument to both the Grantor and any duly qualified guardian or conservator for the Beneficiary as well as to any court of competent jurisdiction which may require same. The statement to the Grantor shall be made at least once per year and may be comprised of regular periodic reports, e.g., quarterly. The Grantor and the Beneficiary shall each have forty-five (45) days from the date of receipt of each periodic accounting to object thereto, and the failure of any party to object thereto shall be conclusive as to all matters and transactions stated therein or shown thereby, as to the party so failing to object. If the

Grantor makes timely objection to any disbursement, or to the reasonableness thereof, the Advisor shall not thereafter authorize or direct the Trustee to make the same or a similar disbursement, except upon advice on, or take appropriate steps with respect to, the proposed disbursement. Nothing herein shall limit the right of Trustee to file its account in a court of competent jurisdiction at appropriate times.

#### ARTICLE IX NOTIFICATION

Any notices or mailings provided for by this trust instrument, shall be sent by certified mail, in the case of the Grantor, to the Department of Justice, Torts Branch, Civil Division, Washington, D.C. 20530, or to such other address of the Grantor as is then on written file with the Advisor.

Until the Trustee shall receive, at the place where this trust is being administered, written notice of Beneficiary's death or other event upon which the right of payment may depend, the Trustee or Advisor shall incur no liability for disbursement in good faith to persons whose interests may have been affected by that event.

#### ARTICLE X COMPENSATION OF TRUSTEE AND ADVISOR

The Trustee and the Advisor shall receive as compensation for their services hereunder annual commissions on the principal of the trust at the rate of one and one-half percent (1.5%), which commissions may be taken by the Trustee and Advisor, without court allowance thereof, at the expiration of each year, or in the case of distribution of principal in whole or in part during any such period, at the time of distribution, from the principal. Said commission shall be computed upon the fair market value of the principal (including any former income added to principal) at the last business day of each year, and in the case of principal distributed during any such period, upon the fair market value thereof at the time of such distribution.

#### ARTICLE XI BOND EXCUSSED

Neither the Trustee nor the Advisor, nor any Successor Trustee or Advisor, shall be required to give bond or any other undertaking for the faithful performance of its duties hereunder in any jurisdiction. If any bond is nonetheless required by law, neither the Trustee nor the Advisor nor any Successor Trustee, shall be required to furnish any surety or sureties upon any bond.

#### ARTICLE XII FORUM FOR DISPUTES AND APPLICABLE LAW

1. *Governing Law.* This is a New Jersey Trust, and is to be construed according to the law of New Jersey, and shall continue to be so construed even though conducted or administered elsewhere within the United States. The forum for all disputes shall be a court of competent jurisdiction in the State of New Jersey. Provided, however, that nothing contained herein shall confer the right upon any court to alter, amend, or change the terms or conditions of the Trust Agreement.

2. In the event that the Beneficiary, his Guardian, or his parents take exception to any decision of the Advisor arising out of this Trust and such exception cannot be resolved among themselves, such exception shall be first submitted to the Department of Justice, Civil Division, Torts Branch, Washington, D.C. for resolution and the Advisor and Trustee shall be bound by the decision of the Department of Justice and shall be held harmless from the results of such decision.

#### ARTICLE XIII REVOCAION OR AMENDMENT

Any other provision of this trust or of the laws of the State of New Jersey or any other state to the contrary notwithstanding, this trust shall be irrevocable, and it may not be amended, modified, or changed in any respect except upon the joint written agreement of the Grantor, the Trustee, the Advisor and duly qualified guardian or conservator for the beneficiary.

**IN WITNESS WHEREOF, the Grantor, the Trustee and the Advisor have hereunto set their respective hands and seals as of the date first above written.**

**GRANTOR  
UNITED STATES OF AMERICA**

**BY: \_\_\_\_\_  
Its Attorney (Hereunto Duly Authorized)**

**ABC TRUST COMPANY  
TRUSTEE**

**BY: \_\_\_\_\_**

**JONES MEDICAL FIDUCIARIES, INC.  
ADVISOR**

**BY: \_\_\_\_\_**

# The Fort Hood Personal Recognizance Bond Program

Captain Patricia R. Stout & Captain Steven A. Rosso  
Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas

Among their war stories, old company commanders and first sergeants will tell you of midnight trips to the local jail to arrange the release of one of their troops or of passing the hat to come up with bail money for a commercial bondsman. Unfortunately, some commands are still functioning by these means. With a population in excess of 90,000, it is inevitable that some Fort Hood soldiers, or their family members, will be arrested and detained by local civilian authorities. At Fort Hood, a better way has been found to get soldiers out of jail. The purpose of this article is to share this method with other legal assistance offices.

## Basis for the Bond Program

In Texas, as in most states, the local magistrate or justice of the peace has the authority during arraignment to either set bail or commit an individual to jail. "Bail" can include either a bail bond or a personal recognizance bond,<sup>1</sup> and there is an important distinction between the two for a relatively transitory soldier.

A bail bond is a written undertaking entered into by the accused and his sureties to secure the appearance of the accused before the appropriate court to answer a criminal charge. The accused has the option of depositing cash with the court in the amount of his bond in lieu of having a surety sign the bond.<sup>2</sup> If the bond is paid by the accused, the money will be refunded to him if and when he complies with the conditions of his bond and upon order of the court. If the bond is signed and put up by a bail bondsman, then the bond is refunded to the bail bondsman once the accused appears in court, complies with the conditions of the bond, and upon order of the court. The percentage (17 to 20%) of the face value of the bond paid to the bondsman by the accused to retain the bondsman's services is not refunded to the accused.

The accused has the right during arraignment to request to be released on a personal recognizance (PR) bond without sureties or other security. The granting of a PR bond is a matter completely within the discretion of the court. The magistrate or justice of the peace makes his decision to authorize a PR bond applying the same factors used in determining whether an individual is a good candidate for any type of bail, e.g., ties to the community, character of the accused, and severity of the offense. Because of their transitory life style, most soldiers do not have the economic and family ties to the community commonly accepted in establishing a personal bond, nor do they have the opportunity to establish their "character" in the off-post community. This is where the Fort Hood Personal Recognizance Bond Program provides a service for our soldiers.

## The Fort Hood Program

The program run by our office is staffed by two Department of the Army civilian employees (GS-6), who are referred to as contact representatives.<sup>3</sup> In operation seven days a week, the two contact representatives work out of an office in the county courthouse. While the program encompasses the two surrounding counties, the office was established in the largest county and the one from which the majority of the PR bonds are generated. The keystone of the program is to provide the soldier or family member with community ties and character references so that they can qualify for a PR bond just like any member of the local community.

At the time of the initial request from a soldier for a PR bond, a contact representative will call the soldier's unit to obtain a recommendation on his character from either the company commander or first sergeant. Any impending personnel action that would influence his court appearance, such as a transfer from the installation or separation from the service, is also discussed. If a family member is requesting a PR bond, then the military sponsor will be contacted as the primary reference. In a favorable situation, a PR bond can be written with the approval of the court. To comply with Texas law, the PR bond must contain the accused's name, address, place of employment, the offense charged, and a sworn statement by the accused promising appearance in court at a given time and place.

The cost of a PR bond varies slightly from county to county. In the communities surrounding Fort Hood, the cost varies from 3% of the face amount of the bond but not less than \$20.00 in one jurisdiction, to a \$15.00 sheriff's processing fee in another. An average local commercial bondsman can charge up to 20% of the face amount of the bond and this is not refunded to the soldier after he appears in court.

## Maintaining Contact With the Soldier

If a PR bond is written for the soldier, his command then assumes responsibility for monitoring the soldier's release and his subsequent appearance in court. Once a soldier is in the program, his command is required to initiate a flagging action of his records.<sup>4</sup>

As a condition of receiving the PR bond, the individual must report in person or by telephone to the PR bond office on a weekly basis.<sup>5</sup> Records are maintained on each bond recipient, and the weekly calls are annotated. If the soldier is participating in a field exercise or is otherwise deployed,

<sup>1</sup> Tex. Code Crim. Proc. Ann. art. 17.01 (Vernon 1977).

<sup>2</sup> Tex. Code Crim. Proc. Ann. art. 17.02 (Vernon 1977).

<sup>3</sup> The full-time civilian positions replaced two noncommissioned officer special duty positions which had existed since 1973.

<sup>4</sup> Dep't of Army, Reg. No. 600-31, Personnel-General-Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings, para. 5a(6) (1 July 1984).

<sup>5</sup> Family members must also comply with these reporting requirements.

his unit commander or first sergeant may fulfill this requirement by calling on the soldier's behalf. When neither the soldier nor his chain of command report to the PR Bond office, a contact representative calls the soldier's unit to ascertain the reason for his failure to report. If a soldier fails to report in for two consecutive weeks, cannot be located, is absent without leave, or does not provide a reasonable explanation for his failure to report, then the contact representative will contact the staff judge advocate for a determination as to whether the individual's bond should be revoked. If the decision is made to revoke the bond, the appropriate court will be notified of the individual's failure to comply with the terms of his release and the court will have a warrant issued for the individual's arrest.

#### **Court Appearances**

When the individual's case has been set for trial, the contact representative notifies him of the date, time, and location of the trial. The commander or first sergeant is also notified of the trial date no earlier than three duty days and no later than one duty day prior to the soldier's trial. If an individual fails to appear for his court appearance as scheduled, the contact representative notifies the unit commander, first sergeant, or, if the individual is a family member, the military sponsor. The individual will be instructed to appear at the appropriate court as soon as possible. If the individual refuses or fails to present himself to the court, an arrest warrant can be issued. In addition to any fines levied against the individual for the offense committed, the individual could also be charged with failure to appear and fined accordingly. The accused will be liable to the State of Texas for the amount of the PR bond plus the costs of any subsequent arrest.

When the trial is over, or the case is otherwise disposed of, the contact representative forwards a Removal of Suspension of Favorable Actions form to the soldier's unit commander.

#### **A Service to the Soldier**

A monthly statistical report is prepared that reflects the activities within the bond office. The report indicates the number of interviews conducted, the number of bonds written or disapproved, the dollar savings to military personnel, and the total cash amount of bonds written. In the first six months of operation with the civilian contact representatives, October 1983 to May 1984, the bond office wrote 472 bonds with a total savings of \$24,861.80<sup>6</sup> to military personnel. In calendar year 1985, the office wrote 1437 bonds with a total savings of \$105,333.00 to military personnel. This was a twenty-six percent increase in the number of bonds written in 1984.

The program has proven to be highly successful and beneficial to the military community. The onus of having a successful program is on the military. The courts are under no duty to inform the soldier or his family member of the availability of a PR bond through the military office; therefore, publicity of the PR Bond Program is a high priority on Fort Hood. A fact sheet briefly describing the program is distributed to all incoming soldiers as part of their welcome packet. This fact sheet is also available in various

offices on post. Additionally, reproducible wallet size cards describing the program are distributed to all units on post for further dissemination to the soldiers. Both the fact sheets and wallet cards are displayed in the III Corps and Divisional legal assistance offices. As a part of the III Corps preventive law program, the PR bond cards and fact sheets are distributed at all programs and classes to enhance awareness of the bond program.

#### **It Can Be Done**

A personal bond release program can be instituted on any military post provided the applicable state law recognizes PR bonds. There is significant political pressure asserted on such a system by the commercial bail bondsman whose business depends on soldiers getting into trouble. The benefits of this program include assisting the local communities in ensuring court appearances, allowing cost savings for our soldiers and maintaining the soldier's readiness and morale for our commanders. The mission of the staff judge advocate's office is to serve the soldier and commanders. The PR bond program is just another way to prove our commitment to the soldier.

<sup>6</sup> This figure represents the amount of money that soldiers would have given to bailbondsmen to secure bail bonds.

## Data Processing Systems—Do More With Less\*

Lieutenant Colonel George D. Reynolds  
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The day the computers first arrive at the office is one of excitement and anticipation. Finally, your office moves into the computerized age with great expectations. Training has begun. The demonstration programs flash colors, songs, and graphics. Four weeks into the new age of computers, word processing is running smoothly, but you are dissatisfied because you know the computer can and should be doing more to justify the cost, time and space.

It was this very dissatisfaction with simply turning out wills, powers of attorneys, and countless other documents that resulted in the development of four major data processing system programs to enhance the quality of legal services at Fort Belvoir. With the use of dBase III by Ashton-Tate, a commercial data processing program, and with the aid of a talented young sergeant from our Directorate of Information Management (DOIM), "stubby pencil" record keeping and time-consuming searches of files are becoming a part of the "good old days" remembered fondly for manual typewriters.

Data processing systems are really electronically-compiled file cabinets that allow the retrieval of files and statistics and the printing of reports based on one or two word inquiries. The major advantage is that they allow you to save time and often publish the same data, reports, or information in a variety of formats using only a keystroke or two on the computer. You can design and program a data processing system in a number of computer languages or use a commercial data processing program that allows you to customize the screen and the report or output format for a specific purpose. As noted above, this office used dBase III, which has now been adopted as the standard JAGC database management software package for stand-alone personal computers (PCs).

Four programs have been developed, tested, used, and revised to support office operations. A claims data processing program based on the DA Form 3 allows quick status checks of claims, reviews all open claims, monitors budgets, and tracks processing times. A legal assistance client data processing program, which is based on the legal assistance interview card, tracks visits and attorney work-time, identifies conflicts of interest, and prints monthly reports reflecting categories of clients served and types of cases. An administrative law research program provides instant retrieval of office administrative law opinions, by topic or key words, to complement the use of WESTLAW. A magistrate court data processing program was developed to allow instant retrieval of case information and the printing of dockets for use in managing the case load and command information. Under development are data processing program files for tracking litigation, labor law cases, administrative board actions, and military justice cases.

The magistrate court docket data processing program is representative of the basic principles that have guided the development of each program. First, the program must be

able to be operated by new clerks or new civilian employees with almost no training, and it must be clearly self-explanatory. Thus, in our magistrate court program as in our other programs, the employee is presented with a menu that requires only the pressing of a number to enter a specific function such as add a record, display a record, or print a record. Each screen is customized to allow the employee to quickly fill in the blanks. Printing the docket requires the employee to type the particular court date and press a key. A file or record is found by typing in the defendant's name.

Second, each data processing program was developed in response to a need to manage information more efficiently than with a stubby pencil. Thus, each program must save time and effort. It must either reduce the time necessary to enter and collect the information, or, if the same amount of time is required, produce end products beyond the scope of the original effort with pencil and paper.

Our office was experiencing a major problem with magistrate court docketing and case preparation. The collated docket from the federal district court did not arrive until less than a week before trial date. While a paper log of cases was kept, it was difficult to always sort by docket date, and even more difficult to respond to inquiries from the court, attorneys, and defendants. The six to seven week lag time between the date of the ticket and the court date created additional problems in ensuring that witnesses were available for court. Our goals included producing working dockets earlier to allow more advanced preparation and planning; developing a method to allow quick retrieval of files or responses to inquiries; and reducing typing time by using the data processing program to automatically print a Results of Trial Information Sheet for distribution.

Not only were our goals met, but, thanks to our programmer, extra benefits accrued such as the automatic computation of the due date for filing Criminal Informations with the court. Information is now entered from the military police blotter each morning, and files are updated as the military police reports become available. If the magistrate court clerk receives a telephone call, she simply asks the computer to display the record that is the subject of the inquiry. If the chief of military justice needs to plan personnel requirements a month in advance, the clerk simply asks the computer to produce the docket for the week in question. Advance copies of the docket are given to the military police to check on the availability of witnesses and to remind them of pending trial dates. After each court session, results of trial are placed in each file. Docket dates for continued cases are updated so they appear on the "next" docket. Less typing is required and a greater volume of information is instantly available.

A particular advantage has occurred with the development of each succeeding data processing program. Each program is a customized system made up of a number of smaller programs, *i.e.*, password program, add a record

\*Fourth in a series of articles on automation. The series began in the January 1986 issue of *The Army Lawyer*.

program, and find a record program. It is now possible to quickly customize a screen; fill in the program blanks to correspond with the new program and a new data base system is running. The initial dependence on our programmer is lessening as the system supervisors are able to cut and paste each new program together or make corrections. The programmer then simply smooths the rough spots, saving time and effort instead of waiting for the development of new programs.

The addition of data processing systems has had a significant impact on the members of the legal office. As each new program is established, the computer terminals become true multi-function machines and not just word processors. The civilian employees, legal clerks, and attorneys using each program have become more actively involved in the computerization process. Ideas for new programs and refinements to current programs are constantly proposed. "What does it do?" has been replaced with "Can we do this?"

The functional proponent in each program area discussed has been asked to review these programs for possible distribution Army-wide. Documentation, *i.e.*, a user's guide to accompany each program, is currently being written. The programs are designed to run on an IBM PC or compatible unit, with dBase III software. Pinpoint distribution is planned for those offices capable of running these programs. Contact Lieutenant Colonel Rothlisberger, Chief, Information Management Office, Office of The Judge Advocate General (AUTOVON 227-8655), for more details.

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**Trial Counsel Forum**

**Article 31(b)—A New Crop in a Fertile Field**

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**Introduction**

Few provisions of the Uniform Code of Military Justice have spawned as much litigation and turmoil as Article 31(b).<sup>1</sup> Over the years, the Court of Military Appeals and the courts of military review have struggled with the plain language of the statute. Perhaps as a precondition to statutory construction, it has been candidly observed that the language of Article 31(b) is anything but unambiguous.<sup>2</sup> Accordingly, "statement"<sup>3</sup> and "suspected of an offense"<sup>4</sup> have been interpreted. Similarly, a judicial gloss has been placed on "any person subject to this chapter."<sup>5</sup>

The trial counsel is often behind the power curve of Article 31 as it evolves. Failure to consider the implications of the statute may frustrate those involved in military justice.<sup>6</sup> Commanders and law enforcement officers are reluctant to

engage in theoretical gymnastics when they seek advice from the trial counsel on what they must do or refrain from doing in order to comply with the law. Because inquiries seldom arise in a context permitting extended research, the trial counsel must be cognizant of current developments.

Several recent decisions from the military courts have dramatically changed the advice that the trial counsel will give in certain situations. While the military is, in many respects, a separate society,<sup>7</sup> the difference is becoming less apparent in this area of the law. Indeed, the Court of Military Appeals has suggested in dicta that a soldier accused of

<sup>1</sup> Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) (1982) [hereinafter cited as UCMJ]. See generally Lederer, *Rights Warning in the Armed Services*, 72 Mil. L. Rev. 1 (1976); Hansen, *Miranda and the Military Development of a Constitutional Right*, 42 Mil. L. Rev. 55 (1968).

<sup>2</sup> See, e.g., *United States v. Harden*, 18 M.J. 81 (C.M.A. 1984).

<sup>3</sup> See, e.g., *Harden*; *United States v. Musguire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958); *United States v. Minnifield*, 9 C.M.A. 373, 26 C.M.R. 153 (1967).

<sup>4</sup> See, e.g., *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982); *United States v. Anglin*, 18 C.M.A. 520, 40 C.M.R. 232 (1969).

<sup>5</sup> See, e.g., *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981); *United States v. Dohle*, 1 M.J. 223 (C.M.A. 1975).

<sup>6</sup> See, e.g., *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982).

<sup>7</sup> See *Parker v. Levy*, 417 U.S. 733 (1974).



an offense should not receive greater protection from the judicial system than is afforded to his or her civilian counterpart.<sup>8</sup>

This article will examine some recent cases which give new meaning to Article 31(b). The key reasoning will be highlighted with the intent of providing an evaluative framework for the trial counsel who is called upon to provide essentially spontaneous advice. Lastly, potentially troublesome areas highlighted by recent cases will be discussed briefly. While this last endeavor is admittedly a journey into the jurisprudential twilight zone, it is submitted that anticipation of problems is far preferable to advice in a crisis.

