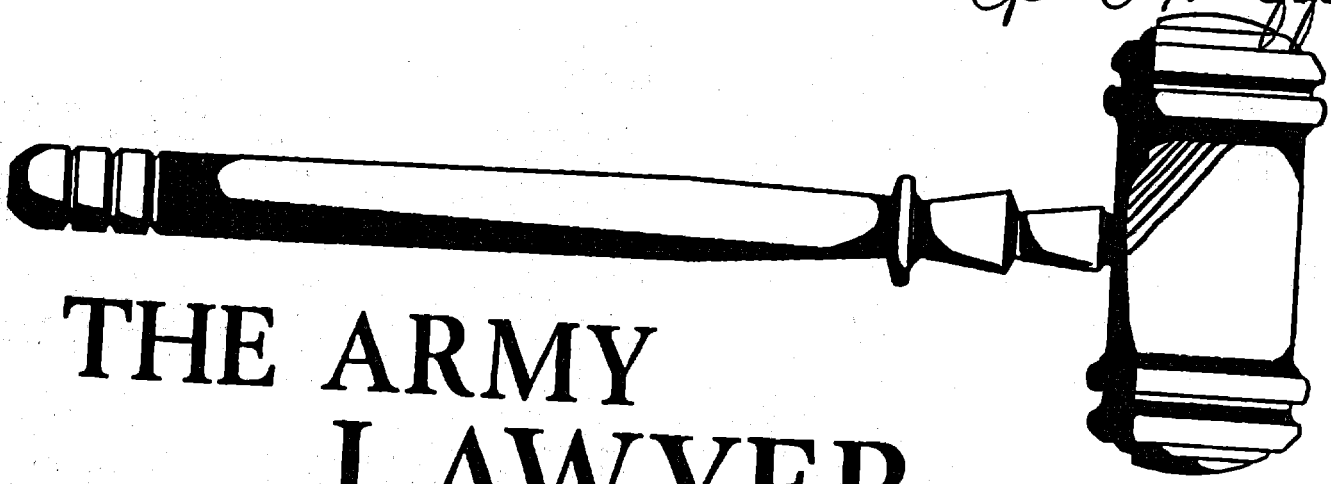
Capt O'Keeffe



THE ARMY LAWYER

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

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

REPLY TO
ATTENTION OF

12 MAR 1986

DAJA-ZX

SUBJECT: Physical Fitness and Appearance - Policy Letter 86-2

STAFF AND COMMAND JUDGE ADVOCATES

1. My goal is for all members of the Judge Advocate General's Corps to continue to set the standard of excellence in the areas of physical fitness and appearance. To this end, I encourage you to--

a. Be familiar with AR 350-15, AR 600-9, and AR 40-501.

b. Set the example personally, in your office, in your command.

c. Emphasize in discussions with your personnel the importance of physical fitness and appearance.

d. Develop morale-enhancing programs which emphasize, as much as possible, group physical training rather than individual programs.

e. Emphasize proper technique in performing exercises.

f. Ensure that your officers and enlisted soldiers have a recent picture in their personnel files showing sharp appearance, not marred by overweight, ill-fitting uniforms, ragged mustaches and haircuts, and the like.

g. Ensure that your personnel understand that physical fitness and compliance with weight control standards are considered in selection and assignment decisions.

h. Ensure that personnel with physical limitations consult a physician and participate in a program compatible with those limitations.

2. Report through technical channels to the Executive, OTJAG, the names of individuals who (a) fail to take or pass the Army Physical Fitness Test or (b) fail to meet weight standards. Include in your report, as appropriate, a medical profile and a description of the remedial program.

Hugh Overholt

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

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

REPLY TO
ATTENTION OF

17 MAR 1986

DAJA-CL

Subject: Relations With News Media - Policy Letter 86-3

STAFF AND COMMAND JUDGE ADVOCATES

1. Army policy on release of information to the news media requires periodic emphasis. Through full coordination, I am confident that we can provide accurate information, minimize risks to an individual's trial rights, and best serve the public's "right to know." To meet these objectives, all judge advocates should have working knowledge of--

a. Army policies on release of information (AR 360-5 and AR 340-17).

b. Ethical considerations regarding trial publicity (ABA Code of Professional Responsibility, DR 7-107 and EC 7-33).

2. Normally, the public affairs office (PAO) of your command will answer all news media inquiries. You should--

a. Establish local procedures with your PAO for handling media inquiries concerning legal matters.

b. Ensure that PAOs look to you personally as the source of information concerning legal matters.

c. Ensure that individual counsel are not placed in the position of speaking for the command, or explaining the results of a case.

3. Generally, no member of your office should, without your approval, prepare a written statement for publication or permit himself or herself to be quoted by the media on official matters within the purview of your office.

4. Personnel assigned to U.S. Army Trial Defense Service will handle responses to news media in accordance with the USATDS standing operating procedure.

Hugh Overholt

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

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

REPLY TO
ATTENTION OF

17 MAR 1986

DAJA-CL

SUBJECT: Practicing Professional Responsibility - Policy Letter 86-4

STAFF AND COMMAND JUDGE ADVOCATES

1. Our practice should reflect continuous commitment to the highest standards of professional responsibility.

2. Ethical conduct requires more than basic integrity. It requires complete familiarity with published professional responsibility standards and an awareness of potential ethical issues before they become problems.

3. To ensure that professional responsibility receives the attention it deserves, you should--

a. Personally emphasize the importance of professional responsibility within your office.

b. Provide practice-oriented classes on professional responsibility designed specifically for less experienced judge advocates; include Trial Defense Service and Trial Judiciary personnel and address ethical issues most applicable to your setting.

c. Establish procedures to make reserve judge advocates aware of the potential conflicts of interest which may arise during active duty.

d. Provide a means by which experienced judge advocates share their professional responsibility knowledge with less experienced judge advocates in your office.

e. Inform your judge advocates of procedures in Army Regulation 27-1 for reporting allegations of professional misconduct.

Hugh Overholt

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

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

REPLY TO
ATTENTION OF

DAJA-ZX

8 APR 1986

SUBJECT: TJAG Policy Letters - Policy Letter 86-6

STAFF AND COMMAND JUDGE ADVOCATES

1. Policy letters are serially numbered and issued on subjects of importance to the Corps and the way we transact our business. In addition to individual distribution, each policy letter will be published in The Army Lawyer. Staff and command judge advocates are encouraged to retain a desk copy of the policy letters as the subjects will frequently be a matter of interest during Article 6 inspections.

2. The enclosure lists policies in effect. We review policy letters each year and announce changes at the Worldwide JAG Conference. Should you believe that a policy has outlived its usefulness, please let me know.

Hugh Overholt

Encl

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

TJAG POLICY LETTERS

NUMBER	SUBJECT
84-1	Reserve Component Legal Assistance
85-2	Administrative Support for Trial Judges
85-3	The Labor Counselor Program
85-4	JAGC Automation
85-5	Terrorist Threat Training
85-6	Intelligence Law
85-7	Appointment of Environmental Law Specialists
85-8	Supporting Reserve Component Commanders in UCMJ Action
85-9	Army Legal Assistance Program
85-10	Army Preventive Law Program
85-11	Legal Assistance Representation of Both Spouses
86-1	Trial Counsel Assistance Program (TCAP)
86-2	Physical Fitness and Appearance
86-3	Relations With News Media
86-4	Practicing Professional Responsibility
86-5	Recruiting Legal Specialists and Court Reporters for the Reserve Components
86-6	TJAG Policy Letters

Enclosure

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

REPLY TO
ATTENTION OF

DAJA-SM

18 MAR 1986

SUBJECT: Recruiting Legal Specialists and Court Reporters for the Reserve Components - Policy Letter 86-5

STAFF AND COMMAND JUDGE ADVOCATES

1. We must continue to make a priority concern out of recruiting experienced legal specialists and court reporters for the Reserve Components. As a minimum, you should--

a. Identify legal specialists and court reporters within your jurisdiction who are terminating active duty.

b. Discuss reserve opportunities with them.

c. Forward, with the individual's permission, the following information to the OTJAG Senior Staff NCO, HQDA(DAJA-SM), WASH DC 20310-2203: Name/rank, MOS, height, weight, last EER score, and home address.

2. As a basis for personal contact by recruiting officials, OTJAG will provide this information to the District Recruiting Command and the legal office nearest the individual's separation destination.

Hugh Overholt

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

The Freedom of Information Act and the Commercial Activities Program

Major Steven M. Post
Instructor, Contract Law Division, TJAGSA

Introduction

Current executive policy directs federal agencies to rely on private commercial contractors to provide commercial goods and services to meet the government's needs.[1] While some exceptions exist, such as when the interests of national defense justify performance by government employees,[2] the policy requires agencies to contract for all commercial requirements if a commercial source is available that can provide the goods or services at a price less than that of government performance.[3] This program, the "Commercial Activities Program," presents special problems concerning the release of information under the Freedom of Information Act.[4]

The Commercial Activities Program was established by the Office of Management and Budget through its Circular Number A–76 and the Supplement thereto, which set forth not only specific policy guidance but also strict implementation requirements binding on all federal agencies.[5] The Circular requires federal executive agencies, including the Army, to establish inventories identifying all commercial activities, and requires that these inventories be updated annually and be made available to the public.[6] The Circular also requires that a review be conducted of each inventoried commercial activity which is presently being performed "in-house" (by the government).[7] This review is conducted to determine whether the activity must be retained in-house for reasons other than cost.[8] If no other-than-cost justification exists, a cost comparison study is required.[9] The schedule of activities for which cost comparison studies are to be conducted must be published in the *Commerce Business Daily* and the *Federal Register* in order to provide public notice of the planned studies.[10]

The cost comparison study is a multi-step process, culminating in a contract solicitation in which the government agency participates by submitting a sealed bid. Prior to issuance of the solicitation itself, however, a Performance Work Statement (PWS) and Commercial Activity Management Study must be conducted.[11] The PWS is developed to describe the output performance standards of the activity under study,[12] and forms the basis of both the government bid *and* the contract specifications. Simultaneously, a management study is conducted to "identify essential functions to be performed, determine performance factors and determine organization structure, staffing and operating procedures for the most efficient and effective in-house performance of the commercial activity."[13] The management study becomes the government's "technical proposal" (the most efficient method and organization to meet the minimum needs as defined by the PWS) which is used to determine the government estimate or bid.[14]

Once the PWS and Management Study have been completed and the government bid is prepared, either sealed bids or proposals are solicited from commercial contractors. Eventually, a contract is awarded to a commercial contractor if the selected contractor's offer is lower than the government bid.[15] Once contracted out in this manner, commercial activities will continue to be performed by contract unless costs become unreasonable and recompetition does not result in reasonable prices.[16]

This procedure—inventorying commercial activities, developing the PWS, conducting the Management Study, generating the government estimate, and evaluating proposals—creates considerable information that can become the subject of a myriad of requests for records under the Freedom of Information Act from a multitude of sources. In

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[1] Office of Management and Budget, Circular No. A–76, Performance of Commercial Activities (Revised Aug. 4, 1983) [hereinafter cited as OBM Cir. A–76]. For a discussion of federal employee challenges to contracting out, *see* Ketler, *Federal Employee Challenges to Contracting Out: Is There a Viable Forum?*, 111 Mil. L. Rev. 103 (1986).

[2] OMB Cir. A–76, para. 8b.

[3] *See* OMB Cir. A–76.

[4] 5 U.S.C. § 552 (1982).

[5] Supplement, OMB Cir. A–76. Department of Defense implementation is contained in Dep't of Defense Directive No. 4100.15, Commercial Activities Program (Sept. 16, 1985), and Dep't of Defense Instruction No. 4100.33, Commercial Activities Program Procedures (Oct. 7, 1985). Department of the Army implementation is set forth in Dep't of Army, Reg. No. 5–20, Commercial Activities Program (1 Feb. 1985) [hereinafter cited as AR 5–20].

[6] Supplement, OMB Cir. A–76, Part 1, Chapter 1, para. B.

[7] *Id.* at para. C. Reviews are also conducted upon expansion of an existing commercial activity or establishment of a new requirement and when the costs of contracted activities becomes unreasonable. *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Supplement, OMB Cir. A–76, Part III, Chapter 1, para. C.

[12] *Id.* at para. C.2.

[13] *Id.* at para. A.

[14] *Id.*

[15] Supplement, OMB Cir. A–76, Part 1, Chapter 1, Exhibit 1, Block No. 13. As noted in the Supplement, contractor cost must actually be 10% less than government cost in order to cover the cost of converting the contract. A complete guide to conducting cost comparisons is contained in Part IV of the Supplement.

[16] Supplement, OMB Cir. A–76, Part 1, Chapter 1, para. C.3.

addition to requests for government-generated documents, there are requests from competitors for information provided to the government by successful contractors. The nature of the Commercial Activities Program, wherein the government "competes" with commercial sources for performance of these activities, presents special problems because of the kinds of information sought and the need to protect this information from premature disclosure, which could interfere with the contracting process.

In order to protect the competitive procurement process, the government estimate and supporting documentation must be protected from premature release in the same way as are the bids of commercial offerors. Protection of the competitive system is particularly important here because not only is full and open competition at issue but so are the jobs of federal employees who may be replaced by a private contractor. Also, because the government is "competing" with commercial contractors, commercially valuable information generated by the government must be protected to ensure equal footing within the competition. An additional concern is premature release of information that may inhibit the decision-making process. Finally, the integrity of the competitive system also requires that the government protect from disclosure confidential commercial information provided to the government by offerors and contractors.

This article will discuss how Freedom of Information Act requests can affect the Commercial Activities Program, what avenues are available to protect commercial information—both information provided to the government from private sources and information generated by the government—and what steps are necessary to secure the protections of commercial information from disclosure.

An Overview of the Freedom of Information Act

To begin the analysis of the application of the Freedom of Information Act (FOIA) to information generated in connection with the Commercial Activities Program, it is first necessary to review the basic purpose of the FOIA and its construction. The FOIA was originally enacted in 1966 and was intended "to provide a true Federal public records statute by requiring the availability, to any member of the public, of all executive branch records . . . except those involving matters which are within nine stated exemptions."[17] The law was intended to correct the abuse of the Public Information Section of the Administrative Procedure Act,[18] which was being used as a withholding rather than as a disclosure statute.[19] The FOIA, as amended,[20] is clearly a disclosure statute which was "broadly conceived"[21] to permit public access to government information. The dominant objective of the FOIA is disclosure, subject only to nine limited exemptions.[22]

The nine exemptions establish "workable standards for the categories of records which may be exempt from public disclosure."[23] Enactment of a broad disclosure statute with limited exemptions was intended "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."[24] The language of the statute and the statute's legislative history have led courts to recognize that the FOIA exemptions were designed to be discretionary, not mandatory, bars to disclosure.[25] Also, the exemptions, by the very terms of the FOIA,[26] are made exclusive.[27] The courts have also held that the exemptions must be narrowly construed[28] and that the burden of proof is on the agency seeking to withhold the requested information.[29]

Considering the stated purpose of the FOIA and the narrow construction placed on the exemption provisions, any agency is fighting an uphill battle when attempting to protect information from disclosure. The difficulty of protecting commercially valuable information generated as part of the Commercial Activities Program is particularly troublesome. Of the nine exemptions, only two—Exemption 4[30] and Exemption 5[31]—are of substantial value in protecting commercial information. Exemption 4 may be used to protect information provided by contractors, and Exemption 5 may be used to protect government commercial information.[32]

Exemption 4

Exemption 4 excludes from the mandatory disclosure requirements of the FOIA "trade secrets and commercial or financial information obtained from a person and privileged

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[17] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) *reprinted in* 1966 U.S. Code Cong. & Ad. News 2418 [hereinafter cited as House Report].

[18] 5 U.S.C. § 1002 (1964).

[19] House Report, *supra* note 17, at 2421.

[20] The FOIA was amended in 1974 by Public Law No. 93–502 and in 1976 by Public Law No. 94–409.

[21] Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1972).

[22] Department of the Air Force v. Rose, 425 U.S. 352, 361 (1975). The nine exemptions are codified as 5 U.S.C. § 552(b)(1)–(9) (1982).

[23] House Report, *supra* note 17, at 2419.

[24] *Id.* at 2423.

[25] Chrysler Corporation v. Brown, 441 U.S. 281, 293 (1979).

[26] *See* 5 U.S.C. § 552(c) (1982).

[27] Environmental Protection Agency v. Mink, 410 U.S. at 79.

[28] Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[29] *Id.*; Schlefer v. United States, 702 F.2d 233 (D.C. Cir. 1983).

[30] 5 U.S.C. § 552(b)(4) (1982).

[31] *Id.* § 552(b)(5).

[32] In certain circumstances other exemptions, such as Exemption 1, 5 U.S.C. § 552(b)(1) (1982), which exempts classified material, may apply to specific contract actions. The Armed Services Procurement Regulations (now the Federal Acquisition Regulation), however, have been held not to be a statute which itself exempts from disclosure under Exemption 3, 5 U.S.C. § 552(b)(3) (1982). Shermco Industries v. Secretary for the Air Force, 452 F. Supp. 306 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980).

or confidential."[33] The purpose of this exemption was explained in a straightforward manner in the House Report on the FOIA: "This exemption would assure the confidentiality of information obtained by the Government. . . . It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government."[34] The intended scope of this exemption included "business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments,"[35] and also was intended to extend to protect good faith government promises of confidentiality.[36]

This exemption is obviously intended to protect from disclosure information provided to the government by outside sources if the source of the information has a valid commercial justification for protecting the information from public disclosure and reasonably expects such protection. In the Commercial Activities Program, there are various categories of information submitted to the government that may be subject to the protection of Exemption 4. Included would be technical proposals submitted by offerors (whether successful or not), cost and pricing data, and negotiation memoranda. While other categories of information may come up in any given case, most information provided by offerors will be "commercial or financial information" rather than "trade secrets."[37]

Information other than trade secrets must meet all three parts of the standard enunciated in the statute to be protected by Exemption 4.[38] The information must be commercial or financial, obtained from a person, and privileged or confidential.[39] Courts have little difficulty finding business data or proposals provided to the government from any outside source to be "commercial or financial" and "from a person."[40] Certainly, technical proposals and cost or pricing data provided by an offeror or contractor under the Commercial Activities Program would meet these standards. The problem is determining whether such information is "privileged or confidential."

In *National Parks & Conservation Ass'n v. Morton*,[41] the Court of Appeals for the District of Columbia Circuit established a test for "confidentiality" which has come to be universally adopted by the courts.[42] The case involved a request for financial information provided to the government by concessioners operating in national parks. This included items such as audits conducted on the books of these companies, as well as annual financial statements filed by the concessioners with the National Park Service.[43]

In developing a test for confidentiality, the court first looked at the interests protected by Exemption 4:

> The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the government to make intelligent, well informed decisions will be impaired.[44]

This interest protected the government's interest in obtaining information it needs from the public. The court went on to recognize a second interest protected by Exemption 4: "Apart from encouraging cooperation with the government by persons having information useful to officials, section 552(b)(4) serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."[45] Hence, there was "a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obligated to provide information to the government and (2) protecting the rights of those who must."[46]

Having reviewed the interests protected by Exemption 4, the court established the now widely accepted two prong test for confidentiality:

> [C]ommercial or financial matter is confidential for purposes of the exemption of disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[47]

The first test is intended to allow the government to protect information voluntarily provided when the business providing the information would refuse to submit it if it were subject to disclosure. The second test protects information mandatorily provided when disclosure would be "unfair" to the business submitting the information. Hence, the two tests distinguish between voluntary and mandatory

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[33] 5 U.S.C. § 552(b)(4) (1982).

[34] House Report, *supra* note 17, at 2427.

[35] *Id.*

[36] *Id.*

[37] Cases involving trade secrets usually turn on the definition to be applied. *See* Public Citizen Health Research Group v. Food & Drug Administration, 704 F.2d 1280 (D.C. Cir 1983) for a recent definition. The scope of this article does not allow for a full discussion of trade secret issues.

[38] Consumers' Union of United States v. Veterans Administration, 301 F. Supp. 796, 802 (S.D. N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

[39] *Id.*

[40] Clark Boardman Company, Ltd., *Guidebook to the Freedom of Information and Privacy Acts*, Chapter 1, Part VI at 23 (Supp. 2983).

[41] 498 F.2d 765 (D.C. Cir. 1974).

[42] *See* Florida Medical Ass'n v. Department of Health, Education, and Welfare, 479 F. Supp. 1291, 1302–03 (M.D. Fla. 1979), and cases cited therein.

[43] *National Parks*, 498 F.2d at 770.

[44] *Id.* at 767.

[45] *Id.* at 768.

[46] *Id.* at 769.

[47] *Id.* at 770 (footnote omitted).

submission. This distinction can become blurred, however, when dealing with the contracting process. Although bidders or offerors voluntarily participate in government contracting, if they choose to do so, they are then required to comply with all requirements placed on them by the government, which may mandate submission of commercially valuable information.

Recognizing the special problems involved in government contracting, the courts have, at least in some cases, resolved the issue by linking the two tests. This analysis concludes that contractors will be reluctant to provide the government with truly valuable commercial information if they recognize that this information will be disclosed by the government; hence, the government's ability to obtain this information will be impaired if it cannot offer protection from disclosure. In *Orion Research, Inc. v. Environmental Protection Agency,*[48] the Court of Appeals for the First Circuit concluded that the government could withhold from disclosure a technical proposal submitted as part of the contracting process, because disclosure would inhibit the government's ability to obtain proposals in the future that contain the latest commercial innovation.[49] In *Racal-Milgo Government Systems v. Small Business Administration,*[50] the District Court for the District of Columbia used a similar analysis to that in *Orion Research* and concluded that disclosure of contract prices was not protected by Exemption 4 because no competitive harm would result as release of such prices was an ordinary part of doing business with the government.[51] Under *National Parks,* two distinct reasons are recognized for protecting commercial information. The government has an obligation to protect commercially valuable information mandatorily provided and needs to protect such information voluntarily provided in order to insure its continued availability. In *Orion* and *Racal-Milgo,* the analysis recognizes that, under either situation, Exemption 4 protects commercial sources of information from substantial competitive harm.

With the development of this analysis, it becomes apparent that the key question in any Exemption 4 case, whether it involves information mandatorily or voluntarily provided, is the extent to which disclosure would cause competitive harm to the supplier of the information. This question can be answered only on a case-by-case basis based on evidence that actual competition exists and that disclosure presents the "likelihood of substantial competitive injury."[52] Hence, no actual injury need be proved; likely injury is sufficient.

What methodology should be used at the installation or activity level to determine if information provided in connection with the Commercial Activities Program may be withheld from disclosure under Exemption 4? There is little substantive guidance available,[53] but this may be due to the fact that there are no real hard and fast rules. As noted above, categories of information are not automatically protected; each case must stand on its own merits. While the courts recently have blurred the two prongs of the *National Parks* test, they nonetheless continue to apply this standard in analyzing such cases. To reach a decision as to whether information should be withheld, an agency should begin its evaluation by applying the *National Parks* test and determining whether the information is being voluntarily or mandatorily submitted, to what extent the agency needs or desires to obtain similar information in the future, and to what extent disclosure will impair the agency's ability to do so.

In negotiating a Commercial Activities contract, the Army generally requires submission of a technical proposal as well as cost and pricing data.[54] Participation of an offeror is voluntary, so, to ensure adequate competition now and in the future, the Army will have to protect information provided, at least to the extent that an offeror requires such protection. Normally, competitors will seek protection of at least parts of the technical package and will also seek protection of cost information. In the contracting process, in order to obtain adequate competition in future procurements and ensure the government receives goods and services at a reasonable price, the government must be able to obtain sufficient information from an adequate number of offerors to properly evaluate bids and proposals. Hence, the government must protect this information to the extent that such protection can be justified.