### The Rescue Exception

*United States v. Jones*<sup>9</sup> involved a soldier who reported to the military police desk sergeant that someone was hurt near the airfield. Preliminary questioning indicated that the person was seriously injured and possibly dying. When the desk sergeant asked how the person was injured, the soldier responded, "I stabbed him." The desk sergeant contacted the dispensary and relayed further questions concerning the extent of the injuries and the location of the injured person. The soldier indicated that he would have to show them the location.

The desk sergeant's supervisors arrived a few minutes later and were briefed on the situation. They were informed that the soldier had not been given Article 31 warnings. Upon receiving proper warnings the soldier declined any comment, but stood and faced the door. He was then asked if he was willing to take the military police to the victim. His response was, "Yes, let's go." The soldier not only revealed the location of the body, but also disclosed important physical evidence as well. Back at the station, some time later, another rights advisement yielded a waiver and incriminating admissions. Neither rights advisement mentioned the initial, unwarned statements.

The Army Court of Military Review was thus confronted with the admissibility of all statements and physical evidence derived from the unwarned statement, "I stabbed him." The soldier was unquestionably a suspect. Therefore, the plain language of Article 31(b) would seem to require

the formal warnings. The court, however, held that the desk sergeant had no duty to advise the suspect of his rights before continuing questioning.

An applicable exception, the rescue doctrine, excused compliance with Article 31. The exception applies when "(a) the possibility exists of saving human life or avoiding serious injury by rescuing the one in danger and (b) the situation is such that no course of action other than questioning of a suspect promises relief."<sup>10</sup>

This objective test was found to be consistent with Article 31. In reaching this conclusion, the court flatly rejected the suggestion that it lacked the authority to interpret Article 31 or Mil. R. Evid. 305.<sup>11</sup> Additionally, the court determined that the language of Article 31 was anything but plain and that Mil. R. Evid. 305 was not intended to codify any particular interpretation of Article 31 or the fifth amendment.<sup>12</sup>

The court observed that *Miranda*<sup>13</sup> warnings are not required when "police officers ask questions reasonably prompted by a concern for the public safety."<sup>14</sup> A similar exception to *Miranda* was applied by the California courts in *People v. Riddle*.<sup>15</sup> This exception, however, also called the rescue doctrine, was limited to situations in which the primary motive of the questioner was to rescue a person in danger. The "primary motive" essentially was determined subjectively. Because both *Riddle* and *New York v. Quarles*<sup>16</sup> reexamined the doctrinal underpinnings of *Miranda*, the Army court did so as well. To the *Miranda* equation were added the interests of public safety and the preservation of human life on one side, and the coercive effect of subtle pressures in military society on the other. The importance of preserving human life, which was clearly not considered in the *Miranda* balancing, tilted the balance decisively.<sup>17</sup>

The court next applied this analytical template to Article 31(b). Such a comparison was appropriate "because the objectives underlying Article 31(b) correspond almost exactly to the objectives of *Miranda*."<sup>18</sup> The subtle coerciveness of rank and the rule of obedience to proper authority were factors not applicable in the *Miranda* context. Perhaps for this reason, the court consciously limited the

<sup>8</sup> In *United States v. Remai*, 19 M.J. 229, 233 (C.M.A. 1985) the court commented on the anomaly that "a convicted servicemember should receive a windfall not available to his civilian counterpart." The court went on to suggest, however, that, "[p]erhaps, as far as harmless error is concerned, violations of Article 31 in the military society should be accorded the same treatment which the Supreme Court ultimately decides to give to coerced confessions, since, by enactment of Article 31, Congress established a fundamental norm in military justice." *Id.* See also *Murray v. Haldeman*, 16 M.J. 74, 83 (C.M.A. 1983); *United States v. Armstrong*, 9 M.J. 374, 378 (C.M.A. 1980). Cases such as the ones discussed *infra* will undoubtedly force the court out of this ambivalence.

<sup>9</sup> 19 M.J. 961 (A.C.M.R.), *petition granted*, 20 M.J. 393 (C.M.A. 1985).

<sup>10</sup> 19 M.J. at 967.

<sup>11</sup> "[N]either do we view ourselves as some sort of sterile hybrid version of a civil law court, operating in a system from which judicial interpretation has been consciously removed." 19 M.J. at 966. *Cf. United States v. Gibson*, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954).

<sup>12</sup> *Id.* at 966-68.

<sup>13</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>14</sup> 19 M.J. at 964 (quoting, *New York v. Quarles*, 104 S. Ct. 2626, 2632 (1984)).

<sup>15</sup> 83 Cal. App. 3d 563 148 Cal. Rptr. 170 (Cal. Ct. App. 1978), *cert. denied*, 440 U.S. 937 (1979).

<sup>16</sup> 104 S. Ct. 2626 (1984).

<sup>17</sup> 19 M.J. at 967. The court rejected the notion that Article 31(b) only provided soldiers the rights secured by the fifth amendment. *Id.* at 967 n.9. Curiously, the court relied on *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980) for its observation concerning the objectives of Article 31(b). *Armstrong* has itself been cited for the proposition that "Congress did not intend to extend protections against self-incrimination any further than the scope of the Fifth Amendment." *Walters v. Secretary of Defense*, 725 F. 2d 107, 109 n.3 (D.C. Cir. 1983), *reh'g denied*, 737 F.2d 1038 (D.C. Cir. 1984).

<sup>18</sup> In this context it is worth noting that Article 31(b) applies more broadly than *Miranda*. The subtle pressures of military society justify this broader scope in that they are operative outside the custodial interrogation context.

exception to the warning requirement to those extreme instances where human life or serious injury were involved.<sup>19</sup>

The potential for expanding the rescue doctrine as far as *New York v. Quarles* allows is certainly available. "Serious injury" might reasonably be interpreted to mean something akin to a concern for the public safety. The theft of explosives or weapons could arguably qualify under the exception, depending on the facts. The importance of the facts from an objective perspective cannot be ignored. In *Jones*, the desk sergeant did not know the victim was already dead. It is, therefore, the objectively reasonable belief of the possibility of rescue or avoiding serious injury that controls. Where this belief exists, the unwarned questioning of a suspect<sup>20</sup> creates no presumptive taint because the questioning is proper.

### Good Faith in the Military

On Christmas Eve 1983, a domestic quarrel erupted between a soldier and his wife. As the quarrel became more intense the soldier began to physically assault his spouse. A social guest in the home, one Ravenel, intervened and told the soldier to stop. Ravenel told the wife to take her children to the military police station. When the soldier attempted to restrain her departure, Ravenel wrestled him to the floor and kept him in check with a full-Nelson hold. A few minutes later, Ravenel arrived at the police station where the wife was relating the details of the incident. Two military police officers were dispatched to apprehend the soldier for assaulting his wife. The soldier was found on the floor of the apartment. He died of asphyxia due to strangulation.

The next day Ravenel was interviewed by criminal investigators as a witness because the agents did not suspect him of any criminal misconduct. Therefore, no Article 31 warnings were given before the interview. Additionally, Ravenel was not informed that the soldier was dead. Ravenel explained what happened the previous evening to include his utilization of the full-Nelson hold. Another social guest rendered a substantially corroborative statement. Later that day the agents advised Ravenel of this rights, resulting in essentially a reiteration of the unwarned statement. Three days later, at another warned interview, Ravenel attempted to demonstrate the wrestling hold for the agents.

The foregoing are the operative facts of *United States v. Ravenel*<sup>21</sup>. The decision was initially concerned with the

propriety of the trial court's ruling that Ravenel was a suspect when the initial statement was rendered. The court applied the traditional two-part test.<sup>22</sup> As to the subjective portion of the test, the court found that the agents did not, in fact, suspect Ravenel of an offense until after they had professionally interpreted the information collected. Accordingly, the agents were acting in "good faith."<sup>23</sup>

Like the trial court, however, the Army court found objectively that the agents should have suspected Ravenel of an offense during the initial interview when use of a full-Nelson hold was admitted.<sup>24</sup> The unwarned portion of the statement following admission of a full-Nelson hold was thus inadmissible. The court then approached the question of a presumptive taint effecting the subsequent rights waivers.

The court began with a discussion of the relationship between Article 31, *Miranda*, and the fifth amendment. The court stated: "It is now well recognized that Article 31 was intended to parallel the fifth amendment privilege and to provide servicemembers with 'the same rights secured to those of the civilian community under the Fifth Amendment . . . no more and no less.'"<sup>25</sup>

The court immediately proceeded to a discussion of the *Miranda* analysis of *Oregon v. Elstad*,<sup>26</sup> which rejected the notion that there was a necessary causal connection between an initial unwarned statement and a subsequent, warned statement. *Elstad* focused on the absence of coercion attendant to the initial unwarned statement. In such situations, the suspect's free will would not be presumptively undermined. Therefore, although the unwarned admission must itself be excluded, the admissibility of subsequent statements would turn on their voluntariness.<sup>27</sup> The Army court adopted the *Oregon v. Elstad* rule in its entirety, voicing confidence that it would be sensitive to the subtle pressures of military society.<sup>28</sup>

Applying the rule to the facts, the court found Ravenel's initial statement to have been voluntarily given. Moreover, it was not the product of "any form of subterfuge initiated by the interrogating agents in an attempt to circumvent [Ravenel's] fifth amendment and Article 31 rights against self-incrimination."<sup>29</sup> The subsequent statements were, therefore, not affected by the initial omission and were thus admissible in view of the totality of the circumstances, which reflected their voluntary nature.

<sup>19</sup> "As long as the victim remained unlocated and unattended, his life potentially hung in the balance." 19 M.J. at 968.

<sup>20</sup> In a recent case, with roughly similar facts, the Navy-Marine Corps Court of Military Review found that unwarned questions were proper because the questioner had no investigatory intent and was thus not seeking incriminating responses. Therefore, Article 31(b) was not triggered. *United States v. Anderson*, 21 M.J. 751 (N.M.C.M.R. 1985). While the Navy court did not mention the rescue doctrine, it did mention in passing that the questions were asked "for the purpose of rendering medical assistance." *Id.* at 758.

<sup>21</sup> 20 M.J. 842 (A.C.M.R. 1985).

<sup>22</sup> See *United States v. Morris*, 13 M.J. 297, 298 (C.M.A. 1982).

<sup>23</sup> 20 M.J. at 844.

<sup>24</sup> 20 M.J. at 845.

<sup>25</sup> *Id.* The court gave a *see also* citation to *United States v. Jones*. As was discussed *supra* note 15, however, the *Jones* court rejected the notion that Article 31 was synonymous with the fifth amendment.

<sup>26</sup> 105 S. Ct. 1285, 1293 (1985). See Finnegan, *Criminal Law Note—Recent Supreme Court Decisions*, *The Army Lawyer*, May 1985, at 17, 19.

<sup>27</sup> 20 M.J. at 846. The court recognized the contrary implications of *Remai* and *Jones*, but was not convinced that the concerns warranted a different result.

<sup>28</sup> 20 M.J. at 846. See also *United States v. Butner*, 15 M.J. 139 (C.M.A. 1983).

<sup>29</sup> *Id.* At an earlier point in the decision, the court found "that the agents acted in good faith." *Id.* at 844.

Lest it be incorrectly assumed that a per se rule is suggested, *United States v. Kruempelman*<sup>30</sup> must be considered. Kruempelman was questioned without Article 31 warnings by a sergeant first class as to the ownership and identity of suspected contraband found unsecured during an unannounced health and welfare inspection. The private first class admitted ownership of the vial, but claimed it contained caffeine instead of cocaine. Within two hours, two warned interrogations yielded similar admissions; however, Kruempelman was not advised that the initial statement could not be used. The trial court admitted the subsequent statements.

The Army court breathed life into the "subtle pressures" of military society and found the atmosphere of the mandatory inspection sufficiently coercive to distinguish the case from *Elstad* and *Ravenel*. The court went on to find that the government had failed to overcome the presumptive influence flowing from the initial statement.<sup>31</sup> Accordingly, the appropriate findings of guilty were set aside.

It should be readily apparent that trial counsel are on the proverbial tightrope in this area. Whether or not warnings are required cannot reasonably be determined without a full knowledge of the operative facts. When a statement is sought after an initial, unwarned statement, the potential value of a cleansing statement<sup>32</sup> in the text of the subsequent statement cannot be ignored. The focus on the voluntariness of a subsequent statement should be sharpened by the suspect's acknowledgement that previous statements were not used to influence a rights waiver. Similarly, law enforcement personnel and commanders should be made well aware of the fact that the realities of subtle, and perhaps unintentional, coercion do not evaporate from the appellate record.

### The Next Generation

While the cases discussed may imply a relaxation of the principle of strict adherence to Article 31, it is submitted that the implication is deceptively misleading. As is the case with the recent modifications of *Miranda*, the limiting interpretations of Article 31 place considerable emphasis on the notion of voluntariness. The constitutional propriety of this emphasis is well established.<sup>33</sup>

The subtle pressures of military society provide a litigational trump card for an accused. The subtle coerciveness of

rank most assuredly will become a staple in the defense arsenal, rather than an incidental factor. This precise issue is often found lurking in the facts. *United States v. Moreno*<sup>34</sup> is but one example. The case involved a specialist four who sought spiritual guidance after fatally shooting his par amour. He eventually found a chaplain, a major, in whom he sought to relieve his conscience. After stating, "I've sinned," the soldier related the sordid details leading up to the killing. When the chaplain told the soldier that he (the chaplain) would have to call the police, the soldier consented.

While the statement was held inadmissible because the chaplain violated the priest-penitent privilege,<sup>35</sup> there was also an underlying question whether voluntary consent or acquiescence to authority was involved in the notification to the military police. The question was further compounded by superimposition of the major's status as a religious representative. That a synergistic enhancement of authority existed would be a likely defense position in attacking the unwarned statements.

In a similar vein, therapists and counselors are often placed in the awkward position of having a duty to report certain criminal activity, such as child abuse, which is mutually exclusive with their obligation of confidentiality to the patient.<sup>36</sup> It is not inconceivable that such a health care practitioner would "suggest" confession as the first step towards rehabilitation. The combined factors of the professional relationship and the rank of the practitioner may be sufficiently persuasive to be termed coercive. The significance of the subtle pressure of military rank could easily tip the balance on the question of voluntariness.

One final scenario is likely to be the subject of future litigation. When law enforcement investigators are dealing with a circumstantial case, it is not uncommon to request the suspect to submit to a polygraph examination. While the results of a polygraph are generally not admissible at trial,<sup>37</sup> a confession made after the examination usually is.

The investigatory utility of the polygraph rests in its incredible ability to induce a confession.<sup>38</sup> It is this ability that raises the question of voluntariness. Typically, the polygraph operator will inform the suspect when "the box" indicates deceptive responses. Confronted with the mystique of the polygraph machine and the presence of the operator, many suspects feel the cat is indeed out of the bag, or box, as the case may be. The psychological environment during this time is far from casual. Indeed, it has been

<sup>30</sup> 21 M.J. 725 (A.C.M.R. 1985).

<sup>31</sup> In testing for harmless error, the court looked at the defense strategy at trial. The court apparently felt that admission of ownership of the vial was quite significant.

<sup>32</sup> See *United States v. Seay*, 1 M.J. 201 (C.M.A. 1975).

<sup>33</sup> "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Quarles*, 104 S. Ct. at 2631 (citing *United States v. Washington*, 431 U.S. 181, 187 (1977) (emphasis added in *Quarles*). See also UCMJ art. 31(d).

<sup>34</sup> 20 M.J. 623 (A.C.M.R. 1985).

<sup>35</sup> See Mil. R. Evid. 503.

<sup>36</sup> It is worth noting that a doctor-patient privilege was rejected as "totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel." Mil. R. Evid. 501 analysis, S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* 215 (1981). The recognition of such a privilege in a state will not be controlling in a trial by courts-martial. Mil. R. Evid. 501 analysis. Additionally, there is no generally recognized psychotherapist-patient privilege, notwithstanding the therapeutic value of confidentiality in such a relationship.

<sup>37</sup> The Court of Military Appeals will address the question of polygraph admissibility. See *United States v. Gipson*, NMCM 83 1514, *petition granted*, 19 M.J. 301 (C.M.A. 1985). The ultimate decision in the case may be preordained, however. See *United States v. Cameron*, 21 M.J. 59, 65 (C.M.A. 1985) ("Expert insights into human nature are permissible, but lie detector evidence—whether human or mechanical—is not").

<sup>38</sup> See D. Lykken, *A Tremor in the Blood—Uses and Abuses of the Lie Detector* (1981).

suggested that the environment is inherently coercive.<sup>39</sup> Trial counsel should realize that the increased focus on voluntariness may transform this suggestion into serious litigation. Inasmuch as the aura of scientific infallibility is a common basis for judicial hostility towards the polygraph,<sup>40</sup> it is not unlikely that the setting of a polygraph examination may create serious problems with the voluntariness aspect of contemporaneous statements.

### Conclusion

For over thirty-five years, Article 31 has been a fertile field of litigation. There is no reason to believe the field is becoming barren. The cases discussed in this article reflect that Article 31 is undergoing a dynamic phase of reinterpretation. The heightened focus on voluntariness in these decisions strongly suggests a new crop of issues are in the offing. The trial counsel must not only anticipate these potential issues in order to give sound advice to those who demand it, but must also be prepared to confront them in the crucible of the courtroom.

<sup>39</sup> See, e.g., *Wyrick v. Fields*, 459 U.S. 42 (1982) and cases cited therein.

<sup>40</sup> See, e.g., *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974).

Once Entrapped—Always Entrapped?

Among a variety of interesting issues raised in the recent Court of Military Appeals decision in *United States v. Bailey*,<sup>1</sup> trial counsel should take careful note of the issue of "continuing entrapment." This issue portends serious difficulty for trial counsel in cases where the government, actively seeking to ferret out crime, has given an accused the "opportunity" to commit a series of related crimes and where the defense of entrapment is raised during a trial on the merits or alluded to during a conditional plea of guilty.

In *Bailey*, the accused was charged with distribution of lysergic acid diethylamide (LSD), attempted distribution of LSD, larceny of \$30.00, and possession of marijuana. These offenses were alleged to have occurred, respectively on 15 April 1983, 11 May 1983, and 13 May 1983. The accused pleaded guilty to the distribution of LSD on 15 April 1983, the larceny allegedly committed on 11 May 1983, and the possession of marijuana on 13 May 1983. He pleaded not guilty to the attempted distribution of LSD on 11 May 1983. The trial judge entered findings consistent with the pleas.

During the providence inquiry, the accused testified that a fellow soldier, John Valdez, knew that he occasionally possessed and used LSD. According to the accused's un rebutted account of the facts, Valdez told him, "I got a guy that wants some LSD from you." The accused maintained that this statement was made "for about a month straight, everyday." The accused indicated that "he didn't want to get involved in any sale of LSD"; but finally, he agreed with Valdez "to meet him and Joe (an undercover criminal investigator)." This meeting resulted, according to the accused, in the sale of five tablets of LSD on 15 April 1983. The accused stated that he conducted this transaction to stop Valdez from making his repeated requests to sell LSD. The accused also stated, during the providence inquiry, that on 11 May 1983, he delivered nine tablets of a substance he represented as LSD to a buyer in return for \$30.00. Bailey maintained however, that he knew the substance was not LSD and that he conducted this "flimflam" so that the buyer would realize "that he had been taken." The accused reasoned that then the buyer would no longer "deal" with him.

The military judge inquired of Bailey whether he had talked with his counsel about the defense of entrapment and received an affirmative answer. The accused's defense counsel also affirmed that, after extensive research, he was convinced that there was no legal defense of entrapment.