Once a determination is made that such information is needed, the next step in the analysis is to determine whether the supplier of the information *needs* it to be protected. This will depend upon the *likelihood* of commercial harm that would result from release. Hence, when viewed this way, at least in the context of the contracting process, the two prongs of the *National Parks* test are both keyed to substantial competitive harm. To determine if substantial competitive harm will result from disclosure of particular information, Army activities should ask the suppliers of the data whether disclosure should be withheld and, if so, on what grounds. In this way, the burden of protecting commercially valuable information is placed on the supplier or owner of that information. Also, this referral to the supplier will aid the activity in developing an administrative record which can serve as a basis for justifying a decision to withhold information from disclosure.

Developing an administrative record by referral to the supplier of data as described above also will go a long way in defending the Army's position when a decision is made to release commercial information and suit is brought by the supplier to prevent release. The leading case in this area, *Chrysler Corp. v. Brown,*[55] emphasized the importance

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[48] 615 F.2d 551 (1st Cir. 1980).

[49] *Id.* at 554.

[50] 559 F. Supp. 4 (D.D.C. 1981).

[51] *Id.* at 6–7.

[52] Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979).

[53] *See* Dept. of Army, Reg. No. 340–17, Office Management—Release of Information and Records from Army Files, para. 3–200 Number 5 (1 Oct. 1982) (I02 11 Mar. 1985) [hereinafter cited as AR 340–17].

[54] Contractors are required to submit cost or pricing data on all negotiated contracts over $100,000. 10 U.S.C. § 2306(f) (1982).

[55] 441 U.S. 281 (1979).

of developing an administrative record in "reverse-FOIA" cases. In *Chrysler*, the Supreme Court held that jurisdiction for such suit was not founded on the FOIA itself, but rather, such actions could only be brought under the Administrative Procedures Act.[56] The Court went on to hold that agencies would ordinarily be held to an "arbitrary and capricious" standard based on review of the administrative record.[57] While the door was left open for de novo review in certain situations,[58] the need for a well-developed administrative record is clear as it will aid judicial review, even when conducted de novo.

In the typical "reverse-FOIA" case, where an "arbitrary and capricious" standard is applicable, the administrative record is paramount in assuring a favorable judicial decision. Recent cases have emphasized the importance of presenting the court with a complete administrative record.[59] In *Canal Refining Co. v. Corralo*,[60] the court held that review under the Administrative Procedure Act was limited to the administrative record.[61] The importance of such a record cannot be overemphasized.

In justifying a decision to release or withhold commercial information provided to the Army as part of a Commercial Activities contract, the contracting activity must first articulate the need to obtain such information as part of the contracting process and then explain the likelihood of substantial competitive harm to the suppliers, based on the suppliers' input. By developing an administrative record which justifies the intended action and articulates the reasons therefore, a proper application of Exemption 4 is more likely and the decision will more often survive judicial scrutiny.

Exemption 5

A much more difficult problem facing the Army with respect to the Commercial Activities Program is protecting the government's competitive position in the contracting process. The solution to this problem may be found in Exemption 5. Exemption 5 of the FOIA excludes from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[62] The concern which generated inclusion of this exemption in the FOIA is set forth in the legislative history:

> [T]he exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fish bowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision, or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.[63]

In contrast to Exemption 4, which protects information supplied to the government from outside sources, Exemption 5 protects information generated within the government if that information would not "routinely be disclosed to a private party through the discovery process in litigation with the agency."[64]

Initially, only traditionally recognized privileges were considered to be included within Exemption 5. These included the attorney-client privilege, the attorney work product privilege, and the executive (or deliberative process) privilege.[65] In 1979, however, the Supreme Court recognized a fourth privilege in *Federal Open Market Committee of the Federal Reserve System v. Merrill*.[66] The Court held that, "Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract."[67] The Court explained, "[T]he theory behind a privilege for confidential commercial information generated in the process of awarding a contract . . . [is] that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered [by premature release]."[68] Such a privilege may exist under Exemption 5 based on Federal Rule of Civil Procedure 26(c)(2), which allows a district court to exclude from discovery "a trade secret or other confidential research, development or commercial information."[69]

In *Federal Open Market Committee*, the information in question consisted of Domestic Policy Directives, which enumerated the Committee's monetary policy for a monthly period.[70] The information was restricted until the period

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[56] 5 U.S.C. §§ 701–706 (1982). *See Chrysler Corp.*, 441 U.S. at 292–317.

[57] 441 U.S. at 318.

[58] *Id.*

[59] *See* Canal Refining Co. v. Corrallo, 616 F. Supp. 1035 (D.D.C. 1985); Burnside-Ott Aviation Training Center, Inc. v. United States, 617 F. Supp. 279 (S.D. Fla. 1985).

[60] 616 F. Supp. 1035 (D.D.C. 1985).

[61] *Id.* at 1037.

[62] 5 U.S.C. § 552(b)(5) (1982).

[63] House Report, *Supra* note 17, at 2427, 2428.

[64] *Id.* at 2428.

[65] *See* National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Mead Data Central, Inc. v. Department of the Air Force, 586 F.2d 242 (D.C. Cir. 1977).

[66] 443 U.S. 340 (1979).

[67] *Id.* at 360.

[68] *Id.*

[69] *Id.* at 355–56.

[70] *Id.* at 344.

expired and a new directive was substituted.[71] The Supreme Court recognized that such data might meet the requirements of the newly enunciated privilege; however, it remanded the case for further review.[72] On remand, the U.S. District Court for the District of Columbia found that, because premature release could adversely affect the government's ability to compete in the securities market, the privilege did apply to these directives during the period in which they were in effect.[73] In subsequent cases, realty appraisals obtained by the government prior to public sale of government land[74] and government prepared cost estimates as part of the procurement process[75] have been held to fit within the commercial information privilege. These cases seem to show that the potential coverage of this privilege is wide ranging but, as with Exemption 4, the decision to withhold information from disclosure must be made on a case-by-case basis.

There are several types of information generated by the Army as part of the Commercial Activities Program which may be exempt from premature release under the commercial information privilege. Obvious examples include the PWS, the management study, and the government estimate or bid. However, FOIA requests concerning commercial activities have extended far beyond these basic items to include information such as existing or draft Tables of Distribution and Allowance (TDA), staffing guides (Schedule X), standing operating procedures, backlogs of maintenance and repairs (BEMAR), personnel rosters, and command operating budgets, all items which may be used by the Army in generating its bid.[76] To determine whether these documents may be withheld from mandatory disclosure, a method of analysis must be developed.

To fall within the commercial information privilege, four conditions must be met.[77] First, the information must be confidential (not otherwise available). Second, the information must be commercial in nature, which means that the information must relate to commercial activity of the government. Third, the activity to which the information relates must involve the contracting process or otherwise be substantially similar to the process of awarding a contract. Fourth, the information must be sensitive in such a way that the government's commercial interests would be harmed by premature disclosure.

In applying this test to those items specifically generated as part of the commercial activities review process—the PWS, the management study, and the government estimate—it is apparent that the first three parts of the test are satisfied. These items are specifically related to awarding of a contract for the commercial activity involved. Because the government competes for these contracts, the information is commercially valuable. Also, because these documents are prepared specifically as a part of this review, they are not otherwise available and hence "confidential." Therefore, to avoid premature release of these documents, it is only necessary to articulate the harm which might result from such premature release. Protection of these items is necessary, of course, to ensure the integrity of the competitive contracting process. Premature release of the PWS would give a prospective offeror an unfair advantage because the PWS is used to form the basis of the specifications. With the PWS and the management study, an offeror could anticipate the government estimate and ensure its ability to underbid the government. Also, premature release would jeopardize the ability of the government to evaluate the management competency of the offerors who had this information because their proposals would only mimic the government review rather than present their own plan. These reasons reflect the clear harm that could befall the government if these documents are released prematurely.[78]

Recognizing that the PWS, management study, and government estimate are likely to be legitimately withheld from disclosure under Exemption 5, prospective offerors instead seek information from indirect sources. Hence, Army installations and activities will see FOIA requests for items such as those mentioned above including TDA, personnel rosters, and command operating budgets. An example of this is *Morrison-Knudsen Co. Inc. v. Department of the Army.*[79] Morrison-Knudsen submitted a FOIA request at Fort Benning, Georgia, for a multitude of items relating to the Directorate of Engineering and Housing, an activity on the commercial activities inventory scheduled for cost study. The request included the current TDA, Schedule X, BEMAR, annual work plans, and unconstrained requirements report.[80] Morrison-Knudsen challenged the Army decision to withhold these documents from disclosure until after contract award.[81]

In determining whether Exemption 5 allowed withholding, the court concluded that a temporary delay was appropriate because disclosure would place the Army at a competitive disadvantage in the pending cost study if the information were released before bid opening.[82] While this case may be relied on to support a decision to withhold information, it also serves to point out the particular problems presented with respect to controlling information

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[71] *Id.*

[72] *Id.* at 361–69.

[73] Merrill v. Federal Open Market Committee, 516 F. Supp. 1028 (D.D.C. 1981).

[74] Government Land Bank v. General Services Administration, 671 F.2d 663 (1st Cir. 1982).

[75] Hack v. Department of Energy, 538 F. Supp. 1098 (D.D.C. 1982).

[76] AR 5–20, para. 4–6e discusses the importance of recognizing requests for this type of information as being related to the cost study process and potentially exempt from disclosure under Exemption 5.

[77] Belazis, *The Government's Commercial Information Privilege: Technical Information and the FOIA Exemption 5*, 33 Ad. L.J. 415 (1981).

[78] The commercial information privilege by the terms of the FOMC decision only protects information before the awarding of the contract. *See* 443 U.S. at 360. The harm to the government will generally be moot after award.

[79] 595 F. Supp. 352 (D.D.C. 1984), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985).

[80] *Id.* at 353.

[81] *Id.* at 354.

[82] *Id.*

which may become sensitive in contracting for commercial activities and highlights the need to justify withholding from disclosure this information, which, but for the cost study, could not be protected. The types of items requested in *Morrison-Knudsen* would normally not be exempt from disclosure absent their use as part of the Commercial Activities Program. In order to exempt these items under the commercial information privilege, their importance to the Commercial Activities Program must be explained. First, the Army activity involved must identify what items of information within the command are crucial to the commercial activities review. Obviously, the items used by the government in preparing the PWS and the management study could also be used by prospective offerors to anticipate the results of the study. Often, existing TDAs will not be drastically altered as a result of the management study. As soon as a commercial activity is scheduled for management review, these essential items should be identified to avoid their inadvertent release. Once these items have been so identified, a justification to exempt them as privileged commercial information can be completed.

Once these items are identified as required to complete the management review, they become related to the process of awarding a contract. Because these items could be used successfully by prospective offerors to undermine the government's competitive position, release would cause competitive harm to the government. By tying these items to the Commercial Activities Program and identifying them as essential items to complete the management review, these items can easily be shown to be commercial. As they are only available within the government, they meet the confidentiality test as well.[83] The key to protecting this information from release will be early identification of these items and the ability to articulate the need for protection.

Conclusion

In dealing with FOIA requests relating to the Commercial Activities Program, the key is awareness at the installation or activity level. Staff judge advocates, contracting officers, commercial activity (CA) managers, and FOIA coordinators must be aware of the special problems involved in exempting commercial information from disclosure and the need to act early on to protect these items. Commercial information—both that provided to the government and that which is self-generated—must be identified and the reasons for protection must be articulated. In both Exemption 4 and Exemption 5 situations, development of a good administrative record which fully justifies withholding information is essential.

Although AR 5–20 provides general guidance on protecting sensitive CA information,[84] responsibility for ensuring proper implementation will likely fall with the staff judge advocate in the field. The SJA office should routinely be involved in contracting actions and FOIA requests. Because the Initial Denial Authority (IDA) for most procurement matters is The Judge Advocate General,[85] guidance is available for SJAs through technical channels. Staff Judge Advocates should take it upon themselves to ensure that their command understands and recognizes problems arising which concern commercial information. Only in this way can the integrity of the Commercial Activities Program be preserved.

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[83] If these items had previously been released to the public or widely disseminated, confidentiality will be more difficult or perhaps impossible to show.

[84] AR 5–20, para. 4–6e.

[85] AR 340–17, para. 5–200*d*(14). The Chief of Engineers and the Commanding General, U.S. Army Material Command, are the IDAs for their respective organizations. AR 340–17, para. 5–200*d*(10),(18).

JAGC Regimental Activation

The 211th birthday of the Judge Advocate General's Corps on 29 July 1986, will mark the official activation of the Judge Advocate General's Corps in the U. S. Army Regimental System. The Judge Advocate General will initiate formal affiliation of the active force at the Worldwide JAG Conference in October 1986. Reserve Components will affiliate concurrently.

The U. S. Army Regimental System (USARS) enhances combat effectiveness through a framework that provides the opportunity for affiliation, develops loyalty and commitment, fosters an extended sense of belonging, improves unit esprit, and institutionalizes the war-fighting ethos. The Chief of Staff, Army, approved the USARS concept in 1981. During phase I (Jan. 1982–Aug. 1984), fifteen regiments were implemented. Approximately 25,000 soldiers were affiliated with these regiments. Since that time, the USARS has evolved into a system that will encompass the total Army, including active and Reserve Components.

In January 1986, the Chief of Staff, Army, approved the JAG Corps regimental plan and authorized its implementation under the USARS. The regimental entity will retain the title of the "Judge Advocate General's Corps." The Corps regimental home will be The Judge Advocate General's School, Army (TJAGSA), in Charlottesville, Virginia. All JAGC personnel (officer, warrant officer, and enlisted) will affiliate with the regimental organization. All active duty personnel presently assigned to the JAGC will be automatically affiliated at the time of the 1986 Worldwide JAG Conference. Their formal affiliation will be accomplished by staff judge advocates sometime following the Conference.

The following Corps positions have been designated:

1. JAG Corps Commander (The Judge Advocate General),
2. JAG Corps Assistant Commander (The Assistant Judge Advocate General),
3. JAG Corps Chief of Staff (Executive Officer, OTJAG),
4. JAG Corps Personnel Officer (Chief, Personnel, Plans, and Training Office, OTJAG), and
5. JAG Corps Sergeant Major (JAG Corps Sergeant Major). The functions of these personnel will not change under the regimental system. Personnel management will follow the same general principles as before affiliation.

The regimental plan establishes honorary positions that carry a special significance for the JAG Corps. Appointees to these positions serve as ambassadors of history, perpetuating the traditions and lore of the Corps with the goal of enhancing unit morale and esprit. The position titles are Honorary Colonel of the Corps, Honorary Sergeant Major of the Corps, and Distinguished Members of the Corps.

The Honorary Colonel of the Corps (HCOC) is a distinguished retired commissioned officer in the grade of colonel or above who served in the Corps. The HCOC will serve for a three year renewable term. The duties of the HCOC are ceremonial in nature, such as attending Corps functions, delivering speeches on the legacy of the Corps at all levels of the organization, and publication of historical notes in Corps periodicals. The prestige, stature, and experience of the appointee will breathe life into the lessons of history for the soldiers of the Corps.

The Honorary Sergeant Major of the Corps (HSGMOC) is a distinguished retired noncommissioned officer in the grade of sergeant first class or above, with prior service in the Corps. The HSGMOC is also appointed for a three year renewable term, and his duties parallel those of the Honorary Colonel, with emphasis on Corps tradition relevant to enlisted soldiers.

Distinguished Members of the Corps (DMOC) may include active duty or retired officers, warrant officers, enlisted personnel, and civilians. All DMOCs must have served in the JAG Corps. Their tenure is indefinite and they serve at the pleasure of The Judge Advocate General. DMOCs supplement and assist the efforts of the Honorary Colonel and Honorary Sergeant Major. There is no limit to the number of persons who may be appointed as DMOCs.

Regimental accouterments will include Distinctive Unit Insignia (crest), colors, and flag. The JAGC colors and flag will become the Corps regimental colors and flag. The design of the crest will be determined competitively. The competition is open to all members of the JAGC (active, Reserve, and retired), and details will be provided by separate message from OTJAG. Suggested crest designs must be submitted to OTJAG (ATTN: DAJA–PT) by the end of June 1986. The design of the crest will be revealed at the Worldwide JAG Conference, and the Distinctive Unit Insignia will be distributed after procurement. Insignia for Reserve Component personnel will be distributed through the Judge Advocate Guard and Reserve Affairs Department, TJAGSA; the crests must be procured with USARS funds.

The U.S. Army Regimental System offers an excellent opportunity to enhance the spirit of the Corps. Honorary members of the Corps will energize the history of our organization. As former members distinguished in their own right, the honorary appointees will be uniquely qualified to transform the traditions of the Corps into the guiding principles of JAGC soldiers.

Claims Information Management*

Audrey E. Slusher
Information Management Officer, U.S. Army Claims Service

Since the U.S. Army Claims Service (USARCS) relocated to Fort Meade in 1971, it has been provided computer support through a host tenant agreement with the Fort Meade U.S. Army Information Systems Command. While the Claims Service appreciates the support rendered by the Information Systems Command, that support is no longer timely, cost effective, or adequate. It is not timely because DA Form 3 data is transmitted by mail, transcribed at USARCS onto discs which are retained in-house, delivered to the Information Systems Command once a month, organized by computers onto ADP reports, and then distributed to the field claims offices approximately thirty to forty-five days after the cycle began. It is not cost effective because USARCS personnel transport the data via automobile to and from the Information Systems Command for each edit. It is not adequate because the output does not totally address the complete management of claims data and cannot be manipulated. The current program which minimally supports USARCS information needs is outdated and in severe need of revision. Colonel Robert D. Hamel, USARCS Commander, summed up the situation by observing, "As the first to automate, we're the first to antiquate."

In 1980, USARCS began studying office automation. Claims attorneys needed more than the electric typewriter for their clerks to use to prepare legal memoranda. Many resources were being wastefully utilized in repetitive typing chores. Thus, the USARCS initiated a study for word processing equipment, which later developed into a data processing study.

This study merged with other studies undertaken in compliance with The Judge Advocate General's Memorandum[1] tasking the JAG Corps to use automation technologies to improve mission support and enhance ability to render timely, accurate, and complete legal services.

An Information Systems Plan (ISP)[2] was completed in 1983, the same time The Judge Advocate General's ISP was completed. The USARCS ISP proposed three action plans toward ultimate worldwide automation for claims:

Action Plan 1—an In-house CLAIMS System
Action Plan 2—a Worldwide CLAIMS System
Action Plan 3—a Worldwide CLAIMS System considering STARNET (Standard Army Network).

In May 1984, the Assistant Secretary of the Army (Financial Management) approved a Product Manager Charter that designated LAAWS (Legal Automation Army Wide System) as a STAMMIS[3] (Standard Army Multicommand Management Information System). The USARCS, as a field operating agency of OTJAG, is a module of LAAWS identified as CLAIMS (Claims Legal Automated Information Management System).

Lacking the in-house expertise or resources to implement the ISP and comply with the provisions of Army Regulation 25–1, The Army Information Program, USARCS hired a consultant to assist in defining and refining automation needs in terms of developing the documentation required by regulation. The contract was awarded on 28 September 1984 and completed on 15 August 1985, at a cost of $145,800. As a result of this contract, the USARCS acquired a Plan of Action, a Functional Description, a Data Requirements Document, and a Management Plan. These deliverables establish the points of reference and detailed descriptions needed for system design and implementation. They provide the players with foundation for coordination with the U.S. Army Information Systems Development Center, Atlanta, the U.S. Army Information Systems Engineering Command-CONUS, Fort Ritchie, and other support agencies identified in the Product Manager Charter.

The USARCS is now in the market for both interim and long-term hardware and software solutions for CLAIMS. Unfortunately, funding constraints have impaired progress. Currently, the Information Management Office, Office of The Judge Advocate General, is seeking $7.85 million to fund the CLAIMS project. Of this amount, $850,000 would go to establish an in-house CLAIMS system at USARCS, and $7 million would be used to establish claims terminals at major Army commands and installations for ultimate networking through the Defense Data Network.

At present, USARCS has one personal computer which is shared by approximately fifteen users for personnel, training, budget, library, TDA, and case management applications. A custom WALT terminal is also available for WESTLAW automated legal research.

As an interim measure, the USARCS is purchasing 23 personal computers (PCs). Expected date of delivery is 1 May 1986. Though this purchase of PCs will not fulfill the USARCS goal of automating claims data management (via DA Form 3), it promises to streamline several key functions in claims processing, particularly carrier recovery and office administration.

Currently, a study team established by the Commander, USARCS, comprised of USARCS personnel and representatives from six field offices, is in the process of revising the DA Form 3 (Individual Claims Data Report). Revision of

*Third in a series of articles discussing automation. This series began in the January 1986 issue of *The Army Lawyer*.

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

[2] U.S. Army Claims Service Information Systems Plan, 31 Mar. 1983.

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

the DA Form 3 is necessary because the current form captures only limited information on a specific claim. This effort, recently reactivated after several months, is progressing well.

Progress in automation by some of the field offices is commendable. Certain offices have developed CLAIMS packages that are assisting them in their day-to-day business. As principal implementer of the Army Claims Program, USARCS is anxious not only to ensure a mutually beneficial automated interface with field offices for claims data management, but also a sharing of effective CLAIMS applications among field offices. To that end, USARCS invites field offices to submit copies of locally-developed CLAIMS applications for USARCS evaluation, the results of which will be disseminated to all.

Dedicated, concerted effort is devoted to the full implementation of CLAIMS to provide timely, accurate and complete legal services as directed by The Judge Advocate General, with the ultimate goal of sharing information with USARCS worldwide claims offices.

The Claims Service has devoted extensive effort to the study and analysis of automation and is now ready to move forward. The USARCS welcomes any suggestions or ideas on any aspect of CLAIMS automation. The USARCS point of contact is Audrey E. Slusher, Information Management Office, Autovon 923–7009/4344.

USALSA Report

U.S. Army Legal Services Agency

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Trial Counsel Forum

Trial Counsel Assistance Program

This month's Trial Counsel Forum *features Part I of a two-part article which questions whether the concept of service connection, as set forth in the United States Supreme Court's opinion in* O'Callahan v. Parker, *still retains its vitality as a standard for determining court-martial jurisdiction within the military justice system. Part I addresses the original bases underlying the* O'Callahan *opinion and traces the development of the concept of service connection by the Supreme Court and the military appellate courts up to the 1980 Court of Military Appeals decision in* United States v. Trottier. *Part II will address the effects of a decade of applying service connection upon the military community; the development of service connection following the* Trottier *decision; and, within the context of this development suggest new approaches that trial counsel may pursue in establishing court-martial jurisdiction over off-post offenses committed by soldiers assigned within the territorial jurisdiction of the United States.*

Service Connection: A Bridge Over Troubled Waters

Major James B. Thwing
Trial Counsel Assistance Program

Part I

"[H]istory teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[1]

No other single opinion has had as much effect upon the armed forces and its system of justice as has the United States Supreme Court's opinion in *O'Callahan v. Parker.*[2] When a bare majority of Justices of the Court[3] determined in 1969 that the 1956 general court-martial of Sergeant James F. O'Callahan was without jurisdiction because his offense was not "service connected," they probably had no idea that this single decision would have as much influence upon military justice as it has had. Despite the fact that the opinion has undergone severe criticism both in and out of the military community and the fact that the Supreme Court itself has on several occasions modified the original foundations of *O'Callahan*, its central holding has seemingly withstood the test of time:

> [T]o be under military jurisdiction [, the crime] must be service connected, lest "cases in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits on an indictment by a grand jury and a trial by a jury of his peers.[4]

Even so, the 1980 Court of Military Appeals decision in *United States v. Trottier,*[5] its 1983 decision in *United States v. Lockwood,*[6] and its most recent decisions in *United States v. Solorio*[7] and *United States v. Scott*[8] have begun to test the original foundations of service connection. In turn, these soundings have stirred a considerable number of recent opinions by the respective courts of military review which have ignored considerable past precedent by expanding the frontiers of court-martial jurisdiction.[9] The issue that has been directly joined by these various opinions is whether service connection has become a permissive standard for determining court-martial jurisdiction, as opposed to a strict standard for denying the existence of subject-matter jurisdiction.