On appeal, the Army Court of Military Review held that the accused's unrecanted factual assertions reasonably raised the defense of entrapment as to the allegation that the accused wrongfully distributed LSD on 15 April 1983.<sup>2</sup>

As to the larceny offense, the Army court held that the accused's plea of guilty was likewise improvident, stating:

[W]e note that where a person is entrapped into one offense, "and soon thereafter performs a number of similar acts at the request of that same agent . . . the influence of the prior unlawful inducement should be presumed to continue. . . ." *United States v. Skrzek*, 47 C.M.R. 317. This factual presumption only applies to acts which are "part of a course of conduct which was the product of the inducement" as opposed to "independent acts subsequent to the inducement." *Sherman v. United States*, 356 U.S. 369, 374 (1958). Appellant's assertions bolster rather than rebut this presumption, raising a facially valid entrapment issue. . . .<sup>3</sup>

The larceny issue was certified to the Court of Military Appeals. Against the argument posed by the government that the larceny was an independent act distinctly different from the drug offense, the Court of Military Appeals determined that because the same parties were involved, both sales took place in a parking lot, and in each instance the sale was of tablets represented to contain LSD, there was no distinction between the 15 April sale of LSD and the 11 May larceny. Accordingly, the Court held:

[I]f Bailey had mistakenly believed the tablets contained LSD—even though they did not—then his attempted distribution would have been excused by entrapment. Under these circumstances we do not believe that the relation between the inducements from Valdez and the obtaining of the \$30.00 from Joe was so attenuated that the entrapment defense is unavailable as to the larceny.<sup>4</sup>

*Bailey* serves as a reminder to prosecutors how lethal the defense of entrapment is, especially when its application and scope are not correctly understood. For example, it is evident in *Bailey* that all parties, the trial counsel, military judge, and defense counsel, did not understand the impact of the accused's statements during his providence inquiry. One of the factors that may have subtly influenced the errant views of this case (as well as many other similar cases) is the evidence of use and possession of illegal drugs by the accused. As was clearly stated by the Court of Military Appeals in *Bailey*, however, "because distribution of drugs is a separate offense with a distinctive criminal intent, the circumstance that an accused has possessed and used a drug does not preclude his advancing an entrapment defense in a prosecution for its distribution."<sup>5</sup>

This is a narrow distinction because, as noted by the court in *Bailey*, evidence of possession and use is relevant in demonstrating that a predisposition exists to distribute. "Persons who possess and use a controlled substance are

<sup>1</sup> 21 M.J. 244 (C.M.A. 1986).

<sup>2</sup> 18 M.J. 749 (A.C.M.R. 1984).

<sup>3</sup> *Id.* at 750 (citations omitted).

<sup>4</sup> 21 M.J. at 247.

<sup>5</sup> *Id.* at 246.

logically more likely to have considered distributing it than someone who has no familiarity with drugs."<sup>6</sup>

Even so, the seminal case on the defense of entrapment, *United States v. Vanzandt*,<sup>7</sup> makes clear that such relevant evidence alone does not sufficiently establish the government's burden of proving *beyond a reasonable doubt* that the accused was predisposed towards committing the charged offense (*i.e.*, distribution).

Further, once it is claimed by the accused that the commission of subsequent criminal acts was due to the initial unlawful inducement by the government or its agents, the government is confronted with the continued application of the defense of entrapment as to acts which are "part of a course of conduct which was the product of the inducement."<sup>8</sup> At this juncture, it is extremely important for trial counsel to develop additional evidence to demonstrate beyond a reasonable doubt that the accused was predisposed to commit the subsequent criminal acts. One recent holding, *United States v. North*,<sup>9</sup> offers illustrative assistance in this regard.

In *North*, the accused agreed, at the behest of a government informant with whom he apparently had a past relationship, to travel from California to Chicago, Illinois, to sell 4,000 50-microgram doses of LSD to FBI undercover agent Fanter. This transaction took place on 28 August 1982. On 17 September 1982, at Santa Cruz, California, the accused again met with Fanter and the government informant and sold 6,000 doses of LSD. On October 15, the accused again sold Fanter 10,000 doses of LSD and provided him samples of marijuana, cocaine, and MDM (an uncontrolled substance). Again on 26 October, the accused sold Fanter 30,000 doses of LSD and was arrested.

At his trial, the accused admitting selling the LSD, but testified that the government informant had pressured him into making the whole series of deals. The accused was acquitted of the 17 September transaction but convicted of wrongfully selling LSD on 15 and 26 October.

On appeal, the accused maintained that, because he was acquitted of the 17 September transaction, he should have therefore been acquitted of the 15 and 26 October transactions because:

If he was not predisposed to sell drugs when [the government informant] induced him to do so in August and September, then as a matter of law he could not have become predisposed to commit the similar and related offenses in October for which the jury convicted him . . . because the offenses were all parts of a single course of dealing, and no evidence showed that [the accused's] state of mind or disposition changed—the prosecution having argued at trial that [the accused]

was predisposed all along—either he was predisposed to make all the sales or he wasn't predisposed as to any.<sup>10</sup>

In rejecting this argument, the Ninth Circuit Court of Appeals determined that the jury, despite acquitting the accused of the 17 September transaction, could have determined that the accused "freely decided, during the month that passed before the October sales, to traffic in drugs." According to the court, "The initial entrapment, assuming it existed, *did not immunize [the accused] from criminal liability for subsequent transactions that he readily and willingly undertook.*"<sup>11</sup> In arriving at this holding, the court made several helpful findings that trial counsel should closely consider in evaluating similar issues:

During the month between the September 17 sale and the October sales, [the accused] alleged *no contact with [the government informant] . . . no events implying that Fanter did more than provide apparently favorable opportunities to break the law in October. The escalating volume of trade also suggests willing participation by [the accused].*<sup>12</sup>

As stated by the Court of Military Appeals in *Vanzandt*, "[t]racking the meanderings of the law of entrapment requires the instincts of a pathfinder and the skills of a surveyor."<sup>13</sup> Whenever the government takes an active role in ferreting out criminal activity, as is so evidently necessary in cases involving illegal drug activity, trial counsel must be alert to the problems inherent in the entrapment defense. Even though an accused's actions may evidence his or her predisposition to commit one form of criminal endeavor, this fact alone should never make a prosecutor conclude that those actions evidence predisposition to commit another form of criminal activity. Consequently, an accused who demonstrates an inclination to possess or use illegal drugs ordinarily will not, without a demonstration other of criminal intent, be held to evidence a predisposition to distribute the same drugs. The fact that an accused is found to have participated in a series of similar subsequent drug transactions, without a showing that the original inducement to enter into this form of criminal activity was attenuated by other circumstances, also will not provide a basis for overcoming the defense of entrapment. In his concurring opinion in *Bailey*, Judge Cox reminded both military judges and trial counsel that "once entrapped does not necessarily mean always entrapped."<sup>14</sup> Even so, he qualified this reminder with the further reminder that a course of criminal conduct that follows an original government inducement must be shown to have been "inspired" by something other than the original inducement. This burden, which must be proven beyond a reasonable doubt, is the government's—whether the case is resolved by a trial on the merits or by a plea of guilty.

<sup>6</sup> *Id.* at 246 n.3.

<sup>7</sup> 14 M.J. 322 (C.M.A. 1982).

<sup>8</sup> *United States v. Skrzek*, 47 C.M.R. 317 (A.C.M.R. 1973).

<sup>9</sup> 746 F.2d 627 (9th Cir. 1984).

<sup>10</sup> *Id.* at 629.

<sup>11</sup> *Id.* at 630 (emphasis added).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> 14 M.J. at 343.

<sup>14</sup> 21 M.J. at 247 (Cox, J., concurring).

### COMA Urges Special Findings Under Rule 403

Since the adoption of the Military Rules of Evidence, prosecutors have gained great leverage in presenting crucial evidence, the admissibility of which would have been questionable, at the very least, before the adoption of the Rules. In many instances, entire cases are built upon the introduction of evidence through the careful application of such rules of evidence as Military Rule of Evidence 404(b) (Uncharged Misconduct)<sup>15</sup> and 803(24) (Residual Hearsay).<sup>16</sup> TCAP has urged trial counsel to use these rules, when applicable, as a basis for planning the entirety of their cases from charging through sentencing.<sup>17</sup> Two recent cases decided by the Court of Military Appeals illustrate how the failure of a trial counsel to properly plan for and apply these essential rules inevitably led to reversal of the case on appeal.

In both *United States v. Watkins*,<sup>18</sup> and *United States v. Maxwell*,<sup>19</sup> the accused was charged with sexual assault, the victim maintained that the accused had forcibly perpetrated the offense and the accused denied the allegations, maintaining that the victim had either proposed or voluntarily consented to acts of sexual intercourse. Further, in both cases, the trial counsel possessed extrinsic evidence of prior misconduct by the accused similar to the charged acts of misconduct and sought admission of this evidence during cross-examination of the accused. In *Watkins*, Judge Cox held that seven prior instances of misconduct introduced by the trial counsel during the cross-examination of the accused was properly admissible because the trial counsel had established a clear foundation under Rule 404(b) to show the accused's  *motive and state of mind* in the commission of the charged offense. In *Maxwell*, however, the Court of Military Appeals determined that the introduction of evidence nearly identical to that introduced in to prove the offense in *Watkins* "indisputably prejudiced" the accused's case. The theory upon which the trial counsel in *Maxwell* based the admissibility of the extrinsic evidence of prior misconduct was that it constituted "rebuttal" evidence to the accused's assertion that he was a peaceable person. As the case revealed, however, the accused did not offer his character for peaceableness during his direct examination. Rather, as the court noted, "That bit of information was extracted from him by the prosecution" on cross-examination.<sup>20</sup> In placing this manner of introducing extrinsic evidence of prior acts of misconduct into context with the Military Rules of Evidence, the court stated that "it was

not appellant who 'offered' evidence of his character for peaceableness here. Indeed what happened here was precisely what Mil. R. Evid. 404(a)(1) was designed to prevent. *It follows that the military judge erred in permitting trial counsel to 'rebut.'*"<sup>21</sup> Obviously with its holding in *Watkins* in mind, the court noted that "[b]ecause the evidence was offered and received at trial as rebuttal of good character evidence and *the court members were specifically so instructed, we do not now speculate whether the evidence might have fit some other theory of admissibility.*"<sup>22</sup>

Thus the court made clear that the distinguishing difference between *Watkins* and *Maxwell* was the inevitable prejudice that arises in a case when the trial judge admits evidence under an errant theory of admissibility and provides an equally errant instruction as to the meaning of this evidence to the court members.

As a way to prevent the recurrence of similar errors, the Court of Military Appeals, in another recent case, *United States v. Dodson*,<sup>23</sup> forcefully pointed out that the trial judge must make the fullest application of Rule 403<sup>24</sup> in considering the admissibility of evidence under other rules of evidence. In his concurring opinion, Chief Judge Everett stated that "Rule 403 may be the most important . . . Rule" and that "the judge should carefully analyze the nature of the case, the court-members, the other evidence in the case and the way the case has been presented in order to estimate the real likelihood in the particular case that the evidence would prejudice the court-members hearing the case."<sup>25</sup> After expressing a concern that not all trial judges are performing this "very important balancing task," Chief Judge Everett stated "[m]y concern would be ameliorated somewhat by more frequent use of *special findings*, as urged by the authors of the *Military Rules of Evidence Manual* . . ."<sup>26</sup>

This is not only a strong message for trial judges; it applies equally to trial counsel. If trial judges begin to heed this message, trial counsel will be required to present a well-reasoned justification for the introduction of the evidence believed to be admissible. Trial counsel's reasoning will be critical to the determination of whether the evidence is admissible.<sup>27</sup>

Within the context of the requirement of "special findings" however, there is a potential pitfall for trial counsel. Defense counsel frequently argue against the admissibility

<sup>15</sup> *United States v. Beechum*, 582 F.2d 898 (5th Cir.), cert. denied, 440 U.S. 990 (1978).

<sup>16</sup> *United States v. Hines*, 18 M.J. 729 (A.F.C.M.R. 1984).

<sup>17</sup> See Thwing, *Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal*, *The Army Lawyer*, Jan. 1985, at 46.

<sup>18</sup> 21 M.J. 224 (C.M.A. 1986).

<sup>19</sup> 21 M.J. 229 (C.M.A. 1986).

<sup>20</sup> *Id.* at 230.

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.* at 230 n.3 (emphasis added).

<sup>23</sup> 21 M.J. 237 (C.M.A. 1986).

<sup>24</sup> Military Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>25</sup> 21 M.J. 239 (Everett, C.J., concurring (quoting S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 176, 177 (1981))).

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *United States v. Shackelford*, 738 F.2d 776, 780 (7th Cir. 1984).

of evidence on the basis that its admissibility would "unfairly prejudice" the substantial rights of the accused. Just as frequently, trial judges construe Rule 403 as a requirement for trial counsel to disprove such generalized forms of objection. Both of these approaches are misdirected, as was made clear in *United States v. Clark*.<sup>28</sup>

In *Clark*, the accused was charged with a series of specifications alleging the rape of his fourteen year-old daughter over a period of two years. The accused pled guilty to the lesser included offense of carnal knowledge during certain periods of time when the alleged rapes occurred, and defended against allegations of rape which were alleged to have occurred at subsequent dates on the basis that the victim consented. The government was permitted to introduce evidence of previous sexual misconduct that had occurred four to six years before the charged misconduct as evidence rebutting the issue of consent. The Army Court of Military Review held that the evidence of uncharged prior misconduct by the accused was relevant, and, in assessing whether the relevance of this evidence was "substantially outweighed by the danger of unfair prejudice" under Rule 403, the court stated:

"Unfair prejudice" as intended by the drafters of the rule does not mean evidence which is adverse to an opposing party for virtually all evidence is prejudicial or it isn't material. Rather, "unfair prejudice" means an undue tendency to decide an issue on an improper basis, commonly, though not necessarily, an emotional one.<sup>29</sup>

Accordingly, once the prosecution has demonstrated that the evidence is relevant, the burden of demonstrating that the admission of such evidence is *substantially* outweighed by its prejudicial effect falls upon the defense. If the defense can only demonstrate that the potential for prejudice is, on balance, equal to the probative value of the proffered evidence, case law demonstrates that Rule 403 should not bar its introduction.<sup>30</sup>

Unquestionably, if trial judges heed the call by Chief Judge Everett to use special findings under Rule 403 to arrive at a balanced determination as to the admissibility of evidence under the other Military Rules of Evidence, the potential for a later determination of appellate error will be reduced. In planning to introduce evidence under any of the rules of evidence, trial counsel must be prepared to give a full reasoned account for the admissibility of the evidence. At the same time, trial counsel must be alert to the potential that Rule 403 may be improperly understood as a rule of exclusion rather than "an extraordinary remedy to be used sparingly and only when the danger of unfair prejudice *substantially* outweighs the probative value of the evidence."<sup>31</sup>

<sup>28</sup> 15 M.J. 974 (A.C.M.R. 1983).

<sup>29</sup> *Id.* at 977.

<sup>30</sup> *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir. 1982).

<sup>31</sup> *United States v. Plotke*, 725 F.2d 1303 (11th Cir. 1985).



## Ineffective Assistance of Counsel: An Overview

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The sixth amendment guarantees to one accused of a crime the right to the assistance of competent counsel during all phases of the proceedings.<sup>1</sup> The military accused's constitutional right to the assistance of counsel is implemented by the Uniform Code of Military Justice.<sup>2</sup> This constitutional right consists of more than the mere presence and availability of counsel; it entitles the accused to the effective assistance of counsel.<sup>3</sup> This right was recognized at a relatively early date by the Court of Military Appeals when it stated that "the uniformed accused is justly entitled to receive from his attorney a full measure of assistance."<sup>4</sup> This article traces the development of the standards of effective assistance of counsel as defined by military and civilian appellate courts, including the United States Supreme Court, and discusses the procedural aspects of how a claim of ineffective assistance is handled at the appellate level by the Army's Defense Appellate Division. Subsequent articles will address specific areas of ineffective assistance in the military context.

### The Standards of Effective Assistance of Counsel

In one of the first military cases involving a claim of ineffectiveness of counsel, the Court of Military Appeals applied the prevailing standard in the federal courts, *i.e.*, an accused could succeed only by showing "[t]hat the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character."<sup>5</sup> The Court of Military Appeals generally followed this test in cases decided during the next twenty years.<sup>6</sup> The Court of Military Appeals did not give further guidance on the standard of competence required until it decided *United States v. Rivas*<sup>7</sup> in 1981. In *Rivas*, the court reviewed the numerous standards upon which an attorney's assistance

could be judged and analyzed the various federal circuit court decisions. The court concluded that effective assistance required the exercise of that skill and knowledge which normally prevails within the range of competence demanded of attorneys in criminal cases, and required that the attorney act as a diligent and conscientious advocate.<sup>8</sup>

More recently, in *United States v. Jefferson*,<sup>9</sup> the Court of Military Appeals announced that it would adopt the two-part standard delineated by the District of Columbia Circuit Court in *United States v. DeCoster*.<sup>10</sup> Under this test, an accused must show evidence of serious incompetency on the part of the defense counsel which affected the trial result.<sup>11</sup>

The United States Supreme Court recently articulated standards for evaluating counsel competency in *Strickland v. Washington*.<sup>12</sup> In *Strickland*, the Supreme Court addressed three separate issues regarding ineffective assistance of counsel. The first area concerned the actual or constructive denial of counsel.<sup>13</sup> Under such circumstances, prejudice to the appellant was presumed once denial of counsel was proven. The Court next addressed the situation involving an attorney who represents conflicting interests. The Court stated, "Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance."<sup>14</sup> Lastly, and perhaps most importantly, the Court addressed the area of counsel's competency and professional conduct, and delineated a two part test for evaluating claims. The Court held "[t]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>15</sup> Under this test, the appellant must first prove that his counsel's conduct was unprofessional or improper, and then show that the questioned conduct adversely affected the

<sup>1</sup> *United States v. Cronin*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984); *Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982); *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977).

<sup>2</sup> Uniform Code of Military Justice arts. 27, 38, 10 U.S.C §§ 827, 838 (1982) [hereinafter cited as UCMJ].

<sup>3</sup> *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>4</sup> *United States v. McMahan*, 6 C.M.A. 709, 718, 21 C.M.R. 31, 39 (C.M.A. 1956).

<sup>5</sup> *United States v. Hunter*, 2 C.M.A. 37, 6 C.M.R. 34, 41 (1952) (citing *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir. 1948)).

<sup>6</sup> See, e.g., *United States v. Luiz*, 49 C.M.R. 150 (A.C.M.R. 1975); *United States v. Hancock*, 49 C.M.R. 830 (A.C.M.R. 1974).

<sup>7</sup> 3 M.J. 282 (C.M.A. 1977).

<sup>8</sup> *Id.* at 288.

<sup>9</sup> 13 M.J. 1 (C.M.A. 1982).

<sup>10</sup> 624 F.2d 196 (D.C. Cir. 1979) (en banc), cert. denied, 444 U.S. 944 (1979).

<sup>11</sup> 13 M.J. at 5 (citing *DeCoster*, 624 F.2d at 1204-05).

<sup>12</sup> 466 U.S. 668 (1984).

<sup>13</sup> *Id.* at 692 (citing *United States v. Cronin*, 466 U.S. 648, 659 (1984)).

<sup>14</sup> *Id.* at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)).

<sup>15</sup> *Id.* at 693.

outcome of the trial.<sup>16</sup> The Court went on to state that, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>17</sup>

Although the Court of Military Appeals has not yet cited the *Strickland* standard, its close similarity to the *Jefferson* holding indicates that it will probably be applied in military practice. This expectation is substantiated by the fact that *Strickland* has been cited with approval by the Army,<sup>18</sup> Air Force,<sup>19</sup> and Navy-Marine<sup>20</sup> Courts of Military Review.

#### The procedural aspects of raising a claim of ineffective assistance on appeal<sup>21</sup>

The issue of ineffective assistance typically arises in one of two ways. First, an appellate attorney reviewing a record of trial may determine that the trial defense attorney made a serious error in his or her handling of the case. Second, an appellant may personally assert the error of ineffectiveness of his trial defense attorney.