The Intent of *O'Callahan v. Parker*

The issue confronting the Supreme Court in *O'Callahan* was whether a court-martial had jurisdiction to try a member of the armed forces charged with commission of a crime cognizable in a civilian court and *having no military significance*, which was alleged to have been committed by the accused off-post and while he was on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court.[10] This issue was clearly one of first impression for the Supreme Court. Indeed, a considerable precedent preexisting the *O'Callahan* opinion established that liability to trial by court-martial was a question of "status"—"whether the accused in the court-martial proceeding [was] a person who [could] be regarded as falling within the term 'land and naval Forces.' "[11] In commenting on the gradual broadening reach of court-martial jurisdiction in his 1958 article, Frederick Bernays Wiener wrote:

> [T]he scope of offenses triable by courts-martial has been gradually but steadily broadened. Originally it was held that the phase "to the prejudice of good order and military discipline" in the general article modified the words "all crimes not capital" as well as the expression "disorders and neglects," so that when a crime was committed against a person wholly unconnected with a military service, and no military order or rule of discipline was violated in and by the act itself, such act would not constitute a military offense. Otherwise stated, the general article did not confer a general criminal jurisdiction. But if the offense was committed while the soldier was in uniform, or in a place where civil justice could not conveniently be exercised, the transgression was held to be a military one; and the broader construction was sustained by the Supreme Court in two cases involving sentinels. In 1863, common-law felonies, including capital ones, were expressly made punishable in time of war. Next, beginning in 1916, common-law felonies were made military offenses at all times, except that murder and rape committed within the continental United States in time of

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[1] Justice Douglas writing for the majority in O'Callahan v. Parker, 395 U.S. 258, 267 (1969).

[2] 395 U.S. 258 (1969).

[3] The majority included Justices Douglas, Black, Brennan, and Marshall, and Chief Justice Earl Warren who retired shortly after the opinion was handed down.

[4] 395 U.S. at 263, 272. *See* Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After* O'Callahan v. Parker, 25 A.F.L. Rev. 1 (1985).

[5] 9 M.J. 337 (C.M.A. 1980).

[6] 15 M.J. 1 (C.M.A. 1983).

[7] 21 M.J. 251 (C.M.A. 1986).

[8] 21 M.J. 345 (C.M.A. 1986).

[9] *See, e.g.*, United States v. Abell, Misc. Doc. No. 1986/1 (A.C.M.R. 11 Mar. 1986); United States v. Householder, 21 M.J. 613 (A.F.C.M.R. 1985); United States v. Griffin, 21 M.J. 501 (A.F.C.M.R. 1985); United States v. Benedict, 20 M.J. 939 (A.F.C.M.R. 1985); United States v. Roa, 20 M.J. 867 (A.F.C.M.R. 1985); United States v. Williamson, 19 M.J. 617 (A.C.M.R. 1984); United States v. Mauck, 17 M.J. 1033 (A.C.M.R.), *petition denied,* 19 M.J. 106 (C.M.A. 1984).

[10] 395 U.S. at 261 (1969).

[11] Kinsella v. United States *ex rel* Singleton, 361 U.S. 234, 240 (1960).

peace could not be tried by court-martial. In time of peace, soldiers accused of civilian offenses were still required to be turned over to the civil authorities on request. Finally, in 1951, the Uniform Code of Military Justice removed all existing limitations so that even murder and rape were made triable by court-martial at all times; and the matter of delivery to the civilian authorities was made a matter of regulation.[12]

Consequently, when the Supreme Court in *O'Callahan* chose to supplant "status" with "service connection" as a standard for assessing courts-martial jurisdiction, its determination to do so was totally contrary to the accepted tradition of law to that point. Although Justice Douglas asserted in his opinion that service connection was consistent with the development of law on this issue, legal analysis fails to support his reasoning. Indeed, in his 1971 *Military Law Review* article, then—Major Paul J. Rice accurately pointed out that

> A repudiation by the *O'Callahan* majority of the principle of law developed in [*Ex Parte Quirin*, 317 U.S. 1 (1942), *Coleman v. Tennessee*, 97 U.S. 509 (1878) and *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960)] would have been more admirable than the insistence that *O'Callahan* is consistent with [these] cases.[13]

By removing the vestige of "status" as the standard for courts-martial jurisdiction, Justice Douglas reached the conclusion that Sergeant O'Callahan had been denied "*first*, the benefits of an indictment by a grand jury and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution"[14] Justice Douglas found that the military justice system was without equivalent guarantees. Indeed, while he found that there was "a genuine need for special military courts," he also found that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[15] For this reason, he concluded, consistent with a passage contained in *Toth v. Quarles*,[16] that the jurisdiction of courts-martial should be limited to "the least possible power adequate to the end proposed."[17] According to the majority opinion in *O'Callahan*, the "end" could be identified by using several factors that the Court found indicated a lack of service connection: (1) the accused's proper absence from the military base; (2) the lack of connection between the accused's military duties and the alleged crimes; (3) the fact that the crimes were not committed on a military post on enclave; (4) the victim of the crimes was not performing duties relating to the military; (5) the situs of the crime was not an armed camp; (6) the alleged offenses dealt with peacetime offenses, not with authority stemming from the war power; (7) the civil courts were open; (8) the offenses were committed within the territorial limits of the United States, not in an occupied zone or foreign country; and (10) the offenses did not involve any questions of flouting of military authority, the security of a military post, or the integrity of military property.[18]

Several conclusions can be drawn from this discussion that are instructive in determining the intent of the majority of the Court. First, the majority opinion presented a stark departure from preceding cases which had clearly established "status" as a standard for determining court-martial jurisdiction. Second, this departure from past precedent was not inadvertent. Third, the application of "service connection" was not limited to the *O'Callahan* case. Indeed, if any clarity to the majority opinion exists at all, it is the statement: "The catalogue of cases put within reach of the military is indeed long; and *we see no way of saving to servicemen and servicewomen* in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial."[19] Fourth, the majority assumed without comment or proof that a serious offense committed by a soldier, alone, bears no military significance. Finally, evidence of service connection would exist if the offense had a palpable relationship to a military duty, function, location, or interest.

Consequently, setting aside any underlying motives that any member of the majority may have had in acquiescing to the principal findings in *O'Callahan*, these conclusions amply demonstrate that the concept of service connection was intended to restrict courts-martial jurisdiction to the greatest extent possible over crimes committed within the territorial limits of the United States during peacetime. The concept of status was determined by the majority of the Court to be the "beginning of the inquiry" into the issue of court-martial jurisdiction, "not its end."[20] In this regard, the majority stated " '[s]tatus' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless, of the nature, time, and place of the offense."[21]

Application of Service Connection by the Supreme Court

In an article written while a professor, Chief Judge Robinson O. Everett observed that:

> The majority opinion in *O'Callahan* does not make clear which factors are sufficient to create service-connection of an offense, and military jurisdiction over the offense. For instance, does it suffice to show service-connection if the victim of an offense is in the military?

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[12] Wiener, *Courts-Martial and the Bill of Rights*, 72 Harv. L. Rev. 1, 11–12 (1958).

[13] Rice, O'Callahan v. Parker: *Court-Martial Jurisdiction, "Service Connection," Confusion and the Serviceman*, 51 Mil. L. Rev. 41, 56 (1971). This article compellingly demonstrates several other critical errors made by the majority in *O'Callahan*.

[14] 395 U.S. at 262.

[15] *Id.* at 265.

[16] 350 U.S. 11 (1955).

[17] 395 U.S. at 265.

[18] *Id.* at 273.

[19] *Id.*

[20] *Id.* at 267.

[21] *Id.*

> Or if the victim is a civilian dependent or employee? Must either the accused or the victim be in uniform? What if the offense occurred on a military reservation? Or in Government quarters? Is the rank of the accused important? Is it significant whether military property, or Government property generally is involved? There obviously will be considerable litigation in determining what are the proper tests of "service-connection;" and the necessity for this litigation would seem to be added reason for hesitancy in casting aside the previously established, much simpler test of military status.[22]

Shortly after these issues were posed, they were brought into focus before the United States Supreme Court in *Relford v. Commandant.*[23] The accused in *Relford* was convicted by general court-martial in 1961 of two specifications of kidnapping and two specifications of rape. Each of the offenses occurred on an Army installation. One of the rape and kidnapping victims was an Army dependent; the other was a civilian employee of the Army. At the time of the offenses, the accused was on active duty with the Army and was not in a leave or other "non-duty" status.

Before the Supreme Court, Relford argued that the service connection requirement established in the *O'Callahan* case demanded that:

> Before a court-martial may sit . . . the crime itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action . . . that [the] charges . . . do not involve a level of conduct required only of servicemen . . . [and] that occurrence of the crimes on a military reservation and the military dependent identity of one of his victims do not substantially support the military's claim of a special need to try him.[24]

Predictably, Relford also argued that because the Supreme Court in *O'Callahan* recognized that a court-martial was to a significant degree a specialized part of the overall mechanism by which military discipline is preserved, there was no basis for a court-martial to exercise jurisdiction over the charged offenses, notwithstanding the fact that his offenses took place on a military installation.

In approaching the issue of the proper application of service connection to these claims, the Court reviewed the factors identified by the majority in *O'Callahan* to assess the existence of court-martial jurisdiction. In so doing, the Court identified twelve factors present in *O'Callahan*, commenting that "this listing of factors upon which the Court relied for its result in *O'Callahan* reveals, of course, *that it chose to take an ad hoc approach to cases where trial by court-martial is challenged.*"[25]

Consequently the Court then turned to the factors in Relford's case that, as spelled out in *O'Callahan*, were relevant to the issue of court-martial jurisdiction. This approach proved that there were as many of the *O'Callahan factors* present in Relford's case as there were ones missing. Additionally, the Court found other significant factors in Relford's case.

> The first victim was the sister of a serviceman who was then properly at the base. The second victim was the wife of a serviceman stationed at the base; she and her husband had quarters on the base and were living there. Tangible property properly on the base, that is, two automobiles, were forcefully and unlawfully entered.[26]

Although the Court readily concluded that the contrasted comparative elements between *O'Callahan* and *Relford* revealed that the crimes charged against Relford were subject to court-martial jurisdiction, the Court was confronted with the additional claim posed in Relford's brief that the "apparent distinctions" between Relford's case and O'Callahan's case "evaporate" when viewed within the context of service connection.[27] Given the compelling need to resolve this claim, the Court enunciated *nine* additional factors amplifying the concept of service connection:

> (a) The essential and obvious interest of the military in the security of persons and property on the military enclave;
>
> (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order;
>
> (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission;
>
> (d) The conviction that Art I, § 8, cl. 14, vesting in the Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish;
>
> (e) The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community;
>
> (f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance;

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[22] Everett, O'Callahan v. Parker—*Milestone or Millstone in Military Justice?*, 1969 Duke L.J. 853 [hereinafter cited as Everett].

[23] 401 U.S. 355 (1971).

[24] *Id.* at 363.

[25] *Id.* at 365 (emphasis added).

[26] *Id.* at 366.

[27] *Id.* at 367.