As a matter of policy at the Defense Appellate Division, the issue is thoroughly documented, investigated, and analyzed before a claim of ineffective assistance of counsel is raised. Although some errors will be documented on the record, many will require the submission of extra-record affidavits. The appellant and his appellate counsel have the burden to document the error and show the resulting prejudice.<sup>22</sup>

When evidence of ineffective assistance is found by the appellant's counsel or appellant insists on raising the error, appellate counsel will notify the trial defense counsel of the possible error or errors and will ask the defense counsel to respond to the issue in affidavit form.<sup>23</sup> The trial defense counsel should respond to these requests as soon as possible. If defense counsel chooses not to respond, he or she should so advise appellate counsel, who has no choice but to review the issue based upon the client's assertions. Appellate defense counsel will review the response in conjunction with all other relevant evidence and decide if the issue should be raised and briefed before the court.

Mere assertions of error by the appellant in post-trial documents will generally be insufficient to raise the error; specific firsthand allegations in affidavit form will be required in most situations.<sup>24</sup> When the defense counsel's affidavit and the appellant's affidavit conflict, the appellate counsel is normally ethically required to give deference to his or her client.

When a trial defense counsel is asked to respond to a claim of ineffective assistance, the attorney-client privilege between trial defense counsel and the appellant no longer exists with regard to matters relevant to the claimed ineffectiveness.<sup>25</sup> Disclosure may be required, for example, when a defense counsel has chosen not to offer certain evidence in order to avoid "opening the door" to unfavorable evidence based on his confidential knowledge.<sup>26</sup>

When appellate counsel determines a claim lacks merit, the appellant is so advised. If the appellant nevertheless persists in raising the issue, appellate counsel must bring the issue to the court's attention.<sup>27</sup> Under these circumstances, however, the issue probably will not be assigned as an error nor briefed by appellate defense counsel.

The Government Appellate Division may conduct an independent investigation of asserted claims of ineffectiveness of counsel. The government appellate counsel may contact the trial defense counsel to discuss the case and request additional affidavits,<sup>28</sup> but the government appellate counsel does not act as legal advisor to the trial defense counsel.<sup>29</sup> Exactly what constitutes legally advising the trial defense counsel has not been settled; however, government appellate counsel certainly should not advise the trial defense counsel how to justify his or her actions or lack thereof.<sup>30</sup>

Once the error of ineffective assistance is properly before the appellate court, the court must first determine whether or not the counsel's assistance was ineffective, and, second, whether any ineffectiveness was prejudicial to the appellant. Should the court find prejudice, it has numerous options to choose from when fashioning a remedy. Under the Army

<sup>16</sup> This test is very similar to the tests set forth in *Jefferson* and *DeCoster*.

<sup>17</sup> 466 U.S. at 694. The "outcome of the trial test" has been modified to apply to situations where there is a probability that the appellant's plea would have been different had he not received incorrect advice concerning eligibility for parole from his attorney. *Hill v. Lockhart*, 106 S. Ct. 366 (1985).

<sup>18</sup> *United States v. Kidwell*, 20 M.J. 1020 (A.C.M.R. 1985); *United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985); *United States v. Wheeler*, 18 M.J. 823 (A.C.M.R. 1984).

<sup>19</sup> *United States v. Carlson*, CM 24356, (A.F.C.M.R. 20 Sept. 1984); *United States v. Garcia*, 18 M.J. 716 (A.F.C.M.R. 1984).

<sup>20</sup> *United States v. Scott*, NMCM 84 0447 (N.M.C.M.R. 22 Jan. 1986); *United States v. Hoxhold*, 20 M.J. 990 (N.M.C.M.R. 1985).

<sup>21</sup> The policies and procedures discussed herein are those of the Army Defense Appellate Division and have been included in the Division's Appellate Advocacy Handbook, United States Army Legal Services Agency, Defense Appellate Division, appendix K (1982).

<sup>22</sup> *United States v. Bowie*, 17 M.J. 821 (A.C.M.R. 1984); *United States v. Zuis*, 49 C.M.R. 150 (A.C.M.R. 1975).

<sup>23</sup> *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977). The trial defense counsel's duties extend throughout the appellate review stages and require the production of information to appellate counsel when requested.

<sup>24</sup> *United States v. Austin*, 13 M.J. 623 (A.F.C.M.R. 1982).

<sup>25</sup> *Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967); *United States v. Dupas*, 14 M.J. 28 (C.M.A. 1982) *on remand*, 17 M.J. 689 (A.C.M.R. 1983); *United States v. Allen*, 8 C.M.A. 504, 508, 25 C.M.R. 8, 12 (1957); *United States v. Zuis*, 49 C.M.R. 150, 158 (A.C.M.R. 1974); Model Code of Professional Responsibility DR 4-101(c)(4) (1980).

<sup>26</sup> Of course, trial defense counsel may be able to explain his or her actions without disclosing confidential matter.

<sup>27</sup> *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>28</sup> *Dupas*, 14 M.J. at 31.

<sup>29</sup> *Id.*

<sup>30</sup> An unusual situation could occur if an ineffective assistance error is raised in conjunction with another error that requires assistance from the field. Such field assistance would normally be supplied by the trial defense counsel, but because the ineffective assistance claim has created a conflict, a new defense counsel should be appointed to act as a field counsel on appeal.

Court of Military Review's broad fact finding power,<sup>31</sup> it may determine that the facts are insufficient to justify a decision regarding ineffective assistance of counsel. If the facts have not been sufficiently developed or are in a state of conflict, the court may return the case to the field for a limited or *DuBay* hearing.<sup>32</sup> In a recent case where the facts supported a claim of ineffective assistance regarding the merits of the case, the Army court ordered dismissal of those charges affected by the ineffective assistance.<sup>33</sup> Where the ineffective assistance only affected post trial proceedings, the Army court may order a new review and action.<sup>34</sup>

### Conclusion

The military accused has a right to the effective assistance of counsel during all phases of the court-martial process. Although military courts have applied various standards to resolve claims of ineffective assistance of counsel in the past, it now appears that the test set forth by the Supreme Court in *Strickland* will be used to resolve all ineffectiveness issues. Under this test, an accused must show not only that his counsel was seriously incompetent, but also that it affected the results of his or her court-martial.

A claim of ineffective assistance of counsel is a very serious allegation for all concerned. A trial defense attorney must constantly be aware of how his or her actions may be interpreted in relation to the standards set forth in current case law. Counsel should document all facets of his or her involvement in the court-martial process, particularly those areas involving tactical choices and strategies, in order to be able to respond to allegations of ineffective assistance.

The representation provided military accuseds by U.S. Army Trial Defense Service lawyers and the civilian bar normally far exceeds minimal standards of competency. As a result, the issue of ineffectiveness of counsel is seldom assigned as error and briefed by appellate counsel before the Army Court of Military Review.

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<sup>31</sup> UCMJ art. 66.

<sup>32</sup> *United States v. DuBay*, 17 C.M.A. 137, 17 C.M.R. 411 (1967); *United States v. Scott*, NCMC 84 0447 (N.M.C.M.R. 22 Jan. 1986).

<sup>33</sup> *United States v. Kidwell*, 20 M.J. 1020 (A.C.M.R. 1985).

<sup>34</sup> *United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985).

### Appellant's Leave Address

The Defense Appellate Division continues to receive many records of trial containing appellate rights forms which do not have an excess leave address for the accused. These omissions have forced appellate defense counsel to expend a great deal of time locating clients who have been released from confinement. Trial defense counsel can help to eliminate this time-consuming process and promote effective client-attorney communications during the appellate process by ensuring that the appellate rights form contains a complete and accurate excess leave address. This is particularly important for those clients with adjudged punitive discharges who have short sentences to confinement. Clients who do not know where they will live after release from confinement should be asked for the address of a person who will know how to contact them. Counsel should point out to clients that the failure to include an accurate address on the form could frustrate future efforts undertaken on his behalf by his appellate attorney.

### Failure To Repair What?

Trial defense counsel should be familiar with the often fine distinctions among certain classes of the same general offense (e.g., homicide, assault, and even absence without official leave).

In this regard, a recent unpublished opinion of the Army Court of Military Review identified a potential problem associated with pleading an accused guilty in cases alleging "going from appointed place of duty with authority" under Article 86.<sup>1</sup> In *United States v. Thrush*,<sup>2</sup> the accused claimed he had left his appointed place of duty for a lunch break with the permission of the person in charge of the detail, but had subsequently failed to return to his place of duty at the conclusion of the lunch break. The accused was charged with "going from his place of duty without authority" in violation of Article 86(2). The offense was consistently characterized, however, as a "failure to repair" by trial counsel throughout the trial, by the defense counsel in the offer to plead guilty, by the military judge during the providence inquiry, by the staff judge advocate in both the pretrial and post-trial reviews, and by the convening authority in his promulgating order. The factual circumstances in *Thrush* supported a finding of guilty to "failure to repair"; however, the accused was not charged or arraigned on that offense. Therefore, the Army court found the plea to be improvident and dismissed the charge.

Failure to repair is a distinct offense and a term of art in the opinion of the Army Court of Military Review. Accordingly, it is improper to characterize "going from appointed place of duty without authority" as a "failure to repair," a separate and distinct violation of Article 86. Captain Carolyn F. Washington

### The Definition of "Prior Convictions"

Rule for Courts-Martial 1001(b)(3)<sup>3</sup> states the rule for allowing prior convictions of an accused into evidence in aggravation. The rule fails to define "prior convictions," however. The corresponding rule under the former Manual defined prior convictions as "offenses committed during the six years next preceding the commission of any offense of which the accused has been found guilty."<sup>4</sup>

An examination of the analysis to R.C.M. 1001 in the new Manual reveals that the new rule is "based on paragraph 75 of MCM, 1969 (Rev.)." The analysis also states that any "[a]dditions, deletions, or modifications, other than format or style charges, are noted [in this analysis]."<sup>5</sup> The analysis makes note of several changes to the old rule; however, it makes no mention of any change to the definition of "prior conviction." Under the rule of statutory interpretation *expressio unius est exclusio alterius*, one could conclude that the old definition is still controlling. This is not the case, however. In a recent decision, the Army Court of Military Review held that a "prior conviction" is any conviction which occurred prior to the time that the current sentencing proceedings commence.<sup>6</sup> The Army court followed an Air Force Court of Military Review decision.<sup>7</sup> In the opinion of these two courts, any convictions of an accused will be considered relevant to sentencing proceedings, even if they related to offenses which occurred *after* all offenses for which he is currently being tried. This change is yet another harbinger of the expanding nature of information which will be allowed into evidence before the court on sentencing. Captain William E. Slade

### Recent Developments

#### Confinement Credit

Concurrent jurisdiction over a military accused can often create confusion, especially when litigating speedy trial motions or confinement credit under *United States v. Allen*.<sup>8</sup> The difficulties associated with sorting out the responsibility for pretrial confinement between concurrent jurisdictions were recently illustrated in *United States v. Vaughn*.<sup>9</sup>

In *Vaughn*, the accused was charged with military crimes which occurred in August and September of 1984. He was

<sup>1</sup> Uniform Code of Military Justice art. 86, 10 U.S.C. § 886 (1982).

<sup>2</sup> SPCM 21813 (A.C.M.R. 17 Dec. 1985).

<sup>3</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(3) [hereinafter cited as MCM, 1984, and R.C.M., respectively].

<sup>4</sup> Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 75.

<sup>5</sup> MCM, 1984, app. 21, at A21-61.

<sup>6</sup> *United States v. Hanes*, 21 M.J. 647 (A.C.M.R. 1985).

<sup>7</sup> *United States v. Allen*, 21 M.J. 507 (A.F.C.M.R. 1985).

<sup>8</sup> 17 M.J. 126 (C.M.A. 1984).

<sup>9</sup> CM 446835 (A.C.M.R. 13 Jan. 1986).

also charged with military crimes that were committed simultaneously with an altercation with a Korean national in November of 1984. In December of 1984, after failing to appear at an Article 32 hearing, he was apprehended and placed in pretrial confinement. The written confinement order stated that the Command Judge Advocate of the United States Forces in Korea exercised his "own discretion" by placing the accused in pretrial confinement to meet obligations under the Korean Status of Forces Agreement.

The military judge ruled that pretrial confinement credit was not due, relying on a leading case in this area, *United States v. Murphy*.<sup>10</sup> In its memorandum opinion, the Army Court of Military Review distinguished *Murphy* and reversed the ruling of the military judge. *Murphy* denied credit for time spent in pretrial confinement when it had been imposed at the specific request of a foreign government.<sup>11</sup> In *Vaughn*, however, the Korean government's interest in having the accused confined was never clearly expressed and was not documented. Practitioners should be alert to this distinction when litigating credit issues in concurrent jurisdiction cases. In particular, the period of confinement at issue in *Murphy* was prior to the preferral of military charges,<sup>12</sup> while the period at issue in *Vaughn* was subsequent to the preferral of charges.

The United States is not relieved from accounting for time spent in pretrial confinement when the decision to confine an accused cannot be clearly attributed to one of two concurrent jurisdictions. This principle, established in *United States v. Young*,<sup>13</sup> is not disturbed by the holding in *Murphy*. In *Young*, the assertion of control by a concurrent jurisdiction was more clearly stated than in *Vaughn*, and yet the court found that was insufficient to relieve the United States of accounting for time spent in confinement.<sup>14</sup>

When the interest of concurrent jurisdictions in an accused who has been confined prior to trial is unclear, assignment of responsibility will often turn on who has asserted a custodial interest in the accused. Preferral of military charges is fairly conclusive proof of custodial interest.<sup>15</sup> Another strong indication of custodial interest is the decision to proceed to trial. This decision alone can determine who should be charged with an accused's pretrial confinement.<sup>16</sup>

In *United States v. Boden*,<sup>17</sup> the Army Court of Military Review considered the government's responsibility for speedy disposition of charges when an accused in confinement had multiple charges preferred on different dates. The military judge in *Boden* dismissed charges which were initially preferred against the accused because of a speedy trial violation, but rejected the accused's contention that a charge preferred several weeks later should also be dismissed. The Army court disagreed with the military judge's ruling that government accountability for the additional charges did not begin until the charges were preferred because the government had insufficient evidence to assure successful prosecution. The court held that in cases involving charges preferred on different dates, government accountability for speedy trial<sup>18</sup> begins on the date the government has in its possession substantial information on which to base preferral of the charge in question. The court also rejected the contention that information possessed by various Criminal Investigation Division investigators (but not transmitted to the accused's commander) should not be imputed to the government, and noted that the term "government" has never been so narrowly construed. The court found that action on the charges in *Boden* was neither coordinated nor reasonably diligent, and that no extraordinary circumstances were shown to have impeded the communication of information between investigators, prosecutors, and commanders. Accordingly, the court set aside the findings and the sentence and dismissed the charges.

#### Sentencing Instructions

The United States Court of Military Appeals has indicated that it will apply a new test for determining prejudice resulting from incomplete sentencing instructions. In *United States v. Fisher*,<sup>19</sup> the military judge gave the members guidance on the procedures to be followed in voting on proposed sentences, but he failed to include the admonition to begin voting on the lightest proposed sentence first.<sup>20</sup> The court acknowledged that it previously treated this instructional error as reversible per se, and reasoned that there may have been reliance on these rulings resulting in a failure to make timely objection at the trial level.<sup>21</sup> The court therefore reversed the Army court's decision as to sentence and ordered the sentence to be reassessed. The court specifically noted, however, that the lack of a timely objection may affect the outcome in future cases and outlined a new

<sup>10</sup> 18 M.J. 220 (C.M.A. 1984).

<sup>11</sup> *Id.* at 234, n.17.

<sup>12</sup> *Id.* at 223.

<sup>13</sup> 1 M.J. 71 (C.M.A. 1975).

<sup>14</sup> *Id.* at 73. The government of Japan waited 149 days without deciding whether it would proceed with prosecution of Young when it had initially requested he be kept in pretrial confinement.

<sup>15</sup> *United States v. Keaton*, 18 C.M.A. 500, 40 C.M.R. 212, 215 (1969); *United States v. Frostell*, 13 M.J. 680, 680 (N.M.C.M.R. 1982).

<sup>16</sup> *United States v. Reed*, 2 M.J. 64, 67 (C.M.A. 1976).

<sup>17</sup> *United States v. Boden*, CM 446811 (A.C.M.R. 14 Feb. 1986).

<sup>18</sup> See *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971); R.C.M. 707(d).

<sup>19</sup> 21 M.J. 327 (C.M.A. 1986).

<sup>20</sup> This procedure is mandated by R.C.M. 1006(d)(3)(a). Historically, the United States Court of Military Appeals has applied three different tests to this same error: (1) treating it as a violation of military due process requiring a reversal in *United States v. Johnson*, 18 C.M.A. 436, 40 C.M.R. 148 (1969) and *United States v. Luma*, 1 M.J. 15 (C.M.A. 1975); (2) as one requiring a test for prejudice in *United States v. Pierce*, 19 C.M.A. 225, 41 C.M.R. 225 (1970); and (3) one requiring a test for the risk of prejudice in *United States v. Roman*, 22 C.M.A. 78, 46 C.M.R. 78 (1972).

<sup>21</sup> 21 M.J. at 329.

test for plain error: "the error must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations."<sup>22</sup> The court went on to say this is determined by evaluating the claim against the entire record, with one consideration to be the lack of a timely objection. It is therefore incumbent upon trial defense counsel to listen carefully to sentencing instructions, and object to guidance which is incomplete or inaccurate. The failure to do so may deprive the client of the favorable sentence voting procedures specified in the Manual. Captain Alfred H. Novotne, Captain H. Alan Pell, and Captain David W. Sorensen.

The court then discussed the requirements for a plain error claim, stating that the error must be both obvious and substantial, and must have had an unfair prejudicial impact on the jury's deliberations. The court noted that the failure to object to sentencing instructions is a critical factor in determining whether a plain error claim is successful. The court also discussed the importance of the defense counsel's duty to listen carefully to the sentencing instructions and to object to any errors that may occur.

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<sup>22</sup> *Id.* at 328.

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### Inclusion of Charge Sheet

Each complete record of trial must include, in the record proper and not merely among the allied papers, the original charge sheet or a duplicate thereof. R.C.M. 1103(b)(2)(D)(i). The implication in appendix 14 of the MCM, 1984, at A14-4, and on page 5 of DD Form 490 (Record of Trial) that a verbatim copy of the charges will suffice is contrary to the requirements of this rule. Most Army jurisdictions either insert the charge sheet or a duplicate in the record at the point of arraignment. A few instead make the charge sheet a part of the record by attaching it as an appellate exhibit. This notice is for those who occasionally do neither.

The absence of the charge sheet from the record has produced some litigation in the Army Court of Military Review. Moreover, when such a record reaches the Court of Military Appeals, remedial action is being required. See, e.g., interlocutory orders in *United States v. Teeple*, 19 M.J. 34 (1984); and *United States v. Bouie*, 19 M.J. 34 (1984), requiring either a certificate of correction or a stipulation by counsel.

The Clerk of Court does screen incoming records for defects. The most efficient remedy, however, lies in the training of court reporters and the vigilance of trial counsel who are responsible for preparing the record, and in the attentiveness of the military judges who authenticate the record.