(g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article;

(h) The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law; [and]

(i) *Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman's-defendant's on-duty and off-duty activities and hours on the post.* [28]

These "*Relford* factors" unquestionably enlarged the concept and application of service connection. Additionally, the Court made it clear that these factors did not present a final close to the issue of service connection. The Court recognized that any subsequent analysis of court-martial jurisdiction would, as in the *Relford* case, be an *ad hoc* approach. The Court set the stage for this reality, stating "*O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military *may* not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. *What lies between is for decision at another time.*" [29]

The next time that the Supreme Court dealt with the concept of service connection was the case of *Schlesinger v. Councilman.* [30] In that case, the Court was asked to enjoin military authorities from proceeding with the court-martial of Captain Councilman. Captain Councilman, while stationed at Fort Sill, Oklahoma, allegedly wrongfully sold, transferred, and possessed marijuana. While off duty and wearing civilian clothing Councilman sold marijuana to Specialist Four Glenn D. Skaggs, an enlisted soldier working as a confidential undercover agent. At the time of the alleged sale, Specialist Skaggs was also not in uniform. The alleged sale of marijuana was conducted off post. Based upon Skaggs' investigation, Councilman was apprehended by civilian authorities, who searched his off-post apartment and found additional quantities of marijuana. Councilman thereafter was remanded to military authorities. After his case was referred to a general court-martial, Councilman unsuccessfully challenged the jurisdiction of the court-martial. Subsequently, he appealed this ruling to the district court which permanently enjoined the Army from proceeding with the court-martial. The Tenth Circuit Court of Appeals affirmed this ruling, holding that only one of the *O'Callahan* and *Relford* factors pointed to service connection, "the factor relat[ing] to the rank of the persons involved in the incident or the fact that both were servicemen." [31] Thereafter, the Solicitor General filed a petition for writ of certiorari addressing the issue of service connection.

The Supreme Court decided not to rule directly on the issue of whether the military had jurisdiction because the Court felt that Councilman had not exhausted those remedies already available within the military justice system. In addressing the equities of compelling Captain Councilman to pursue his claim of lack of jurisdiction through the military justice system, the Supreme Court rendered the following compelling observation:

> We see no injustice in requiring respondent to submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well. Of course, if the offenses with which he is charged are not "service connected," the military courts will have had no power to impose any punishment whatever. But that issue turns in *major part* on gauging the impact of an offense on military discipline and effectiveness, on determining whether the offense is distinct from and greater than that of civilian society, and *on whether the distinct military interest can be vindicated adequately in civilian courts.* These are *matters of judgment* that often will turn on the precise set of facts in which the offense has occurred. More importantly, *they are matters as to which the expertise of military courts is singularly relevant,* and their judgments indispensable to inform any eventual review in Art. III courts. [32]

This language was tremendously significant because, at the most, it suggested that an offense committed by a soldier, despite the situs of its commission, may bear such "military significance" that the military interest in adjudicating the offense would be rightfully superior to any civilian interests thereto. At the least, the language offered substantial support to the nine factors set forth in *Relford* further expanding the concept of service connection.

It is important to note that in neither *Relford* nor *Councilman* did the Supreme Court discuss the implications of its decisions within the context of each respective petitioner's constitutional rights to a grand jury investigation and jury trial, as it did in *O'Callahan*. Seemingly, the centerpoint of the *O'Callahan* decision was the balance between the military interests and these constitutional rights. The Court did discuss this issue in other cases outside of the context of service connection, thus providing further contrasts with in approach in *O'Callahan.*

In *Brown v. Glines,* [33] the Supreme Court was presented with a challenge to an Air Force regulation that required members of that service to obtain approval from their commanders before circulating petitions on Air Force bases. The petitioner, Captain Glines, was in the Air Force Reserve. While on active duty during a routine training flight through Anderson Air Base, Guam, he gave petitions addressed to several members of Congress and to the Secretary of Defense complaining about the Air Force's grooming standards to an Air Force sergeant without obtaining approval from the base commander. Subsequently, Glines' commander removed him from active duty, determined that he had failed to meet professional standards

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[28] *Id.* at 367–69 (emphasis added) (citations and discussion omitted).

[29] Id. at 369 (emphasis added).

[30] 420 U.S. 738 (1975).

[31] Councilman v. Laird, 481 F.2d 613, 614 (10th Cir. 1973).

[32] 420 U.S. at 760 (emphasis added).

[33] 444 U.S. 348 (1980).

expected of an officer, and reassigned him to the standby reserves. Glines then brought suit in a United States District Court claiming that the Air Force regulations requiring prior approval for the circulation of petitions violated, among other things, the first amendment of the Constitution. After both the district court and the Ninth Circuit Court of Appeals ruled that the regulation was facially invalid, the issue was presented to the Supreme Court.

In reviewing previous decisions that addressed the precise issues raised in *Brown v. Glines*, the Court reaffirmed the position it took earlier in *Parker v. Levy*:[34]

> [W]hile members of the military services are entitled to the protections of the First Amendment, "*the different character of the military community and of the military mission requires a different application of those protections*". . . . The rights of military men must yield somewhat "to meet certain overriding demands of discipline and duty". . . . Speech likely to interfere with these *vital prerequisites* for military effectiveness can be excluded from a military base.[35]

In so stating, the Court also reaffirmed an observation first made in *Schlesinger v. Councilman*:

> To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on *unique military exigencies* as powerful now as in the past.[36]

This observation stood in such stark contrast to the thrust of *O'Callahan* that a substantial question existed following *Councilman* whether military courts were still bound to submit to the restrictions of service connection as defined in *O'Callahan*. This question remained unanswered, however, as *Councilman* was the last case that the Supreme Court addressed the issue of service connection. Even so, it is arguable that the Supreme Court did answer the question by leaving it in the hands of the military courts when it observed in *Councilman* that:

> In enacting the Code, Congress attempted to balance . . . military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted. As a result, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges "completely removed from all military influence or persuasion," who would gain over time thorough familiarity with military problems. . . . [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to responsibly perform its assigned task. *We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.*[37]

Accordingly, it is important to examine how the military system adjusted to and applied to concept of service connection as outlined in *O'Callahan v. Parker*.

Application of "Service Connection" by Military Courts

Early Developments

Predictably, military courts were met with an immediate series of issues in applying the *O'Callahan* opinion, including whether *O'Callahan* had extraterritorial application, whether it applied differently to officers, whether it applied to off-post offenses committed by soldiers in uniform, and whether it applied to petty offenses. Interestingly, despite the criticisms of the military justice system made by the majority in *O'Callahan*, the early opinions by the respective boards of review reflected a careful application of, as opposed to a rigorous submission to, service connection.

In *United States v. Taylor*,[38] the Army Board of Review held, with respect to a charge involving the off-post forgery of a stolen check, that:

> Our evaluation of the entire record in this case leads us to conclude, *unhesitatingly*, that the offense of forgery alleged against [the accused] was service connected. We note the following factors: a fellow soldier . . . was the owner of the check; accused found the check in the barracks (a soldier's home and "castle") at Fort Carson (a military post), Colorado; . . . although cashed at a downtown Colorado Springs bank, the forged instrument *operated to the prejudice of a member of the armed force.*[39]

Similarly, in *United States v. Konieczko*,[40] the Army Board of Review determined that service connection was sufficiently present even though the accused was charged with possessing marijuana off post and during normal off-duty hours. Writing for the Army board Judge Stevens stated:

> In my view, the services have a legitimate and direct interest in convicting and punishing soldiers found on or off post, in wrongful possession of marijuana before they use or transfer it. I would find as a fact that the offense with which [the accused] was charged, of which he was convicted, and for which he was sentenced has *substantial military significance*, and I therefore conclude that the court-martial which tried him and jurisdiction to do so. . . .[41] The Court of Military Appeals was less circumspect in applying

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[34] 417 U.S. 733 (1974).

[35] 444 U.S. at 354 (emphasis added) (citations omitted).

[36] 420 U.S. at 757 (emphasis added).

[37] *Id.* at 757.

[38] 40 C.M.R. 761 (A.B.R. 1969), *petition denied*, 40 C.M.R. 327 (1969).

[39] *Id.* at 766 (emphasis added).

[40] 40 C.M.R. 767 (A.B.R. 1969).

[41] *Id.* at 770.

O'Callahan. In *United States v. Borys*,[42] the court was confronted with the issue of whether the offenses of robbery, rape, and sodomy committed by an Army officer while in an off-duty status, in Augusta, Georgia, and Aiken, South Carolina, against civilian victims, were service connected. The Court of Military Appeals concluded they were not, and accordingly held that there was no court-martial jurisdiction. After a careful review of *O'Callahan*, the court found no distinction between the facts in *O'Callahan* and those in *Borys*. In viewing the issue of the status of the accused, the court stated the "accused's military status was *only a happenstance* of chosen livelihood, having nothing to do with his vicious and depraved conduct, and none of his acts were 'service connected' under any test or standard set out by the Supreme Court."[43]

On the same day that *Borys* was decided, the Court of Military Appeals determined in *United States v. Prather*,[44] that the off-post offenses of wrongful appropriation of an automobile, robbery, and resisting arrest committed by a soldier in the townships of Marietta and Mableton, Georgia were not service connected. The court did not inquire into the duty status of the accused or the accused's reasons for being at either of these locations. Instead, the court perfunctorily held:

> [W]here the crimes involve civilians unconnected with the military, if the offenses are not committed on a military post, do not occur at "an armed camp under military control, as are some of our far-flung outposts," do not breach military security, flout military authority, or affect military property, and if civil courts are open, the offenses are not "service connected". . . . Tested by *this standard* the crimes committed by Prather are not service connected within the meaning of *O'Callahan*.[45]

One week after *Prather*, the Court of Military Appeals was not apparently so constrained by "this standard." In *United States v. Beeker*,[46] the court determined that the off-post offenses of use and possession of marijuana were of such "singular military significance" that they were "outside the limitation of military jurisdiction set out in the *O'Callahan case*."[47]

These early positions established a trend later used by the court as a pattern for applying the concept of service connection into the mid-1970s. For example, the court determined that there was no service connection in off-post offenses against civilians involving sodomy,[48] indecent acts with children,[49] carnal knowledge,[50] "bad checks,"[51] housebreaking,[52] and murder.[53] Similarly, the court's early views that illicit off-post drug activities by soldier's were inherently service connected were carried forward in subsequent cases.[54] In turn, the respective military courts of review eventually departed from their original positions and conformed to these patterns. There were exceptions, however.

For example, the Court of Military Appeals found service connection *lacking* in a case involving an off-post larceny of two automobiles (one belonging to a retired Army officer) by a soldier in uniform who was absent without leave (AWOL).[55] One day later, however, the court held that service connection was present in a case involving the wrongful appropriation of an automobile where the accused, dressed in fatigues, appeared at a used-car lot, identified his unit, and obtained a car for a test drive and never returned it.[56]

The Court of Military Appeals demonstrated a similar capability to shade its general view of service connection as to drug activity and its "military significance." In *United States v. Morley*,[57] the accused was charged with off-post sales of lysergic acid diethylamide (LSD) and marijuana to an undercover federal narcotics agent. The offenses took place in Manhattan, Kansas, a community adjacent to Fort Riley, Kansas. The Court of Military Appeals, after a brief and superficial review of the facts of the case, perfunctorily held that because the accused was not charged with possession of marijuana or LSD or with their delivery to another soldier, the offenses were not service connected.

The Court of Military Appeals and the military courts of review thus established general patterns for applying the concept of service connection. However, by making exceptions to those patterns, which were often characterized by a superficial review of the facts and tortured reasoning, the courts portended future problems for both the military and its system of justice.

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[42] 18 C.M.A. 547, 40 C.M.R. 259 (1969).

[43] *Id.* at 549, 40 C.M.R. at 261 (emphasis added).

[44] 18 C.M.A. 560, 40 C.M.R. 272 (1969).

[45] *Id.* at 561, 40 C.M.R. at 273 (emphasis added).

[46] 18 C.M.A. 563, 40 C.M.R. 275 (1969).

[47] *Id.* at 565, 40 C.M.R. at 277.

[48] United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969). The victim was the accused's stepson. The charged offenses took place both on and off post. This case has since been reversed by United States v. Solorio, 21 M.J. 251 (C.M.A. 1986).

[49] United States v. McGonigal, 41 C.M.R. 94 (C.M.A. 1969). This case has also been reversed by *United States v. Solorio*.

[50] United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

[51] United States v. Wolfson, 21 C.M.A. 549, 45 C.M.R. 323 (1972).

[52] United States v. Camacho, 19 C.M.A 11, 41 C.M.R. 11 (1969).