## Trial Judiciary Notes

### Recusal and Disqualification of the Military Judge

Major Gary J. Holland

Military Judge, Fourth Judicial Circuit, Fort Lewis, Washington

#### Introduction

A military judge seeks to fairly try each and all who for justice upon his court shall call. He avoids bias and preconceived discernment from the trial's commencement to adjournment. He guides, aids and assists all, even those counsel who seek to challenge and request his recusal. He puts forth his best in upholding judicial integrity, as well as being an exemplar of impartiality. He tries to improve discipline whenever he can without harming the rights of any man. He addresses to each soldier his own right to live in peace and to be let alone. He tries, in general, to gain respect for the law, and from the court-martial system, remove every flaw. He does his utmost to promote public confidence in avoiding even the slightest improper appearance by maintaining a faithful diligence to guard against any ill-found utterance. These are the goals that a judge must set, and, if he does well, at least a few will be met.<sup>1</sup>

Of all the essential characteristics and duties of a military judge, the one next in importance to the duty of rendering a correct judgment is that of doing it in a manner which casts no aspersions upon the judge's fairness, impartiality, independence and integrity.<sup>2</sup> This article will explore factors and situations that conceivably detract from a military judge's ability to maintain proper judicial temperament. The article will also examine the applicable standards that determine whether the judge should disqualify or recuse

himself or herself from the proceedings. Although the article discusses the responsibilities of military judges, trial and defense counsel also must be thoroughly familiar with the grounds for a judge's disqualification and the relevant case law interpretations so that the subject of the judge's disqualification may be adequately broached at trial.

#### Express Disqualifications

Assuming that an individual has properly been certified and detailed as a military judge,<sup>3</sup> the Uniform Code of Military Justice disqualifies the judge from acting in a case if he or she is the accuser, a witness for the prosecution, or has acted as investigating officer or as counsel in the court-martial in which he or she is presiding.<sup>4</sup> The Manual for Courts-Martial, United States, 1984, expands upon these statutory disqualifications by stating:

A military judge shall also disqualify himself or herself in the following circumstances:

- (1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.
- (2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

<sup>1</sup> Poetic license taken with Trial Judiciary Memorandum 82-9, subject: Preparing Officer Evaluation Reports, 2 Mar. 1982.

<sup>2</sup> 48A C.J.S. 2d *Judges* § 98 (1981).

<sup>3</sup> Uniform Code of Military Justice art. 26(b) and (c), 10 U.S.C. § 826(b) and (c) (1982) [hereinafter cited as UCMJ].

<sup>4</sup> UCMJ art. 26(d).

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.<sup>5</sup>

The above mentioned circumstances constitute nonwaivable grounds for disqualification; therefore, even if the accused desires for the military judge to preside when such situations are present, the judge may not continue in the proceeding.<sup>6</sup>

The 1984 Manual further mandates that even if a nonwaivable ground for disqualification does not exist, a military judge must recuse him or herself in any proceeding in which his or her "impartiality might reasonably be questioned"<sup>7</sup> unless the parties waive the disqualification after a full disclosure on the record concerning the basis for disqualification.<sup>8</sup> This present standard of disqualification appears different than the former standard contained in the Manual for Courts-Martial, United States, 1969 (Rev. ed.). After listing specific documentations, it contained the following as a catchall ground for ineligibility of a military judge to sit on a case: "Any other facts indicating that he should not sit as a . . . military judge in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality."<sup>9</sup>

#### Case Law Interpretations

The reason for discussing the standard in the 1969 Manual is that most of the relevant case law has focused on its

provisions. Numerous decisions have addressed situations which potentially detracted from the military judge's fairness and impartiality. The purpose at this point is not to determine whether the 1984 Manual's provisions would alter the results in these cases, but rather to give an overview of situations which military judges face in considering recusal from a case.

#### Prior Knowledge of Facts

By possessing prior knowledge of evidence in a case, a military judge could conceivably abandon his or her requisite neutrality. The United States Court of Military Appeals has addressed the practice of judicial officers reviewing the investigative files of a case prior to their presiding at the court-martial.<sup>10</sup> The court ruled that prior knowledge or exposure to the facts of a case is disqualifying only if such knowledge or exposure produces a conviction of guilt within the mind of the judge.<sup>11</sup> While recognizing that the better practice would be for the presiding official not to review the expected testimony of witnesses or the investigative file, the court held that the key to ineligibility is not mere knowledge of the evidence, but the effect of such knowledge and whether it presents a fair risk of prejudice to the accused.<sup>12</sup>

Some prior exposure situations are so offensive that they automatically disqualify the judge. Confronting the situation where the presiding law officer had drafted sample specifications for the accuser, the court stated, "We can only look with complete disapproval upon the conduct of a law officer who actively assists in the prosecution prior to trial and then subsequently attempts to sit in the case as a disinterested arbiter."<sup>13</sup>

The Army Court of Military Review has recently held that a judge should have recused himself or denied the subsequent request for trial by judge alone when, during a motion for permission to withdraw from the case, the defense counsel made known to the judge that he believed his client would commit perjury.<sup>14</sup> The court stated: "The revelation by . . . counsel that his client intends to commit perjury is so egregious that it disables the fact finder from impartially judging the merits of [the] defense."<sup>15</sup> Another blatantly offensive illustration of a military judge's partiality and improper zeal toward law enforcement occurred when the trial judge reviewed the case file prior to trial,

<sup>5</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 902(b) [hereinafter cited as 1984 Manual and R.C.M., respectively].

<sup>6</sup> R.C.M. 902(e).

<sup>7</sup> R.C.M. 902(a) (emphasis added). Accord 28 U.S.C. § 455(a) (1982); ABA Code of Judicial Conduct Canon 2 (1980); ABA Standards for Criminal Justice 6-1.5 (2d ed. 1980).

<sup>8</sup> R.C.M. 902(e).

<sup>9</sup> Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 62f(13) [hereinafter cited as MCM; 1969].

<sup>10</sup> United States v. Hodges, 14 C.M.A. 23, 33 C.M.R. 235 (1963); United States v. Fry, 7 C.M.A. 682, 23 C.M.R. 146 (1957). See also United States v. Haynes, 44 C.M.R. 487 (A.C.M.R. 1977) (Military judge had read pretrial advice; assuming it was error, the court stated that the defense waived it by failing to challenge the judge).

<sup>11</sup> United States v. Hodges.

<sup>12</sup> United States v. Hodges; United States v. Fry. See also United States v. Perry, 34 C.M.R. 761 (A.B.R. 1963) (Recusal required where law officer consulted the records of trial of government witnesses and had formed an opinion of their veracity); cf. United States v. Kama, 47 C.M.R. 838 (N.C.M.R. 1973) (Recusal not required where judge had read only small portion of the record of a prior proceeding).

<sup>13</sup> United States v. Renton, 8 C.M.A. 697, 701, 25 C.M.R. 201, 205 (1958); cf. United States v. Goodman, 3 M.J. 1 (C.M.A. 1977) (Recusal not required where judge told the Criminal Investigation Division agent investigating case that it would be better to hold physical lineup rather than a photographic lineup).

<sup>14</sup> United States v. Roberts, 20 M.J. 689 (A.C.M.R. 1985).

<sup>15</sup> Id. at 691.



conversed with the staff judge advocate, complimented him on the wording of the pretrial advice and his recommendations to refer the case as a capital case, and discussed with the staff judge advocate what medical evidence should be made available at trial.<sup>16</sup>

A seemingly obvious prejudicial effect exists if the military judge has prior knowledge of an accused's unsuccessful efforts to plead guilty in exchange for a pretrial agreement. The Court of Military Appeals, however, found no grounds for challenging the military judge sitting in a contested case where the judge disclaimed any partiality; but the court looked with disfavor on the situation by suggesting that the trial judge should recuse him or herself or direct a trial before court members.<sup>17</sup>

A military judge could also conceivably find him or herself in the position of trying a case in which he or she had gained knowledge through participation in another capacity before his or her ascension to the trial bench. In *United States v. Richmond*,<sup>18</sup> the law officer had been the trial counsel in a related case (the offenses, the witnesses, and the methods of operation were the same in both cases); however, the accused in the two cases were not co-conspirators, accomplices, or joint offenders. The court held that because the defense could show no specific harm to the accused, the law officer was not disqualified.<sup>19</sup> Conversely, the court has found that a ground for challenge existed against a presiding judge due to his reviewing the charges, the Article 32 Investigative Report, and his making recommendations on the case in his former capacity as chief of military justice.<sup>20</sup> Because no challenge occurred after the judge disclosed these facts and the accused pled guilty, however, the court deemed the challenge waived.<sup>21</sup> A military judge in a recent case had been the convening authority's legal officer during three of five of the accused's alleged unauthorized absence periods.<sup>22</sup> Assuming there was error in such a situation, the Navy-Marine Court of Military Review found no prejudice to the accused when the judge stated on the record that he had no memory of the case; however, the court stated that mandatory recusal under the 1984 Manual in such situations should not be based upon the judge's memory of the case, but whether the offense was charged or the case existed at the time of the judge's former capacity.<sup>23</sup>

Because of the small number of military judges throughout the world and their assignment to relatively fixed geographical locations, two potential ways that judges may acquire prior knowledge of facts regarding a case are through participation as the presiding judge in a companion case, or by being the judge at the original trial of the accused with subsequent detail as trial judge for a rehearing of the same case. The Court of Military Appeals held in *United States v. Broy*<sup>24</sup> that recusation of the military judge was generally not predicated upon previous exposure, but upon personal bias. In *Broy*, the court gave its approval to a law officer presiding over a sentencing rehearing even though he presided over the original trial.<sup>25</sup> The courts seemingly recognize that a trial judge has the capacity to decide issues impartially, even though there may have been prior exposure to the case. The Court of Military Appeals recently held "that a military judge need not recuse himself solely on the basis of prior judicial exposure to an accused and his alleged criminal conduct . . . [h]owever, a trial judge may recuse himself in such a case as a matter of discretion."<sup>26</sup>

Circumstances may, however, warrant recusal of the military judge when he or she has presided over a companion case. In *United States v. Jarvis*,<sup>27</sup> the same defense counsel and military judge appeared in a subsequent, related case. The military judge, sitting alone, tried both cases. While stating that the judge was not subject to challenge merely because he presided in a closely related case, and opining that the court would normally give effect to a judge's disclaimer of any bias or prejudice, the court, citing paragraph 62f(13) of the 1969 Manual, held that the combination of the same judge and same counsel created "substantial doubt as to legality, fairness, and impartiality."<sup>28</sup> Removal of either the judge or the counsel would have evidently eliminated the impropriety of the situation. In a later case,<sup>29</sup> the Army Court of Military Review confronted the problem of the military judge denying a challenge for cause against himself after stating that he had formed an opinion of the accused's guilt in a related case. Although the judge stated that his prior opinion would not affect his judgment at trial, the court held that he should have recused himself.<sup>30</sup> Another situation where the military judge was mandatorily disqualified based on prior exposure to the case

<sup>16</sup> *United States v. Jones*, 44 C.M.R. 818 (A.C.M.R. 1969).

<sup>17</sup> *United States v. Hodges*, 22 C.M.A. 506, 47 C.M.R. 923 (1973). For further analysis of *Hodges*, see B. Quann, *Recusal in the Military* (Apr. 1, 1974) (unpublished thesis) (available in the library of The Judge Advocate General's School Army) [hereinafter cited as Quann].

<sup>18</sup> 11 C.M.A. 142, 28 C.M.R. 366 (1960).

<sup>19</sup> *Id.* at 148, 28 C.M.R. at 372.

<sup>20</sup> *United States v. Wismann*, 19 C.M.A. 554, 42 C.M.R. 156 (1970). See R.C.M. 902(b)(3).

<sup>21</sup> *Wismann*, 19 C.M.A. at 555, 42 C.M.R. at 157. But see R.C.M. 902(e).

<sup>22</sup> *United States v. Edwards*, 20 M.J. 973 (N.M.C.M.R. 1985).

<sup>23</sup> *Id.* at 976. See R.C.M. 902(b)(2).

<sup>24</sup> 15 C.M.A. 382, 35 C.M.R. 354 (1965).

<sup>25</sup> *Id.* at 384, 35 C.M.R. at 356. See also MCM, 1969, para. 62f(10).

<sup>26</sup> *United States v. Soriano*, 20 M.J. 337, 340 (C.M.A. 1985). Accord *United States v. Castillo*, 18 M.J. 590 (N.M.C.M.R. 1984).

<sup>27</sup> 32 C.M.A. 260, 46 C.M.R. 260 (1973).

<sup>28</sup> *Id.* at 262, 46 C.M.R. at 262.

<sup>29</sup> *United States v. Watson*, 47 C.M.R. 990 (A.C.M.R. 1973).

<sup>30</sup> *Id.* at 991. Cf. R.C.M. 902(b)(3) (judge not mandatorily disqualified merely because he has formed an opinion of the accused's guilt from the same or a related case).

existed when he had previously accepted the guilty plea of a co-accused who had implicated the accused in the offense, and at the accused's trial, the military judge said that if the co-accused testified, the judge would be inclined to believe him.<sup>31</sup> Because the court equated the judge's inclination as a personal bias or prejudice concerning a party to the proceeding, the disqualification could not be waived based on the provisions of the 1984 Manual.<sup>32</sup>

The court later defined its *Jarvis* holding in *United States v. Lewis*.<sup>33</sup> The military judge in *Lewis* had previously tried a co-accused. The defense counsel challenged the trial judge for cause; however, the judge disavowed any bias against the accused and denied the challenge. Noting that the facts were different than in *Jarvis* because the defense counsel at the two trials were different, the court reiterated the rule that exposure to related cases alone is not a disqualifying factor for a military judge.<sup>34</sup> The court again indicated its practice of giving effect to the judge's disclaimer of any bias or prejudice.<sup>35</sup> Apparently, only when additional circumstances exist (e.g., a personal bias or prejudice concerning a party or the presence of the same defense counsel and same judge), will the military judge have to recuse himself or herself due to presiding in a closely related case.<sup>36</sup>

#### Presiding After Guilty Plea Declared Improvident

Oftentimes a military judge learns much about a case from a providence inquiry after the accused pleads guilty to an offense. If for some reason the military judge is unable to accept the guilty plea, or if the accused changes his plea, may the judge still preside as the trier of fact in the resulting contested case? Apparently, the result depends upon when the plea becomes improvident—before or after findings.

Caselaw reflects that an improvident guilty plea prior to findings is not a sufficient ground alone for recusal of the military judge.<sup>37</sup> Improvident guilty pleas after findings are

less frequent, but create greater problems. Having publicly announced guilty findings, the military judge has accepted that the accused is, in fact, guilty; whereas, prior to announcing findings, the judge has not formed this judgment. In such a situation, the Court of Military Appeals held that the military judge should recuse him or herself or direct trial by court members.<sup>38</sup> Because the judge under such circumstances necessarily reached conclusions regarding the accused's factual and legal guilt, the court stated that "[t]he disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."<sup>39</sup>

#### Judge Ruling on His or Her Prior Actions

Another situation in which the military judge is susceptible to challenge for cause is when he or she must rule upon the propriety of his or her own prior actions, e.g., a decision in the judge's capacity as a military magistrate<sup>40</sup> to authorize pretrial confinement or to authorize searches and seizures. The Court of Military Appeals has indicated that "we wish to caution trial judges to avoid situations . . . in which a trial ruling requires that a judge pass upon the effect of his own previous actions."<sup>41</sup> When the defense contests a probable cause search determination previously made by the trial judge in his or her capacity as military magistrate, recusal should occur due to the judge becoming a witness for the prosecution.<sup>42</sup> There are no reported cases concerning the propriety of the military judge ruling on the legality of the pretrial confinement which he or she previously approved as military magistrate for the accused; however, such situations should be avoided. Pretrial confinement cases, instead, have concerned whether the judge becomes statutorily disqualified as an "investigating officer" by serving as a military magistrate. The rule apparently is that the judge does not automatically become disqualified by serving as a magistrate for pretrial confinement; but in a given case, he or she could conduct his or her magistrate

<sup>31</sup> *United States v. Kratzenberg*, 20 M.J. 670 (A.F.C.M.R. 1985).

<sup>32</sup> *Id.* at 672.

<sup>33</sup> 6 M.J. 43 (C.M.A. 1978).

<sup>34</sup> *Id.* at 44.

<sup>35</sup> *Id.* at 44-45. See also *United States v. Reed*, 2 M.J. 972 (A.C.M.R. 1976) (considerable weight must be given to the judge's disclaimer of bias or prejudice).

<sup>36</sup> See, e.g., *United States v. Lewis*, 6 M.J. 43 (C.M.A. 1978); *United States v. Jarvis*; *United States v. Peterson*, 15 M.J. 530 (A.F.C.M.R. 1982), petition denied, 15 M.J. 475 (C.M.A. 1983); *United States v. Scholten*, 14 M.J. 939 (A.C.M.R. 1982), aff'd on other grounds, 17 M.J. 171 (C.M.A. 1984); *United States v. Wager*, 10 M.J. 546 (N.C.M.R. 1980), petition denied, 11 M.J. 145 (C.M.A. 1981); *United States v. Stewart*, 2 M.J. 423 (A.C.M.R. 1975); *United States v. Scaife*, 48 C.M.R. 290 (A.C.M.R.), rev'd on other grounds, 49 C.M.R. 247 (C.M.A. 1974); *United States v. Wright*, 47 C.M.R. 637 (A.F.C.M.R. 1973). See also R.C.M. 902(b)(3) (judge not mandatorily disqualified if, in the performance of duties as a military judge in the same or related case, he or she has expressed an opinion concerning the guilt or innocence of the accused).

<sup>37</sup> *United States v. Cooper*, 8 M.J. 5 (C.M.A. 1979); *United States v. Jophlin*, 3 M.J. 858 (A.C.M.R. 1977), petition denied, 8 M.J. 173 (C.M.A. 1979); *United States v. Cockerell*, 49 C.M.R. 567 (A.C.M.R. 1974), petition denied, 23 C.M.A. 640 (C.M.A. 1975); *United States v. Kaufmann*, 3 M.J. 794 (A.C.M.R. 1974).

<sup>38</sup> *United States v. Bradley*, 7 M.J. 332 (C.M.A. 1979).

<sup>39</sup> *Id.* at 334. Cf. *United States v. Flynn*, 11 M.J. 638 (A.F.C.M.R.), petition denied, 12 M.J. 23 (C.M.A. 1981) (guilty plea declared improvident during sentencing phase of trial, and counsel declined to challenge the judge; the court found waiver, plus saw no difference in this situation as compared to a judge permissibly presiding at a rehearing of the same case); *United States v. Melton*, 1 M.J. 528 (A.F.C.M.R. 1975), petition denied, 2 M.J. 159 (C.M.A. 1976) (defense waived error; mere fact that a possible ground for challenge existed did not render a judge ineligible to sit).

<sup>40</sup> See Mil. R. Evid. 315(d)(2) and R.C.M. 305 (i)(2). For implementation of these sections, see, e.g., Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, ch. 9 (15 Mar. 1985) (Military Magistrate Program) [hereinafter cited as AR 27-10].

<sup>41</sup> *United States v. Wolzok*, 1 M.J. 125, 127-28 (C.M.A. 1975).

<sup>42</sup> See, e.g., *United States v. Cardwell*, 46 C.M.R. 1301 (A.C.M.R. 1973) (for further analysis of *Cardwell*, see Quann, *supra* note 17); but see *United States v. Cansdale*, 7 M.J. 143 (C.M.A. 1979) (case approves holdings in *Cardwell* and *Wolzok*; however, Judge Cook's opinion is that a judge is not disqualified merely because he must rule on a validity of a search conducted pursuant to a warrant issued by him).

duties in such a manner as to become an "investigating officer."<sup>43</sup> Moreover, when supervising other military magistrates, a judge must be careful to avoid contacts with them that would create the appearance of impropriety.<sup>44</sup>

#### Judge's Questioning of Witnesses

The trial judge is not a mere figurehead or an umpire in a trial contest. While he cannot lay aside impartiality and become an advocate for one side or the other, he can, and in our view sometimes must, ask questions to clear up uncertainties in the evidence or further develop the facts.<sup>45</sup>

The line where the judge abandons his or her impartial role through questioning witnesses is an ill-defined one, but the judge certainly may not question for the purpose of perfecting the case against the accused,<sup>46</sup> nor may he or she extensively question to undermine the credibility of a witness.<sup>47</sup> Basically, as long as the military judge's questions clarify or amplify matters to which a witness has already testified, and do not "by the form or content of the question, or the extent of questioning, show bias on his part, or intimate his personal opinion as to the merits of the case, the credibility of a witness, or the weight or sufficiency of the evidence,"<sup>48</sup> the judge will not be disqualified from presiding at the court-martial.

#### Judge's Calling of Additional Witnesses

Besides being able to question witnesses, the military judge may call additional witnesses to testify when he or she has insufficient evidence to determine an issue or when the judge is not satisfied that he or she has received all available evidence.<sup>49</sup> Cases reflect that a judge does not become a partisan advocate for the government merely

because he or she allows the prosecution to reopen its case or because the judge calls witnesses to provide testimony regarding a matter of proof overlooked by the prosecution.<sup>50</sup>

#### Judge Becoming a Witness

As previously stated,<sup>51</sup> the military judge must disqualify himself or herself if he or she becomes a witness in the case. The Military Rules of Evidence, moreover, declare the judge to be an incompetent witness in the case in which he or she presides regardless for whom he or she testifies.<sup>52</sup> The Court of Military Appeals has gone so far as to deem as an incompetent witness a military judge voluntarily appearing as a character witness against an accused even when the judge was not presiding at the court-martial.<sup>53</sup> A military judge may also become a witness without actually testifying at trial. Several cases involved the disqualification of the presiding judge after the prosecution introduced prior transcripts or records of trial which the judge had previously authenticated.<sup>54</sup> Another way in which the judge may become a witness in the case is by the use of his or her expertise in a given area in arriving at findings.<sup>55</sup> In sum, a military judge must avoid situations where the factfinder (whether a panel of court members or the judge alone) must pass upon the competency or credibility of the judge's own testimony or knowledge.

#### Exception to Judge Becoming a Witness

At least one exception evidently exists to the general rule that the presiding judge may not testify about matters at trial. The Military Rules of Evidence do "not preclude the

<sup>43</sup> See *United States v. Wilson*, 12 M.J. 652 (A.C.M.R. 1981); *United States v. Reeves*, 12 M.J. 763 (A.C.M.R. 1981), *petition denied*, 13 M.J. 122 (C.M.A. 1982); *United States v. Williamson*, 11 M.J. 542 (A.C.M.R. 1981); *United States v. Trakowski*, 10 M.J. 992 (A.F.C.M.R.), *petition denied*, 11 M.J. 338 (C.M.A. 1981).

<sup>44</sup> *United States v. Rice*, 16 M.J. 770 (A.C.M.R.), *petition denied*, 17 M.J. 194 (C.M.A. 1983).

<sup>45</sup> *United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *petition denied*, 15 M.J. 183 (C.M.A. 1983); *accord United States v. Jordan*, 45 C.M.R. 719 (A.C.M.R. 1972).

<sup>46</sup> *United States v. Berry*, 6 C.M.A. 638, 20 C.M.R. 354 (1956).

<sup>47</sup> See, e.g., *United States v. Schackleford*, 2 M.J. 17 (C.M.A. 1976) (sheer number of questions (51) of the accused by the judge highlighted his concern with the accused's credibility, thereby crossing the line of propriety). *accord United States v. Wilson*, 2 M.J. 548 (A.C.M.R. 1975); cf. *United States v. Blanchard*, 8 M.J. 655 (A.F.C.M.R. 1979), *aff'd on other grounds*, 11 M.J. 269 (C.M.A. 1981) (no impropriety in judge asking two government witnesses upon whose credibility the case depended over 100 questions).

<sup>48</sup> *United States v. Taylor*, 47 C.M.R. 445, 451 (A.C.M.R. 1973); see *United States v. Clark*, 50 C.M.R. 350 (A.C.M.R. 1975) (judge's skepticism and displeasure over accused's answers to his questions overcame his judicial composure).

<sup>49</sup> R.C.M. 801(c); Mil. R. Evid. 614.

<sup>50</sup> E.g., *United States v. Blackburn*, 2 M.J. 929 (A.C.M.R.), *petition denied*, 2 M.J. 166 (C.M.A. 1976); *United States v. Masseria*, 13 M.J. 868 (N.M.C.M.R.), *petition denied*, 14 M.J. 171 (C.M.A. 1982).

<sup>51</sup> See *supra* text accompanying notes 4 and 5.

<sup>52</sup> Mil. R. Evid. 605(a) provides in pertinent part: "The military judge presiding at the court-martial may not testify in that court-martial as a witness. . . ." The Drafter's Analysis to Rule 605, however, states that "Rule 605, unlike Article 26(d), does not deal with the question of eligibility to sit as military judge, but deals solely with the military judge's competency as a witness."

<sup>53</sup> In *United States v. Tomchek*, 4 M.J. 66, 69 (C.M.A. 1977), the court stated that "[t]he [voluntary] appearance of a military judge as a Government witness on the issue of the appellant's veracity unfairly enhanced the Government's attack upon appellant's credibility."

<sup>54</sup> See, e.g., *United States v. Airhart*, 48 C.M.R. 685 (C.M.A. 1974) (judge disqualified by having authenticated transcript from a related case which was offered into evidence; however disqualification was waived by defense failure to challenge); *United States v. Wilson*, 7 C.M.A. 656, 23 C.M.R. 120 (1957) (law officer had previously signed promulgating order stating that the accused's prior conviction was legally sufficient); *United States v. Scarborough*, 49 C.M.R. 580 (A.C.M.R. 1974) (judge properly recused himself when possibility existed that record of trial he had authenticated could be introduced into evidence).

<sup>55</sup> See, e.g., *United States v. Conley*, 4 M.J. 327 (C.M.A. 1978) (judge used his expertise as a documents examiner to convict the accused); *United States v. Jamison*, 18 M.J. 540 (A.C.M.R. 1984) (when deciding a motion to dismiss due to improper court selection, judge used his knowledge of court selection procedures when he was the installation's staff judge advocate); *United States v. Duvall*, 7 M.J. 832 (N.C.M.R. 1979) (judge used expertise on subject of an aviation reserve organization to reach his findings).

military judge from placing on the record matters concerning docketing of the case.<sup>56</sup> Two military appellate courts<sup>57</sup> have allowed the judge's recital of docketing matters regarding speedy trial motions; moreover, they indicate that such matters are of a neutral nature, thereby not causing the judge to become a witness either for the prosecution or the defense.

### Ethical Considerations

If the military judge overcomes the statutory disqualifications and relevant case law interpretations of those disqualifications, he or she still confronts the ethical duties of recusing him or herself under the American Bar Association's Code of Judicial Conduct and Standards for Criminal Justice.<sup>58</sup> Above all, the military judge "should uphold the integrity and independence of the judiciary."<sup>59</sup> The judge's ethical obligations require him or her "to avoid impropriety and the appearance of impropriety in all his activities."<sup>60</sup> The Court of Military Appeals had indicated that the 1969 Manual's provisions regarding challenges for cause required the military judge to liberally sustain challenges in order to avoid the appearance as well as the existence of unfairness in a court-martial.<sup>61</sup> This should also be true of the provisions in the 1984 Manual.

Illustrations of where the presiding judge lost his sense of fairness include the following: after the defense moved for a finding of not guilty (in which the trial counsel concurred), the judge took a recess and had discussions with the staff judge advocate indicating that he would grant a continuance if it would help to obtain a conviction;<sup>62</sup> the judge, before adjourning the court, directed the trial counsel to prepare charges for the judge's signature against the accused for all offenses to which he had judicially confessed while also indicating that he invariably gave the maximum confinement for convicted "pushers";<sup>63</sup> the judge, during his summary of the evidence to the court members, emphasized the evidence favorable to the prosecution and included sarcastic remarks which disparaged the evidence

favorable to the defense;<sup>64</sup> and where the judge accused a defense witness of lying and made comments which implicated the accused in the perjury.<sup>65</sup>

Of course, not every ethical violation by a military judge will mandate disqualification. The final analysis must focus upon the trial proceeding itself. In *United States v. Garwood*,<sup>66</sup> the trial judge gave interviews to the media during the course of the trial in which he expressed his opinion concerning such matters as tactical decisions made by the defense, the relevancy of certain discovery items, and the accused testifying in his defense. While the court concurred with the lower court in chastising the trial judge for violating the Code of Judicial Conduct, it did not find that the judge's conduct, judged by the 1969 Manual's provisions, disqualified him from the trial or infected the proceedings.<sup>67</sup>

### The Standard for Recusal

The 1984 Manual brought a change in terminology regarding the standard for recusal.<sup>68</sup> The 1969 Manual required disqualification of the military judge when the proceeding would not be free from substantial doubt as to the judge's impartiality, whereas the present standard mandates recusal whenever the military judge's impartiality might reasonably be questioned. It is important to note that the present standard is the same as the ethical standard which existed inconsistently with the 1969 Manual's language regarding recusal.<sup>69</sup> Notwithstanding this inconsistency, the military courts often cited the ethical standard in holding that the judge should have disqualified himself under the 1969 Manual;<sup>70</sup> however, the Court of Military Appeals, in applying the 1969 Manual as recently as September 1985, refused to hold that a military judge should have disqualified himself in a particular case as "there [were] no facts which create[d] substantial doubt in the mind of reasonable persons as to the impartiality of the military judge. . . ."<sup>71</sup> In the past, military courts essentially allowed the trial

<sup>56</sup> Mil. R. Evid. 605(b).

<sup>57</sup> See *United States v. Aragon*, 1 M.J. 662 (N.C.M.R. 1975); *United States v. Spence*, 49 C.M.R. 189 (A.C.M.R. 1974).

<sup>58</sup> AR 27-10, para. 5-8, provides in pertinent part:

The Code of Judicial Conduct and Model Code of Professional Responsibility of the American Bar Association . . . are applicable to judges . . . involved in court-martial proceedings. . . . Unless they are clearly inconsistent with the UCMJ, the MCM, and applicable departmental regulations, the American Bar Association Standards for Criminal Justice also apply to military judges. . . .)

<sup>59</sup> ABA Code of Judicial Conduct Canon 1 (1980).

<sup>60</sup> ABA Code of Judicial Conduct Canon 2 (1980); ABA Standards for Criminal Justice 6-1.5 (2d ed. 1980).

<sup>61</sup> *United States v. Conley*, 4 M.J. 327, 329 (C.M.A. 1978).

<sup>62</sup> *United States v. Kennedy*, 8 C.M.A. 251, 24 C.M.R. 61 (1957); see also *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982) (after holding *ex parte* meeting with trial counsel, deputy staff judge advocate, and clinical psychologist, the judge indicated that he anticipated ruling against the defense counsel's request for a sanity board).

<sup>63</sup> *United States v. Morgan*, 44 C.M.R. 699 (A.C.M.R. 1971); see also *United States v. Posey*, 21 C.M.A. 188, 44 C.M.R. 242 (1972) (judge lost his impartiality during sentencing phase by directing the examination of the accused for three hours after both counsel had concluded their questioning).

<sup>64</sup> *United States v. Grandy*, 11 M.J. 270 (C.M.A. 1981).

<sup>65</sup> *United States v. Holmes*, 1 M.J. 128, 50 C.M.R. 577 (C.M.A. 1975); cf. *United States v. Pergande*, 49 C.M.R. 28 (A.C.M.R. 1974) (judge's questioning of defense counsel's ethics held not to be a ground for disqualification).

<sup>66</sup> 20 M.J. 148 (C.M.A. 1985).

<sup>67</sup> *Id.* at 150-52.

<sup>68</sup> See *supra* text accompanying notes 7-9.

<sup>69</sup> ABA Code of Judicial Conduct Canon 3C(1) (1980); ABA Standards for Criminal Justice 6-1.7 (2d ed. 1980).

<sup>70</sup> E.g., *United States v. Bradley*, 7 M.J. 332 (C.M.A. 1979); *United States v. Head*, 2 M.J. 131 (C.M.A. 1977) (Fletcher, J. dissenting); *United States v. Conley*, 4 M.J. 327 (C.M.A. 1978).

<sup>71</sup> *United States v. Soriano*, 20 M.J. 337, 340 (C.M.A. 1985) (emphasis added).

judge to determine his or her own standard, subject to appellate review for an abuse of discretion. "Whether to grant a challenge for cause against the bench and whether to recuse himself on his own motion are matters left within the sound discretion of the trial judge."<sup>72</sup> If military judges apply the current standard (impartiality might reasonably be questioned), recusal should occur more often than it did in the past. The judge should at least seek to obtain an affirmative waiver from all parties whenever the judge's presence might cast reasonable doubt, albeit not substantial, doubt upon his or her impartiality.<sup>73</sup>

### Conclusion

By surveying the express disqualifications, case law interpretations, and ethical obligations regarding recusal, one concludes that many considerations face the military judge in recusal determinations. Not only must the military judge be concerned with fairness for the individual accused, but he or she must also uphold the integrity of the judicial system. Only when the trial judge exercises proper judicial composure by suppressing personal predilections will the necessary respect for the court-martial system be attained. As the Court of Military Appeals once stated, "[p]ublic confidence in military justice, which is so vital to the successful operation of the military establishment, will prevail only so long as there exists in court-martial proceedings an atmosphere of complete and unshackled freedom from command direction and partiality."<sup>74</sup>

### Physical Examinations for IMA Military Judges

Individual Mobilization Augmentees (IMA) assigned to Trial Judiciary are reminded that they are required to undergo a medical examination at least once every four years (one year if purpose of exam is ADT over 29 days). If you are 39½ years old or older, you must, in addition, have a digital rectal exam (to include a stool occult blood test), an EKG, and a measurement of intraocular tension expressed numerically in millimeters of mercury. The U.S. Army Reserve Personnel Center will not issue orders for AT/ADT if this requirement is not met. In a recent case, an IMA assigned to Trial Judiciary did not appear at his scheduled AT/ADT because this requirement was not satisfied. This physical can be completed by the examining facility on your orders or a civilian physician at your expense. Plan ahead and get physicals completed well in advance of scheduled AT/ADT. Lieutenant Colonel Jackson.

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<sup>72</sup> *United States v. Bradley*, 7 M.J. 332, 333 (C.M.A. 1979); see also *United States v. Cooper*, 8 M.J. 5 (C.M.A. 1979) (per curiam); *United States v. Montgomery*, 16 M.J. 516 (A.C.M.R. 1983).

<sup>73</sup> See R.C.M. 902(a) and (e).

<sup>74</sup> *United States v. Renton*, 8 C.M.A. 697, 25 C.M.R. 201 (1958).

## Copyright Notes

### Patents, Copyrights & Trademarks Division

**Foreign Copyright License Agreements.** By memorandum dated 31 January 1986, the Armed Forces Information Service (AFIS) of the Office of the Assistant Secretary of Defense (Public Affairs) provided guidance on the negotiation and payment of copyright license fees to foreign performing rights societies. This guidance supplements Department of Defense Directive No. 5535.7, which was issued on 1 November 1985. Under the Directive and the AFIS memorandum, the Department of the Army is responsible for negotiating and reviewing license agreements for the following countries:

Belgium, France, the Federal Republic of Germany, Korea, Liberia, Mali, Republic of Panama, Senegal, and Republic of Zaire.

The required clauses for such agreements are set forth in the AFIS memorandum.

**Videotaping.** The Supreme Court ruled in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), sometimes referred to as the *Betamax Case*, that off-the-air video recording in the home is permissible for certain purposes such as time-shifting. This decision does not, however, provide a basis for the unlimited use of videotapes and recording devices.

In addition, the Department of Defense issued DOD Directive 5535.4 (49 Fed. Reg. 49,450 (1984), on 20 December 1984 that provided policy on the use of copyrighted sound and video recordings. This Directive has been implemented in Army Regulation 215-2, paragraph 6-67, dated 26 November 1985, which states that it is Army policy:

- (1) To recognize the right of copyright owners by establishing specific guidelines for the use of copyrighted works by individuals within the Army community consistent with the department's unique mission and worldwide commitments.
- (2) Not to condone, facilitate, or permit unlicensed public performance or unlawful reproduction for private or personal use of copyrighted sound or video recordings using government appropriated or nonappropriated fund owned or leased equipment or facilities.

The same paragraph also offers the following guiding principles:

- (1) A performance in a residential facility or a physical extension thereof is not considered a public performance.
- (2) A performance in an isolated area or deployed unit is not considered a public performance.
- (3) Any performance at which admission is charged normally would be considered a public performance.

The showing of videotapes, even to a limited number of people outside of a home setting, has provoked recent litigation. See, e.g., *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3rd Cir. 1984), and *Columbia*

*Pictures Industries, Inc. v. Aveco, Inc.*, 612 F. Supp. 315 (M.D. Pa. 1985), where the courts held that showing rented videotapes in a small viewing room of a commercial establishment, even where attendance was limited to a few friends, was a public performance. These decisions can be contrasted with *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors*, 31 Pat., Trademark & Copyright J. (BNA) 223 (Jan. 23, 1986), where a California district court held that viewing hotel-rented videotape movies in a hotel room was not an infringement.

**Questions:** Questions in any area of copyrights may be directed to the Patents, Copyrights, and Trademarks Division, commercial: (202) 756-2430/2434 or AUTOVON: 289-2430/2434.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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## Administrative and Civil Law Notes

### Digests of Opinions of The Judge Advocate General

(Standards Of Conduct—Outside Employment And Other Activities Of DA Personnel). DAJA-AL 1985/2686, 9 August 1985.

Paragraph 2-6a(3), AR 600-50, states that DA personnel will not engage in outside employment or other activity, with or without compensation, that interferes, or is not compatible with their government duties, may reasonably be expected to bring discredit upon the government, or that reasonably can be expected to create a conflict or the appearance of conflict of interest.

The issue presented in this case involved military personnel serving as adjunct professors for a civilian institution which was providing an on-post educational program. The military personnel would teach subjects in their specialty area, the teaching would be accomplished during duty hours, student enrollment would consist of DA personnel only, and the instructors would receive a degree from the civilian institution as compensation for their services.

Serving as an adjunct professor while simultaneously performing military duties would create the appearance of a conflict of interest and be in violation of paragraph 2-6a(3), AR 600-50. A conflict of interest would also arise from the acceptance of a degree as compensation. Even if there were no compensation for their services, a potential conflict exists. Finally, according to paragraph 2-5a, AR 600-50, they would be precluded from using their official titles or positions in connection with any commercial enterprise. They could not be identified in their official capacity as being adjunct professors for the educational institution.

(Claims—Against the Government) Dependent Travel and Shipment of Household Goods at Government Expense for

Soldiers Stationed in CONUS Who Are Sentenced to Confinement. DAJA-AL 1985/3124, 29 October 1985.

The purpose of statutes authorizing transportation of dependents and household goods is to relieve soldiers of the burden of personally defraying the expense of moving when the move is necessitated by an ordered change of station. Regulations issued pursuant to these statutes have uniformly denied such benefits to soldiers sentenced to confinement or otherwise being separated from the service under conditions other than honorable. The Comptroller General has held that under these circumstances, absent statutory authority, such expenses must be borne by the persons concerned.<sup>1</sup>

37 U.S.C. § 406(h) provides authority to transport the dependents, household goods, and POV's of soldiers stationed outside CONUS who are sentenced to confinement or being separated under other than honorable conditions.<sup>2</sup> This authority extends to similarly situated soldiers without dependents.<sup>3</sup> There are no statutes that authorize such transportation allowances for similarly situated soldiers stationed in CONUS, however.<sup>4</sup> Within CONUS, 37 U.S.C. § 406(a)(2)(A), authorizes a limited transportation allowance for dependents of soldiers being separated under less than honorable conditions or involuntarily placed on appellate leave. There is no statutory authority, however, for the transportation of household goods at government expense.<sup>5</sup>

The Comptroller General has held that placing a soldier in confinement cannot be considered a permanent change of station. The soldier's station has always been considered a place where assigned to duty. Assignment to a place where

<sup>1</sup> See 37 Comp. Gen. 21 (1957).