[53] United States v. Armstrong, 19 C.M.A. 5, 41 C.M.R. 5 (1969).

[54] United States v. Sexton, 48 C.M.R. 662 (C.M.A. 1974); United States v. Lee, 47 C.M.R. 554 (C.M.A. 1973).

[55] United States v. Armes, 19 C.M.A. 15, 41 C.M.R. 15 (1969).

[56] United States v. Peak, 19 C.M.A. 19, 41 C.M.R. 19 (1969).

[57] 20 C.M.A. 179, 43 C.M.R. 19 (1970).

Application of Service Connection by CMA (1975–1979)

For the Court of Military Appeals, the years 1975 through 1979 were marked by the tenure of Chief Judge Albert E. Fletcher, who authored most of the leading opinions concerning the application of service connection. At the time of his appointment, the Supreme Court had decided *Schlesinger v. Councilman,* and, of course, *Relford v. Commandant* was well known to the court. In fact, in *United States v. Moore,*[58] one of the first cases in which Chief Judge Fletcher was confronted with the issue of service connection, he concluded that the twelve factors of service connection found in *O'Callahan,* balanced with the additional nine factors of *Relford,* within the context of *Councilman,* required a need for "*a detailed, thorough analysis* of the jurisdictional criteria enunciated [in *Relford*] to resolve the service connection issue in all cases tried by court martial."[59] Chief Judge Fletcher also made the following observation. "A more simplistic formula, while desirable, was not deemed constitutionally appropriate by the Supreme Court. *It no longer is within our province to formulate such a test.*"[60]

Consequently, in deciding in *Moore* whether there was court-martial jurisdiction over a soldier who had conspired off-post to avoid military service and collect $20,000 from the Serviceman's Group Life Insurance Program by feigning his drowning, Chief Judge Fletcher determined that "the military society's interests far outweighed those of the civilian community"[61] and that the offenses were triable by court-martial. In arriving at this holding, Chief Judge Fletcher concluded that the most compelling factor for determining service connection was "that the accused's military status, and that status alone, enabled [the accused] to devise and implement his scheme."[62]

While this opinion seemed to follow the trail blazed by the Supreme Court in *Relford* and *Councilman,* Chief Judge Fletcher's promise of a "detailed and thorough analysis" of service connection never materialized. Paradoxically, even Chief Judge Fletcher's observation that the court was "constitutionally prohibited" from formulating a simple test for service connection was, regretfully, overshadowed by later opinions of the court.

Shortly after *Moore* was decided, the court, in *United States v. Hedlund,*[63] was faced with determining whether there was service connection where the accused had conspired with his wife and two fellow Marines, on base, to commit a robbery at a town near the base. In the process of executing this plan, the accused and his co-conspirators encountered a hitchhiker (an AWOL Marine whose status was unknown to the accused) and kidnapped, beat and robbed him. The court held that there was no court-martial jurisdiction over the robbery and kidnapping offenses. Writing for the court, Judge Perry specifically applied the twelve *O'Callahan* factors to the factual setting of *Hedlund* and held that only one factor possibly favored court-martial jurisdiction—the status of the victim—and that factor was not sufficient because the accused was unaware of the victim's status. In amplifying this view, Judge Perry observed "we believe that the degree of interest by the military in this AWOL Marine is *de minimis* and, alone, will not result in 'service connection' as that term has come to be known."[64]

One week after *Hedlund* was decided, the court determined in *United States v. McCarthy*[65] that there was service connection where the accused transferred three pounds of marijuana to another soldier off-post but near one of the main gates to Fort Campbell, Kentucky. In referring both to *Relford* and *Councilman,* Chief Judge Fletcher determined that "[t]he military interest in this offense [was] pervasive."[66] He issued a strong warning concerning the factual setting of the case, however:

> [W]e wish to stress that this factual situation is materially different under *Relford* than those in which off-duty servicemen commit a drug offense while blended into the general populace. While it may very well be that a given civilian community takes a "hands-off" approach to marihuana, that circumstance, in and of itself, is an insufficient basis upon which to predicate military jurisdiction. . . . To the extent that *United States v. Beeker* . . . suggests a different approach in resolving *drug offense jurisdictional questions,* it *no longer should be considered viable precedent,* of this Court.[67]

This latter rationale was applied in *United States v. Williams.*[68] In *Williams,* the accused, an Air Force staff sergeant, was convicted of possessing marijuana. An informant told both civilian police and Air Force investigative agents that the accused possessed marijuana in his off-post apartment. This information led to the obtaining of a civilian search warrant and the subsequent search of the accused's apartment. Chief Judge Fletcher, writing the opinion for the court, held that the application of the *Relford* criteria compelled the conclusion that "[t]he off-post, off-duty use of hashish by a serviceman standing alone is simply not enough."[69] The opinion did not discuss the accused's duty position, the requirements of his mission, or whether he was off or on duty at the time of the discovery of the marijuana, nor did it examine the reasons why

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[58] 1 M.J. 448 (C.M.A. 1976).

[59] *Id.* at 450 (emphasis added).

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

[61] *Id.* at 451.

[62] *Id.*

[63] 2 M.J. 11 (C.M.A. 1976). *See* Cooper, O'Callahan *Revisited: Severing the Service Connection,* 76 Mil. L. Rev. 165, 170–71 (1977).

[64] *Id.* at 15.

[65] 2 M.J. 26 (C.M.A. 1976).

[66] *Id.* at 29.

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

[68] 2 M.J. 81 (C.M.A. 1976).

[69] *Id.* at 82.

the Air Force was contacted concerning the accused's alleged possession of marijuana. Additionally, it is of further interest to note that, contrary to Judge Fletcher's holding, the accused was not charged with *use* of marijuana. In a footnote to his opinion, addressing the dissenting opinion of Judge Cook, Chief Judge Fletcher rendered the following perplexing observation:

> Judge Cook's conclusion [regarding the sufficiency of service connection] as to the instant case ignores the evidence of record. Staff Sergeant Williams had served over 8 years of unblemished service characterized by the staff judge advocate as "exceptional." The record is replete with *clemency* recommendations and performance reports stressing his efficiency, industry, and ability. Numerous superiors, both officers and NCO's testified that despite the charge . . . each would willingly have the appellant back in the unit in his same duty station. *In light of this evidence it is puzzling to determine the factual basis for the dissent's conclusion of the presence of "service connection."*[70]

This holding was taken to its logical extreme in *United States v. Conn,*[71] where the court held that there was no service connection where the accused, a second lieutenant assigned to the Army Military Police Corps and serving as a company executive officer, was charged with the off-post use of marijuana. The accused used the marijuana in the presence of other military police officers from his own unit. In referring to these facts, Judge Fletcher observed that the accused's status or the status of the military police who observed him "[was] not sufficient alone to establish service connection over this particular offense charged under Article 134, UCMJ."[72]

An even more provoking application of service connection was established in *United States v. Klink.*[73] In *Klink,* the accused was charged with possession, transfer, and sale of marijuana to another soldier. These offenses were committed at the "Belvoir Bar and Grill," a location approximately *ten yards* from Fort Belvoir, Virginia. The Court noted that this establishment was virtually surrounded by Fort Belvoir. Despite its earlier holding in *United States v. McCarthy,* the court determined that service connection was lacking. In a *per curiam* opinion, the court provided the following rationale to justify its holding

> If a citizen of State "A" committed an offense cognizable by that state only yards across its borders in neighboring State "B," State "A" lacks jurisdiction over the subject-matter of that offense just as surely as if it had been committed hundreds of miles from its borders. *The boundary of a military installation is just as significant a border, and, absent sufficient service connection, that border is determinative.*[74]

According to the court, the basis for this rationale was contained in the "12 factors and the 9 additional factors of *Relford.*"[75]

Other types of offenses were not immune from this adaptation of service connection. In *United States v. Sievers,*[76] the accused, an active Army captain, met with two enlisted soldiers (one of whom was under the accused's direct command) at his off-post apartment and conspired to destroy his (the accused's) automobile. The automobile was located at Godman Army Airfield, Fort Knox, Kentucky. The accused provided his co-conspirators with a duplicate key to the car, enabling them to remove the car from the airfield parking lot. The two soldiers then took the car to a cliff a short distance from Fort Knox and maneuvered it over the cliff. Subsequently, the accused reported the car stolen and filed an insurance claim with his insurer. Two insurance checks were received by the accused at his on-post address. The accused was charged and convicted of larceny by false pretenses. He appealed his conviction, arguing that there was no court-martial jurisdiction over the offense. The Court of Military Appeals disagreed. Even so, the court determined that there was court-martial jurisdiction *only* because the object of the conspiracy to defraud—the insurance proceeds—were received by the accused at his on-post address and deposited in his on-post bank account. In *United States v. Hopkins,*[77] where the accused obtained an identification card from the Army, falsified it, and used the identification card at a civilian bank near his military base to make three separate withdrawals amounting to $10,479.16 from the bank account of a civilian, the court determined that there was a lack of service connection over the larceny charges. This holding was based upon the court's previous holding *United States v. Sims,*[78] where it rejected considerable precedent that service connection was present whenever an accused used his military status as a means of committing an off-post offense.

In *Sims,* the accused purchased stolen money orders from another soldier. The sale of the stolen money orders was completed on post. Writing for the court, Judge Perry found that there was no court-martial jurisdiction over the charges of forgery which arose from the cashing of the stolen money orders. Mislabelling the twelve service connection factors of *O'Callahan*—"*Relford* factors"—and applying them to the facts, Judge Perry found a lack of service connection. While he recognized the *O'Callahan* opinion was "lacking in truly meaningful guidelines,"[79] Judge Perry nevertheless rejected a series of earlier Court of

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[70] *Id.* at 82 n.2 (emphasis added).

[71] 6 M.J. 351 (C.M.A. 1979).

[72] *Id.* at 353.

[73] 5 M.J. 404 (C.M.A. 1978).

[74] *Id.* at 405 (emphasis added).

[75] *Id.*

[76] 8 M.J. 63 (C.M.A. 1979).

[77] 4 M.J. 260 (C.M.A. 1978).

[78] 2 M.J. 109 (C.M.A. 1977).

[79] *Id.* at 111.

Military Appeals precedents[80] that had found service connection where the accused's abuse of military status was the "moving force" in the commission of an off-post offenses. Judge Perry observed that the viability of these earlier cases had been "negated by the United States Supreme Court in . . . *Relford v. Commandant.*"[81] Apparently anticipating this view, the government had urged the court to reevaluate its position, arguing that the Supreme Court had materially altered *O'Callahan* and *Relford* by its subsequent opinions in *Schlesinger v. Councilman, Parker v. Levy,*[82] and *Gosa v. Mayden.*[83] Judge Perry responded to this argument in a footnote, observing that:

> While we do not differ materially with Government counsel in their reading of these cases, we cannot agree that they, sub silentio, amount to an overruling of *O'Callahan* and *Relford.* We believe that if, and when, the Supreme Court intends to overrule *O'Callahan* and *Relford* and to expand the jurisdiction of a military tribunal, it can and will do so in terms as explicit as those it used to restrict that jurisdiction.[84]

At the close of a decade of *O'Callahan's* applicability to the military justice system, and addressing the role of the Court of Military Appeals in ensuring the constitutional rights of soldiers, Chief Judge Fletcher commented in *United States v. Ezell* that, "It is essential for this Court to keep pace with the constitutional evolution of the military justice system fashioned by the Supreme Court and the *emerging realties of life in the modern military community.*"[85] It seems questionable whether the Court of Military Appeals fulfilled this view regarding the application of the *O'Callahan* case. During the decade following *O'Callahan,* rarely did the Court of Military Appeals pay homage to the presumed constitutional rights of a military accused to a grand jury indictment and a trial by jury. The court regularly failed to balance these presumed rights realistically with those similar rights already available to soldiers and invested in the military justice system by Congress. The court compounded this failing by not considering the practical realities of military life itself; especially following the *Relford* and *Councilman* opinions.