<sup>2</sup> 44 Comp. Gen. 724 (1965).

<sup>3</sup> 55 Comp. Gen. 1183 (1976).

<sup>4</sup> See Comp. Gen. Dec. B-131632 (30 Nov. 1977).

<sup>5</sup> See 63 Comp. Gen. 135 (1983).

there is no duty required, such as confinement, does not change the station.<sup>6</sup>

## Contract Law Note

### Purchase of Alcoholic Beverages Using Nonappropriated Funds

There is a provision in the 1986 DOD Appropriations Act, Pub. L. No. 99-190 (19 Dec. 1985), that controls the purchase of alcoholic beverages by nonappropriated fund (NAF) activities in CONUS. Section 8099 of the Act provides as follows:

None of the funds appropriated by this Act shall be used for the support of any nonappropriated fund activity of the Department of Defense that procures alcoholic beverages with nonappropriated funds for resale (including alcoholic beverages sold by the drink) on a military installation located in the United States, unless such alcoholic beverages are procured in the State, or in the case of the District of Columbia, within the District of Columbia, in which the installation is located: Provided, That in a case in which a military installation is located in more than one State, purchases may be made in any State in which the installation is located: Provided further, That not later than one year after the date of enactment of this Act, the Secretary shall transmit a report to the Congress concerning the implementation of this section.

This provision was implemented by a memorandum dated 6 January 1986 from the Assistant Secretary of Defense for Force Management and Personnel and became effective on that date. The memorandum also states that any use of appropriated funds to support NAF activities in violation of this provision will constitute a violation of the Anti-Deficiency Statute, 31 U.S.C. §§ 1341, 1517.

The application of statutory controls to NAF activities is a dramatic departure from past practice. Historically, Congress has not legislated controls over NAFs, leaving policy and procedures to the discretion of the service secretaries. That hands-off attitude may be changing, and the impact on NAF activities generally is not yet known.

The immediate impact of this provision on NAF operations is also uncertain, but it seems likely that many NAF activities will see price increases as a result of this mandate. Any price increases will likely make self-sufficiency of operations even more difficult than they are at present. Major Post

## Criminal Law Notes

### Vehicle Identification Numbers

In *New York v. Class*,<sup>7</sup> the Court held, in a 5-4 decision, that when the driver of an automobile is lawfully stopped and exits the vehicle, the police may look for the Vehicle Identification Number (VIN) on the dashboard. If the number is not visible on the dashboard, the officer may search the vehicle either on the door posts or on the dashboard without asking the driver to return to the car. In *Class*, the officer saw a handgun protruding from under the front seat while checking for the VIN.

The Court's rationale was that the governmental interest in the safety of the police officer outweighed the right to privacy.<sup>8</sup> Additionally, there was no reasonable expectation of privacy as to a VIN which was located on the dashboard or inside the door jamb, even when some object on the dashboard obscured the VIN.<sup>9</sup> Such a search would only be minimally intrusive.<sup>10</sup>

Justice Powell, in a concurring opinion, described the holding as follows:

In view of the important public purposes served by the VIN system and the minimal expectation of privacy in the VIN, I would hold that where a police officer lawfully stops a motor vehicle, he may inspect the VIN, and remove any obstruction preventing such inspection, where the driver of the vehicle either is unwilling or unable to cooperate.<sup>11</sup>

An officer looking for a VIN number may not make an entry more extensive than reasonably necessary to remove any obstruction and read the number.<sup>12</sup> Where the driver of the car remains in the vehicle, the police officer may ask him to remove objects obscuring the VIN. If the driver does not accede to such a request, the officer can conduct a search for the VIN number.<sup>13</sup>

<sup>6</sup> See 48 Comp. Gen. 603 (1969); Comp. Gen. Dec. B-214731 (4 Sept. 1984).

<sup>7</sup> 54 U.S.L.W. 4178 (U.S. Feb. 25, 1986).

<sup>8</sup> *Id.* at 4181. "As we recognized in *Delaware v. Prouse*, 440 U.S. at 658, the governmental interest in highway safety served by obtaining the VIN is of the first order, and the particular method of obtaining the VIN here was justified by a concern for the officer's safety."

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* "All three of the factors involved in [Pennsylvania v.] *Mimms* [434 U.S. 106 (1977)] and [Michigan v.] *Summers* [452 U.S. 692 (1981)] are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and the search stemmed from some probable cause focusing suspicion on the individual affected by the search."

<sup>11</sup> *Id.* at 4182 (Powell, J., concurring).

<sup>12</sup> *Id.* at 4181 (footnote omitted).

We note that our holding today does not authorize police officers to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile. If the VIN is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it.

*Id.* at 4182 n.\*. "An officer may not use VIN inspection as a pretext for searching a vehicle for contraband or weapons. Nor may the officer undertake an entry more extensive than reasonably necessary to remove any obstruction and read the VIN." (Powell, J., concurring).

<sup>13</sup> *Id.* at 4181.

"The search was far less intrusive than a formal arrest, which would have been permissible for a traffic offense under New York law . . . and little more intrusive than a demand that the respondent—under the eyes of the officers—move the papers himself."



Justice White, joined by Justice Stevens, dissented on the basis that he was not prepared to say the governmental interest outweighed the rights to privacy "at least for the reasons the Court gives."<sup>14</sup> He did not agree with the holding that a search of a car for the VIN was permissible "whenever there is a legal stop, whether or not the driver is even asked to consent."<sup>15</sup>

Justice White noted that had the accused remained in his vehicle and refused the officer's order to turn over his registration and to remove the article obscuring the VIN, there would be no justification for entering the interior of the vehicle to read the VIN or search the vehicle for

registration.<sup>16</sup> Justice White's opinion implied that the Court should have found that the refusal to turn over the registration or remove the article obscuring the VIN, or the fact that Class was driving without a license, gave the officer a justification for an arrest. Under these circumstances, the officers then could have searched the interior of the vehicle incident to the arrest. Alternatively, if the automobile was towed for safe keeping or the accused was taken into custody, the police could have impounded the vehicle and inventoried the items in the vehicle.<sup>17</sup> Colonel Gilligan.

## Legal Assistance Items

### Tax News

#### California Income Tax—IRA Deductions

The following information, which was provided by Captain David W. Engel, Medical Claims Judge Advocate, William Beaumont Army Medical Center, may be of interest to soldiers who pay California state income tax.

Federal tax law was changed in 1981 to permit all taxpayers with earned compensation to deduct from gross income their contributions to an individual retirement account (IRA) within specified limitations. I.R.C. § 219. This changed existing law to permit those already participating in an employer sponsored retirement plan, including military personnel, to open an IRA and deduct their contributions to it.

California income tax law, however, did not change to parallel the new federal law concerning IRAs. As explained in a notice of additional assessment from California tax authorities,

There are significant differences in State and Federal law regarding this issue. For California tax purposes an individual who is an active participant in a qualified corporate or self-employed (KEOGH) pension, profit-sharing or stock-bonus plan, a retirement plan for Government employees, or a tax-deferred (tax-sheltered) annuity cannot also claim a deduction for a contribution to an IRA during the same taxable year. You are considered an active participant in the plan whether or not your interest in the plan is vested.

Thus, for purposes of California tax law, soldiers are deemed to be participating in an employer-provided retirement plan, and are therefore not eligible to deduct contributions to an IRA on their California tax return.

#### Tax Assistance Report

All legal assistance offices should be aware that a report is required concerning assistance rendered under the Army Tax Assistance Program. That requirement was established

by a message, DAJA-LA, 082002Z Jan 86, subject: Army Tax Assistance Program After Action Report (RCS JAG-73). The text of that message inadvertently omitted subparagraph (2) of the report format, and is reprinted below with the correction:

A. AR 27-3, para 2-8b.

B. DAJA-LA Ltr, subj: Army Tax Assistance Program, 18 Oct 85.

All Staff and command JA'S will submit an Army Tax Assistance Program after action report covering the period ending 1 May 86 to HQDA (DAJA-LA) WASH DC 20310-2215 NLT 15 May 86. Provide fol INFO in mil ltr format:

1. Population Served:
  - A. Military:
  - B. Family Members, Retired, Others:
2. Number of Unit Tax Assistors:
3. Number of ACS and Other Volunteers:
4. Number of JA'S and Civilian Attorneys Providing Tax Assistance:
5. Tax Assistance (Provide Data Categorized by Federal and State):
  - A. Preparation Assistance:
    - (1) Number by UTA'S:
    - (2) Number by Volunteers:
    - (3) Number by JA'S:
  - B. Other Assistance:
    - (1) Number by UTA'S:
    - (2) Number by Volunteers:
    - (3) Number by JA'S:
6. Tax Instruction Provided by:
7. Remarks (include problems encountered, recommendations for improvement of program, etc.).

A suggested format for this report was included in the Model Tax Assistance SOP distributed to legal assistance offices in November 1985.

<sup>14</sup> *Id.* at 4185 (White, J., dissenting).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The Court expressly refused to adopt these theories. *Id.* at 4181 n.\*.

# Litigation Division Note

## 1985 Amendment to the Equal Access to Justice Act

Lieutenant Colonel J. Tomas Holloman, Major Emmett L. Battles, & Major Harry Lee Dorsey  
Litigation Division, OTJAG

### Introduction

Judge advocates must not underestimate the Army-wide impact of the 1985 amendment to the Equal Access to Justice Act (EAJA).<sup>1</sup> It provides a tremendous incentive for Army lawyers to ensure that their clients "do it right the first time," because EAJA awards can have a very adverse impact on the local command operating budget.<sup>2</sup> This article briefly describes the significant provisions of the 1985 amendment. It is also intended to alert judge advocates to their role in protecting the Army from fee awards under the EAJA.<sup>3</sup>

The 1985 amendment to the EAJA is a continuing effort by Congress to facilitate citizen access to judicial or quasi-judicial review of government action.<sup>4</sup> It is also designed to ensure that the government acts against individuals only where such actions are "substantially justified."<sup>5</sup> The EAJA provides that agencies conducting adversary adjudication proceedings must, under certain circumstances, award attorney's fees to a prevailing party unless the position of the agency is substantially justified or an award of attorney's fees would be unjust.<sup>6</sup>

The 1985 amendment made significant changes to the EAJA, including:

1. The term "position of the agency" was clarified and a review of the entire agency record is now mandated;<sup>7</sup>
2. The definition of "substantially justified" has been clarified;<sup>8</sup>

3. Local governments are now eligible to recover fees under the EAJA;<sup>9</sup>

4. The EAJA was made permanent law and was made retroactive to the expiration of the former act;<sup>10</sup> and,

5. Fee awards for actions before the Armed Services Board of Contract Appeals (ASBCA) are now specifically authorized.<sup>11</sup>

### Position of the Agency

Prior to the 1985 amendment, judicial review of the position of the agency was frequently construed as restricted to the litigation position taken by the United States in the court or board proceedings.<sup>12</sup> Congress found that this interpretation "helped the Federal Government escape liability for awards."<sup>13</sup> Congress also observed that defining "position" to apply solely to the actual litigation position failed "to focus attention on the unjustified government activity that formed the basis of the litigation."<sup>14</sup> Consequently, Congress determined that the government should not be permitted to "insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed 'reasonable' litigation positions, thereby having the effect of substantially justifying their [the Government] position."<sup>15</sup> This indicates that Congress fully intended to give agencies an "incentive for careful agency actions." It also reflects a congressional intent to require agencies to pay "attorney fees when an unjustifiable agency action forces litigation, and the agency then [tries] to avoid such liability by reasonable behavior during litigation."<sup>16</sup>

<sup>1</sup> Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 183-187 (1985) (to be codified, as amended, at 5 U.S.C. § 504 and 28 U.S.C. § 2412).

<sup>2</sup> Pub. L. 99-80, 99 Stat. 184, 185 (to be codified at 5 U.S.C. § 504(d) and 28 U.S.C. § 2412(d)). The 1985 Amendment retains the requirement that fee payments to successful plaintiffs be made from agency appropriations. Installation and activity officials need to be apprised of the EAJA, the focus it places on their decisions, and the potential impact on agency funds. The decision-making process should not be impeded, but it should proceed with an informed understanding of the "substantially justified" requirement.

<sup>3</sup> 5 U.S.C. § 504 and 28 U.S.C. § 2412 (1982). The act was also amended on September 3, 1982 by Pub. L. 97-248, 96 Stat. 574 (1982). For comprehensive analysis of the EAJA, see Hughes, *Attorneys' Fees and Expenses Under the Equal Access to Justice Act*, *The Army Lawyer*, Oct. 1983 at 1.

<sup>4</sup> H.R. Rep. No. 120, 99th Cong., 1st Sess. 8 (1985).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(a)(1982).

<sup>7</sup> Pub. L. 99-80, 99 Stat. 183-184 (to be codified at 5 U.S.C. § 504c(3)(E)).

<sup>8</sup> *Id.* at 184-185 (to be codified at 28 U.S.C. § 2412 (b)).

<sup>9</sup> *Id.* at 183 (to be codified at 5 U.S.C. § 504 (c)(1)(B)).

<sup>10</sup> *Id.* at 186.

<sup>11</sup> *Id.* at 187.

<sup>12</sup> H.R. Rep. No. 120, 99th Cong., 1st Sess. 7, 8-9, and 12-14 (1985).

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 11.

Congress expressly broadened the meaning of "position of the agency" to "include an assessment of the agency action, or failure to act, that forms the basis of the [plaintiff's] cause of action."<sup>17</sup> The assessment is to be based upon a review of the "agency record as a whole."<sup>18</sup> Preliminary or procedural decisions will not be included in the assessment, but it will include any action subject to judicial review.<sup>19</sup> The court is, however, limited to the administrative record presented and cannot engage in *de novo* discovery procedures to supplement the existing record.<sup>20</sup>

Installation or activity decisions that give rise to a right of judicial review and are not subject to statutory requirements to pay attorney fees may generate applications for fees under EAJA. Examples of such decisions include contracting officer bid protest determinations, contracting officer final decisions on claims and terminations, administrative actions to bar individuals from an installation, and decisions to suspend or deny commercial solicitation permits. If such agency decisions are not substantially justified, attorney's fees may be awarded. Consequently, potential plaintiffs and their counsel will carefully scrutinize the decisions of installation officials, the underlying rationale, and the documents supporting those decisions. This signifies a greater burden on the government to justify its position.

Installation and activity judge advocates must be alert to decisions that may afford a right of review in district courts or before administrative bodies. Judge advocates should actively assist administrative decision-makers to ensure that they comply with applicable regulations, can articulate the reasons for their decisions, and have documents to support those decisions. These actions should result in strong, well-supported administrative records. Failing this, government actions may become an easy target for plaintiff's counsel seeking to force the government to pay for the privilege of being sued.

#### Substantial Justification

The legislative history of the 1985 amendment notes that the language "substantially justified" means more than reasonably justified.<sup>21</sup> While the amendment does not elaborate, the legislative history concludes that a decision is not substantially justified if it is subsequently reversed as

being arbitrary and capricious or unsupported by substantial evidence.<sup>22</sup> This indicates that it may be a mistake to rely upon pre-amendment cases that conclude that a decision may be "substantially justified" even if determined to be arbitrary and capricious.<sup>23</sup>

#### Local Governments Covered by EAJA

The 1985 amendment includes units of local government in the definition of "party."<sup>24</sup> Towns, cities, incorporated or unincorporated townships or villages, Indian tribes, and special purpose districts (such as school districts, water districts, and planning districts) are now included in the definition.<sup>25</sup> These government units still must be within specified size standards to be eligible for fee awards.<sup>26</sup> This expansion of the definition of "party" indicates that installation level land use planning and environmental proceedings may now be exposed to fee awards.

#### Retroactive Applicability

The EAJA expired on September 30, 1984.<sup>27</sup> The 1985 amendment made the EAJA permanent.<sup>28</sup> The amendment also provides that the amended EAJA shall apply to cases pending on, or commenced on or after, the date of enactment.<sup>29</sup> There are two retroactive provisions. First, any case commenced on or after October 1, 1984, and finally disposed of before the date of enactment shall be deemed to have commenced on the date of enactment, August 5, 1985.<sup>30</sup> Thus, any action commenced and decided during the hiatus between the original EAJA and the reenactment on August 5, 1985, will be governed by the amended act. Second, prevailing parties in "hiatus" cases must apply to the agency for recovery of attorney's fees within thirty days of the final disposition of the adversary adjudication.<sup>31</sup> Consequently, actions commenced and resolved, except for EAJA fees, between October 1, 1984, and August 5, 1985, had an application deadline of not later than September 4, 1985. Applications received after September 4, 1985, in a "hiatus case" are untimely.

#### Conclusion

The potential impact of the 1985 amendment to the EAJA on Department of the Army appropriations, to include funds at the local level, requires that judge advocates

<sup>17</sup> *Id.* at 13.

<sup>18</sup> Equal Access to Justice Act, Extension and Amendments, Pub. L. No. 99-80, 99 Stat. 183, 184 (to be codified at 5 U.S.C. § 504(a)(1) and § 504(C)(3)(E)).

<sup>19</sup> H.R. Rep. No. 120, 99th Cong., 1st Sess., 13 (1985).

<sup>20</sup> *Id.* at 13, 14.

<sup>21</sup> *Id.* at 9, 10.

<sup>22</sup> *Id.* at 9, 10.

<sup>23</sup> *Id.* at 9, 10, n.16.

<sup>24</sup> Equal Access to Justice Act Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 183-185 (1985).

<sup>25</sup> H.R. Rep. No. 120, 99th Cong., 1st Sess., 14, 15 (1985).

<sup>26</sup> Equal Access to Justice Act Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 183, 185 (1985); H.R. Rep. No. 120, 99th Cong., 1st Sess., 15 (1985).

<sup>27</sup> The EAJA, as originally enacted, contained a sunset provision that repealed the EAJA on October 1, 1984. Prior to the expiration date of the EAJA in 1984, Congress passed a revision of the act that would have made the act permanent by repealing the sunset provisions, and made several substantive changes in the provisions of the act. H.R. Res. 5479, 98th Cong., 2d Sess., 130 Cong. Rec. H 9297 (1984). The President vetoed that bill on November 8, 1984. 11 Weekly Comp. Pres. Doc. 1814 (Nov. 8, 1984). The EAJA expired on September 30, 1984.

<sup>28</sup> Equal Access to Justice Act Extension and Amendment, Pub. L. No. 99-80, 99 Stat. 186 (1985).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> H.R. Rep. No. 120, 99th Cong., 1st Sess., 20, 21 (1985).

become more sensitive to potential litigation and be aware of the scrutiny to which local level decisions will be subjected. Proactive participation in installation and activity decision-making, education of decision-makers, and attentiveness to potential litigation, will enable judge advocates to ensure that their installations and activities do not become easy prey under the EAJA.

The reality of budgetary constraints makes the 1985 amendment to the EAJA an opportunity for lawyers to make a tangible, positive contribution through an aggressive preventive law program.

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# Criminal Law Note

Criminal Law Division, OTJAG

## Amendments to MCM, 1984

202210Z FEB 86

DA WASHDC//DAJA-CL//

FOR SJA/JA/TDS/MIL JUDGE/LEGAL COUNSEL

SUBJ: 1986 MCM Amendments

A. My 151000Z Nov 85.

1. On 19 Feb 86, President Reagan signed executive order 12550, amending the Manual for Courts-Martial, 1984. An advance summary of the amendments was provided in Ref A. The effective date of the amendments is generally 1 Mar 86 and, except as noted below, the amendments do not apply to any trial in which arraignment occurred prior to the effective date.

2. Printing of the amendments (Change 2, MCM, 1984) is now under way. The major changes are summarized below:

A. MRE 311 is amended to incorporate the "good faith exception" to the exclusionary rule. *US v. Leon*, 104 S.Ct. 3405, 52 U.S.L.W. 5155 (1984).

B. MRE 304 and 311 are amended to incorporate the "inevitable discovery exception" to the exclusionary rule. *Nix v. Williams*, 104 S.Ct. 2501, 52 U.S.L.W. 4732 (1984) and *US v. Kozak*, 12 M.J. 389 (CMA 1982).

C. Delete MRE 704(b) so that psychiatric witnesses are again allowed to give ultimate issue opinion testimony regarding sanity.

D. RCM 707 is amended to delete dismissal as the remedy for imposition of conditions on liberty. While imposition of "conditions" would continue to be authorized under

RCM 304, there would be no speedy trial remedy for conditions which exceed 120 days in duration. Amendment effective only for conditions imposed after the effective date.

E. RCM 909(a) is amended to require the defense to prove incompetence to stand trial by a preponderance of the evidence.

F. RCM 1003(b)(10)(B) is amended to clarify authorization of DD for noncommissioned warrant officers convicted of any offense at GCM.

G. RCM 1010 and Appendix 8 are amended to shorten post-trial advisement of rights. The military judge will no longer be required to ascertain on the record the accused's understanding of post-trial rights.

H. RCM 922 and 1004 are amended to require unanimous findings of guilt in capital cases as a precondition to imposition of death sentences.

I. Paragraph 30a, Part IV, is added to implement the recent UCMJ amendment establishing the offense of espionage (Art. 106a) (Pub. L. No. 99-145, 8 Nov 85). Any command receiving a report of a violation of Art. 106a occurring between 8 Nov 85 and the effective date of the MCM implementation should contact this office immediately.

J. Paragraph 16b(3)(B), Part IV, is amended to read "that the accused knew or reasonably should have known of the duties."

3. Copies of the Executive Order will be mailed to SJA's and through TDS and judiciary channels for use until distribution of Change 2.

4. POC at HQDA is LTC Casida, DAJA-CL, (AV) 225-1891.

## JAGC Officer Personnel Note

Personnel, Plans and Training Office, OTJAG

### Acquisition Law Specialty Program

Priority

P 261926Z Feb 86

FM DA WASHDC//DAJA-PT//

FOR SJA/JA/Legal Counsel/TDS:

SUBJECT: Acquisition Law Specialty (ALS) Program

1. Reference: The Army Lawyer, Nov 85, at 4-5.

2. The Acquisition Law Specialty (ALS) Program is a voluntary program under which JAGC attorneys interested in acquisition law will be identified, trained, and managed. JAGC officers may now apply for the ALS Program. Award of the contract law SI does not constitute entry to the ALS Program; officers must apply separately for the ALS Program. Applicants must be career status officers (incl CVI) and may apply for one of two ALS categories.

a. Category A: Qualified acquisition lawyer

(1) Officers applying for this category must meet the criteria for award of SI 3D (see AR 611-101 at page 56 for the classification guidance applicable to the government contract law specialist).

(2) Officers applying for this category should state their qualifications for the ALS Program, including:

(a) A list in reverse chronological order of all assignments involving contract law, with a brief explanation of the nature and extent of the contract law work, and

(b) A list of all contract law education and training, including non-military contract law experience.

b. Category B: JAGC officers with limited or no acquisition experience who desire to enter the initial phase of the ALS program.

(1) Officers applying for this category must have at least two years of JAGC experience and be competitive for normal career progression.

(2) Officers applying for this category should state any relevant experience, training, or other qualifications. They should also briefly state why they want to enter the ALS Program.

3. Selections will be made by The Judge Advocate General on a "best qualified" basis.

4. Applications should be submitted to HQDA (DAJA-PT) WASH DC 20310-2206 by military letter. These letters should be forwarded through the SJA or supervising judge advocate and must be received by 1 June 1986.

# Enlisted Update

Sergeant Major Gunther Nothnagel

The 1985 promotion list for sergeant first class was released on 11 February 1986. Congratulations to the fifty-one 71D/Es selected by that board for promotion. As mentioned in my previous article, SGM Bobby Giddens, Chief Legal NCO, Second Army, Fort Gillem, GA, sat as a member of that board. The following after action report submitted by SGM Giddens provides a number of useful insights. Because of the importance of this report, I request that each Chief Legal NCO pass a copy of this article to his or her subordinates.

## After Action Report, Board Member, 1985 E-7 Promotion Board

As a member of the 1985 DA E-7 Centralized Promotion Board, I had the opportunity to become familiar with the centralized promotion system and to review many of the records of our 71D/E soldiers who were in the primary and secondary zones for promotion consideration. While the 71D/E files were generally in good shape compared to the other MOSs within the 71 CMF, many could have been better, particularly in the areas noted below:

a. Photos. Some soldiers had no photo at all, others had outdated photos (up to five years old in some cases), and many presented a poor appearance, e.g., "sloppy" haircuts or mustache trims, ill-fitting uniforms, ribbons/badges/medals worn incorrectly, and the appearance of being overweight.

b. EER. It is good to know that most of our staff sergeants are "the best legal clerk/court reporter the rater has ever known." But when practically all EER performance narratives begin with this same sentence and contain little else of substance, it becomes very difficult to use the narrative comments in making an objective comparison of who is the best qualified for promotion. Many of the narratives I reviewed were poorly written—they were full of superlatives and generalities, but contained few specifics as to what the soldier was supposed to have done, whether he or she did it, how well, and under what conditions. Often soldiers were cut a point or two in blocks such as integrity or loyalty with no explanation in the narrative. The potential narratives were not much better, i.e., all our staff sergeants "should be selected for advanced schooling and higher level assignments." Again, more generalities.

(1) Height/Weight/Profile data. While most EERs had the appropriate required block entries, few had corresponding comments in the performance narratives for the soldiers who failed to meet standards, e.g., remedial PT programs, overweight program, profile does not adversely affect job performance, etc. In many instances, height/weight data entered on the EER did not match with height/weight data contained in other documents in the file.

(2) The numbers are still inflated, but to my surprise no more than the other MOSs within the 71 CMF. We appear to be getting away from the automatic maximum scores.

(3) Our officers, civilians, and junior NCOs need training on the EER system, particularly on how to better write job descriptions, performance/potential narratives, and how to use better judgment in awarding numerical ratings. It is important to all our soldiers that raters and indorsers have the moral courage to "tell it like it is."

c. Personnel Qualification Records. It was apparent that many soldiers did not review their DA Forms 2A and 2-1 as carefully as they should have prior to forwarding these documents to the board. As a result, entries pertaining to such important events as MMRB results, latest school completions, SQT results, awards, etc., were not always posted. Many 2-1s had not been verified and authenticated by the soldier. Some records even had a comment by the MILPO to the effect that the soldier had been notified to come review his PQR, but through apathy on his part had failed to do so.

d. Performance Microfiche. A number of 71D soldiers had courts-martial and Article 15s in their performance fiche. Many of the Article 15s would probably have been transferred to the restricted fiche had the soldiers petitioned the DA Suitability Evaluation Board for transfer.

Soldiers who want to enhance their promotion competitiveness should pay more attention to ensuring that their personnel file is accurate and up-to-date. Particular emphasis should be placed on the following:

a. Photo. Soldier should take a new photo for each board, and have the most critical NCO in his or her rating chain review it with him or her prior to forwarding. If not completely satisfied that the photo is 100% correct, the soldier should take a new one, and keep doing so until satisfied.

b. PQR. Soldier should ensure that DA Forms 2A and 2-1 are accurate and current. Each entry should be thoroughly examined. If the forms are sloppy and hard to read, the soldier should have the MILPO clerk prepare new ones. Once satisfied that the forms are accurate, clean, and complete, the soldier should sign the certification statement for forwarding.

c. Performance Microfiche. The soldier should obtain a copy of his or her fiche from USAEREC, ATTN: PCRE-RF, Fort Benjamin Harrison, IN 46249-5301, and review it item-by-item. It is extremely important that all EERs and academic reports are in the file. If some are missing, the servicing MILPO can advise the soldier on what has to be done to get them in. The disciplinary data side of the fiche should be carefully scrutinized to ensure that someone else's disciplinary data is not in the file, and that material that has been approved for transfer to the restricted fiche has been removed.

Some personal suggestions to soldiers who want to increase their promotion potential:

a. Seek the most challenging, responsible jobs available. Successful performance in slots of higher grade, particularly in leadership positions *really stand out*.

Volunteer for additional duties such as squad leader, section sergeant, and platoon sergeant. Ensure that these additional duties are mentioned in the job description and performance narrative of your EER.

b. Get all the leadership training available. Completion of PLDC is a *must*. Selection and/or completion of ANCOES is a *must*—do it by correspondence if necessary.

c. Take advantage of all technical training opportunities. Complete all the legal correspondence courses available.

d. Work on civilian education. Aim for at least an associate degree.

e. Do as well as you possibly can on the SQT. Scores in the 85–100 range really stand out.

f. Your EERs are the most important documents considered by the board. Make sure that when you review your EER, you pay particular attention to the job description, and the performance and potential narratives. These entries should tell what you were supposed to do, how well you did it, and under what conditions results were achieved. Discuss the EER with the rater.

g. At least six months before they are to appear before a DA promotion board, you should begin getting your records in order. Three parts of your

file—your photo, your performance fiche, and your PQR—contain over ninety-five percent of the information on which board members will decide whether or not to select you for promotion, school attendance, etc. Do not ignore the importance of that fact. **REVIEW YOUR FILE.**

Some personal tips to soldiers on how *not* to get promoted:

a. Be overweight.

b. Do not sign/verify your PQR. Board members will probably consider this as apathy on your part.

c. Do not update your photo.

d. Avoid PLDC and NCOES. This shows a lack of desire to improve yourself.

e. Seek the “laid back” easy jobs and avoid leadership duties.

f. Fail the PT test.

g. Flunk your SQT.

Any one or all the above will help ensure that you will not be selected for promotion or schooling.

## CLE News

### 1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with 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: (801) 293-6286; FTS: 938-1304).

### 2. TJAGSA CLE Course Schedule

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. Oklahoma Adds CLE Requirements

Members of the armed forces on fulltime active duty are exempt from new mandatory CLE requirements that took effect in Oklahoma on 1 March 1986. Beginning in 1987, every active member of the Oklahoma Bar Association must submit a report by 1 April indicating completion of or exemption from the minimum hours of instruction. A form will be provided by the Bar Association. Questions should be directed to: Oklahoma Bar Association, Director of Continuing Legal Education, 1901 North Lincoln Blvd., P.O. Box 53036, Oklahoma City, Oklahoma 73152.

### 4. 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	1 February in three year intervals
Oklahoma	1 April annually starting in 1987
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*.

### 5. Civilian Sponsored CLE Courses

July 1986

- 6-11: AAJE, A Judge's Philosophy of Law, Williamsburg, VA.
- 6-11: AAJE, The Law of Evidence, Cambridge, MA.
- 6-25: NITA, National Session—Program in Trial Advocacy, Boulder, CO.

- 7-11: ALIABA, Basic Law of Pensions & Deferred Compensation, Palo Alto, CA.
- 9-11: PLI, Annual Institute on Employment Law, San Francisco, CA.
- 10-11: PLI, Annual Antitrust Law Institute, San Francisco, CA.
- 11: PLI, Marketing for the Law Firm, San Francisco, CA.
- 14-18: AAJE, Fact Finding, Williamsburg, VA.
- 17-18: PLI, Bankruptcy Practice for Bank Counsel, New York, NY.
- 17-18: PLI, Current Developments in Trademark Law, New York, NY.
- 17-19: GICLE, Fiduciary Law Institute, Hilton Head, SC.
- 20-25: AAJE, Rules of a Judge—and Judicial Liability, Moran, WY.
- 21-8/1: AAJE, The Trial Judges' Academy, Charlottesville, VA.
- 24-25: PLI, Annual Antitrust Law Institute, Chicago, IL.
- 24-25: PLI, Introduction to Qualified Pension & Profit Sharing Plans, New York, NY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1986 issue of *The Army Lawyer*.

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are 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.

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.

## 2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
UPDATE #7	Officer Ranks Personnel		30 Jan 86
UPDATE #9	Morale, Welfare, and Recreation		26 Feb 86
UPDATE #15	Reserve Components Personnel		3 Feb 86
AR 600-85	Alcohol & Drug Abuse Prevention & Control	110	1 Feb 86
AR 600-85	Alcohol & Drug Abuse Prevention & Control	111	10 Feb 86
AR 601-50	Appointment of Temporary Officers in the Army of US upon Mobilization		8 Jan 86
AR 670-1	Wear & Appearance of Army Uniforms and Insignia		16 Jan 86

## 3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

- Alpher & Blanton, *The Accuracy of Lie Detection: Why Lie Tests Based on the Polygraph Should Not Be Admitted Into Evidence Today*, 9 Law & Psychology Rev. 67 (1985).
- Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths-A Dead End?*, 86 Colum. L. Rev. 9 (1986).
- Caron, *The Capital Defendant's Right To Obtain Exculpatory Evidence From the Prosecution To Present in*

- Mitigation Before Sentencing, 23 Am. Crim. L. Rev. 207 (1985).
- Chase & Taylor, *Landlord and Tenant: A Study in Property and Contract*, 30 Vill. L. Rev. 571 (1985).
- Colbach, *The Post-Vietnam Stress Syndrome: Some Cautions*, 13 Bull. Am. Acad. Psychiatry & L. 369 (1985).
- Donigan, *Child Neglect and Dependency Actions: Uncertainty Under the Uniform Child Custody Jurisdiction Act*, 49 Alb. L. Rev. 787 (1985).
- Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21 Willamette L. Rev. 425 (1985).
- Giacopassi & Wilkinson, *Rape and the Devalued Victim*, 9 Law & Hum. Behav. 367 (1985).
- Hartje, *Cross-Examination—A Primer for Trial Advocates*, 8 Am. J. Trial Advoc. 11 (1984).
- Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 Iowa L. Rev. 93 (1985).
- Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611 (1985).
- Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 Neb. L. Rev. 120 (1986).
- Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. Rev. 1 (1985).
- Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071 (1985).
- MacCarthy & Mejia, *The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. Crim. L. & Criminology 1197 (1984).
- Osborne, *Uncle Sam and the Tort-Feasors: A Look at the Tax Consequences of Tort Settlement*, 8 Am. J. Trial Advoc. 257 (1984).
- Price, *The Pro Se Criminal Defendant: A Judicial Dilemma*, 23 Ct. Rev. 12 (1986).
- Rehnquist, *Oral Advocacy*, 27 S. Tex. L. Rev. 289 (1986).
- Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 Yale J. Int'l L. 279 (1985).
- Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121 (1985).
- Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Va. J. Int'l L. 109 (1985).
- Rostow, *The Legality of the International Use of Force by and From States*, 10 Yale J. Int'l L. 286 (1985).
- Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 Employee Rel. L.J. 422 (1985-86).
- Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 Env't L. 455 (1985).
- Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 Yale J. Int'l L. 291 (1985).
- Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 195 (1985).
- Stiglitz, *Government Subrogation Rights in Tort Judgments and Settlements*, 32 Fed. B.N. & J. 420 (1985).
- Truver, *The Law of the Sea and the Military Use of the Ocean in 2010*, 45 La. L. Rev. 1221 (1985).
- United States Supreme Court 1982-1983 Term: Criminal Law Decisions*, 30 N.Y.L. Sch. L. Rev. 231 (1985).
- Weston, *Lawyers and the Search for Alternatives to Nuclear Deterrence*, 54 U. Cin. L. Rev. 451 (1985).
- Wolfe, *A Strategy for Effective Use of the Courtroom During Direct Examination*, 8 Am. J. Trial Advoc. 205 (1984).
- Comment, *Child Witnesses in Sexual Abuse Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 Pepperdine L. Rev. 157 (1985).
- Comment, *Meeting the Agency Burden Under the Confidential Source Exception to the Freedom of Information Act*, 60 Wash. L. Rev. 873 (1985).
- Note, *The Appearance of Justice: Judges' Verbal and Non-verbal Behavior in Criminal Jury Trials*, 38 Stan. L. Rev. 89 (1985).
- Note, *Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice*, 65 B.U.L. Rev. 275 (1985).
- Note, *Regulating Fraud in Military Procurement: A Legal Process Model*, 95 Yale L.J. 390 (1985).

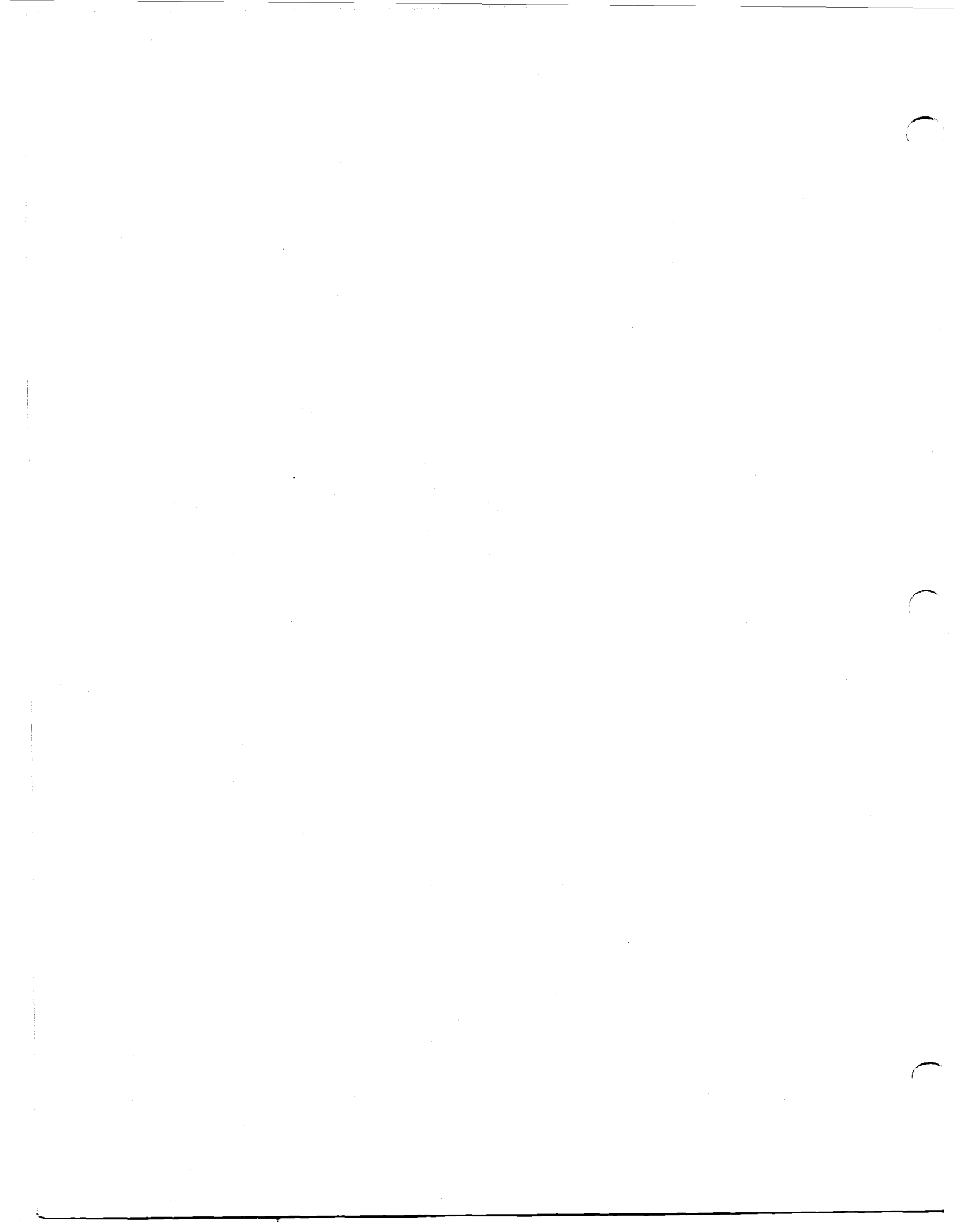
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