Indeed, in *United States v. Jones,*[86] Senior Judge Dunbar, writing for the Navy Court of Military Review, assessed Chief Judge Fletcher's view of the Court of Military Appeals set out in *Ezell:*

> [B]y claiming that the Supreme Court is fashioning 'military justice evolution' the Court of Military Appeals is, in effect, attributing responsibility for the legality of its own acts upon the Supreme Court. Yet, the claim of the Court of Military Appeals, that the Supreme Court is fashioning the constitutional evolution of military justice appears completely at odds with the language of the United States Supreme Court in cases such as *Burns v. Wilson.*[87]

Indeed, it is clear that by the end of Chief Judge Fletcher's tenure as chief judge, the Court of Military Appeals had applied the concept of service connection to a restrictive level beyond that which was *originally* intended by the majority in *O'Callahan.* One learned commentator has suggested that the court's application of service connection was but one aspect of a larger effort by Chief Judge Fletcher to conform the military justice system as nearly as possible to civilian criminal practice.[88] Notwithstanding this possible motive, the Court of Military Appeals' application of the concept of service connection created grave problems for military prosecutors and the commanders they advised. The effects of the entire decade of *O'Callahan's* application to court-martial jurisdiction unquestionably created enormous pressures on the administration of military justice. The frustrations created by this pressure were placed into perspective by Senior Judge Dunbar in *Jones* when he echoed the sentiments of a considerable segment of the military community:

> Reduced to its simplest terms, the central issue in this controversy is the continuing and somewhat successful effort of the High Court to transform and "civilianize" the unique nature of military justice, its words and terms, practices, procedures and substantive law. . . . "[C]ivilianization" constitutes a kind of unwarranted and unauthorized reorientation, a new and unverified way of looking at military matters, one which might very possibly do subtle and irreparable harm to the militaristic spirit and ideals of our Armed Forces whose traditional heroism, reliability and proven effectiveness should not be capriciously tampered with.[89]

It was under this state of affairs that the concept of service connection entered the 1980s. This decade was to be characterized by the appointment of a new Chief Judge of the Court of Military Appeals, who had written about *O'Callahan* in 1969. "There are many devices available for limiting materially the effect of *O'Callahan.* However, in preference to a gradual erosion of its strength, the Supreme

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[80] United States v. Wolfson, 45 C.M.R. 323 (C.M.A. 1972); United States v. Peterson, 41 C.M.R. 319 (C.M.A. 1970); United States v. Frazier, 41 C.M.R. 40 (C.M.A. 1969); United States v. Morisseau, 41 C.M.R. 17 (C.M.A. 1969).

[81] 2 M.J. at 111.

[82] 417 U.S. 733 (1974).

[83] 413 U.S. 665 (1973).

[84] *Sims,* 2 M.J. at 112 n.8.

[85] 6 M.J. 307, 326 (C.M.A. 1979) (Fletcher, C.J. concurring) (emphasis added).

[86] 7 M.J. 806 (N.C.M.R. 1979).

[87] *Id.* at 811. The opinion in Burns v. Wilson, 346 U.S. 137 (1953), is worth reading. It is considered to be the "keystone" of the concept of "military necessity."

[88] Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System,* 76 Military Law Review 43, Spring 1977. This article presents a masterful exigesis of the Court of Military Appeal's efforts at judicial "engineering" during a three year period of Judge Fletcher's tenure as Chief Judge of the Court.

[89] 7 M.J. at 810.

Court should take the earliest opportunity to overrule the case."[90]

[90] Everett *Supra* note 22, at 896.

Expectation of Privacy in a Barracks Room: A Plain View

Since the end of the Viet Nam War, the lifestyle of the average soldier has dramatically improved. From the inception of the All Volunteer Army through the current force structure, a myriad of perquisites have been created to make garrison duty less tedious and, therefore, more attractive.

Life in the barracks has undergone a significant metamorphosis. On most installations, where enlisted soldiers and junior noncommissioned officers live in non-training, permanent party environments, the open squad bay is a thing of the past. Most soldiers currently reside in barracks which are divided into rooms designed to accommodate two to four soldiers. As a result, the wholesale lack of privacy which generations of Americans came to expect as a normal concomitant of military service is not routinely encountered after basic and advanced training.

Although conditions have improved considerably for the private soldier, they cannot be compared or equated with those routinely enjoyed by the average civilian.[1] Because soldiers are commonly subject to a plethora of daily intrusions[2] that are directly related to military service, the various military tribunals have never been willing, even in this more enlightened era, to accord to the barracks room the "sanctity" of a civilian's private home.[3] Nonetheless, there is little doubt that soldiers do entertain some objectively reasonable expectation of privacy, for fourth amendment purposes,[4] in their rooms and the government property supplied to them to secure their personality.[5]

Recently, the Court of Military Appeals reviewed an intrusion into a Marine barracks room[6] and further defined the parameters of the actual expectation of privacy that members of all the armed services might enjoy in a barracks environment. In December 1983, a corporal informed Sergeant Keane that he suspected illegal drugs were being distributed from a room within the barracks which was occupied by Lance Corporal Lansing.[7] Apparently the building was designed very much like a standard motel; the rooms all faced in the same direction and each has a large glass window next to a door that led outside to a common walkway/balcony. The room in which the drug transactions were suspected of occurring was located only two doors down from the room assigned to Sergeant Keane.

Subsequently, Sergeant Keane, dressed in civilian clothes, walked outside onto the common passage and casually observed the room in question for a few hours. During this time, twenty to thirty persons knocked on the door of Lansing's room. They received no response as Lansing was on duty and his roommate was on leave. Finally, two individuals knocked on Lansing's door and then proceeded to the quarters occupied by the accused, Lance Corporal Wisniewski. After some discussion, Wisniewski left the area, contacted Lansing, and obtained the key to his room. Upon his return to the barracks, he and two other individuals entered Lansing's room and closed the door.

When Sergeant Keane observed the three Marines enter the room, he walked down the common passage to the window of Lansing's quarters. He noted that the door to the room had automatically locked when it closed behind Wisniewski, that the venetian blind over the window was secured, but that there was a minute opening, measuring *⅛-inch by ⅜-inch*, in the blind. Sergeant Keane placed his face against the window, peered into the opening, and saw the accused transfer a white substance to the other two men, who consumed some of the substance. Shortly thereafter, Sergeant Keane entered the room, confronted Wisniewski, and apprehended him.

The Navy-Marine Court of Military Review considered the government's arguments that Wisniewski did not have adequate interest (standing) in the room or locker assigned to Lansing,[8] Sergeant Keane was not acting in an official capacity when he observed the defendant's criminal conduct,[9] and Sergeant Keane was not conducting a "search" when he peered through the tiny hole in the venetian blind. After a thorough review of Supreme Court and military precedent, the court overturned the decision of the military judge, holding that Wisniewski had an adequate interest in Lansing's room and wall locker, that Sergeant Keane *was* acting in an official capacity, and that his conduct amounted to an unlawful search for evidence.

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[1] Committee for G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975) ("From his first day in boot camp, the soldier has come to realize that unlike his civilian counterpart he is subject to extensive regulation by his military superiors. The soldier cannot reasonably expect the army barracks to be a sanctuary like his civilian home."); United States v. McCormick, 13 M.J. 900, 904 (N.M.C.M.R. 1982).

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

[3] United States v. Lewis, 11 M.J. 188 (C.M.A. 1981); United States v. Hessler, 4 M.J. 303 (C.M.A. 1978); United States v. Brouillette, 3 M.J. 767 (A.F.C.M.R. 1977).

[4] For purposes of the fourth amendment, the courts have recognized an abbreviated, but objectively reasonable, expectation of privacy from "searches" conducted by government personnel in barracks rooms. *See* United States v. Mitchell, 3 M.J. 641, 643 (A.C.M.R. 1977). This expectation of privacy, however, does not protect a soldier from reasonable apprehensions in a barracks room without a prior formal "authorization." *See* United States v. McCormick, 13 M.J. 900 (N.M.C.M.R. 1982); R.C.M. 302 (e)(2).

[5] Mil. R. Evid. 314(d), 316(d)(3).

[6] United States v. Wisniewski, 21 M.J. 370 (C.M.A. 1986).

[7] United States v. Wisniewski, 19 M.J. 811 (N.M.C.M.R. 1984).

[8] Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Lawless, 18 M.J. 255 (C.M.A. 1984); Mil. R. Evid. 311 (a)(2). To have a sufficient interest to challenge a search, a person must have a reasonable expectation of privacy in the person, place, or property searched.

[9] United States v. Portt, 17 M.J. 911 (A.F.C.M.R. 1984); United States v. Aponte, 11 M.J. 917 (A.C.M.R. 1981); United States v. Pansoy, 11 M.J. 811 (A.F.C.M.R. 1981). The fourth amendment protects individuals from unreasonable searches conducted by government officials. When an intrusion occurs as the result of the actions of a private party or a person acting in a private capacity, the fourth amendment does not control and the Exclusionary Rule cannot be invoked, *See* Mil. R. Evid. 311(c).

Because the viewing was not properly "authorized" [10] and did not fall within one of the recognized "exceptions," [11] the court ruled that it was unlawful. The subsequent entry into the room and seizure of physical evidence was determined to be derivative of the illegal search. [12] Consistent with this ruling, the court set aside the verdict and sentence. Thereafter, the Judge Advocate General of the Navy certified two specific issues to the Court of Military Appeals:

I

WHETHER THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND THAT THE ACCUSED'S EXPECTATION OF PRIVACY IN THE BARRACKS ROOM AND WALL LOCKER ASSIGNED TO ANOTHER WAS REASONABLE WHEN THE ACCUSED AND TWO OTHERS, NONE OF WHOM WERE ASSIGNED THE BARRACKS ROOM, ENTERED THAT UNOCCUPIED BARRACKS ROOM SOLELY FOR THE PURPOSE OF DISTRIBUTING LSD.

II

WHETHER THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND A SERGEANT'S SEARCH TO BE UNLAWFUL WHEN, WITH PROBABLE CAUSE TO BELIEVE THAT DRUGS WERE BEING DISTRIBUTED BY THE ACCUSED IN A BARRACKS ROOM, THE SERGEANT PEERED THROUGH THE WINDOW, SAW DRUGS BEING DISTRIBUTED, ENTERED THE ROOM AND OBTAINED DRUGS FROM THE ACCUSED.

Judge Cox, after reviewing and evaluating the lower court's reasoning, concluded that the court had erred in both instances and reversed its decision.

In arriving at its conclusion, the Court of Military Appeals accepted, without deciding, that Sergeant Keane had been acting in an "official" capacity. [13] Further, Judge Cox, citing *Rakas v. Illinois*, [14] recognized that an individual could have "standing" or adequate interest in a place other than his or her own home so that the fourth amendment would offer protection from unreasonable government intrusion into that place. [15]

The court determined that the "ultimate issue" in this (or any case involving the protections of the fourth amendment) was "whether there has been an official invasion of a legitimate expectation of privacy." [16] In this particular matter, Judge Cox concluded that "there was no reasonable expectation of privacy invaded by the actions of Sergeant Keane as he did *nothing more than look through an opening available to any curious passerby.*" [17]

The Court of Military Appeals, relying upon *Texas v. Brown*, [18] *United States v. Lewis*, [19] the Military Rules of Evidence, [20] and other precedent, [21] reasoned that the actions of Sergeant Keane amounted to nothing more than a plain view observation. [22] Judge Cox determined that Wisniewski "had no reasonable expectation of privacy from visual intrusions in the place and objects observed because they could be viewed *with ease* from a public walkway." [23]

Sergeant Keane's entry into the room followed closely upon his plain view observation of an illegal drug transaction in progress. Once lawfully in the quarters, his actions were not undermined simply because Wisniewski had placed the contraband in the wall locker and secured it out of sight.

This decision reinforces the well-established fact that while soldiers do not abandon their fourth amendment rights when they become subject to the Uniform Code of Military Justice, their *objectively* reasonable expectations of privacy are significantly diluted by the rigors, exigencies, and practical realities of military duty. A soldier's life in the barracks, whether in a small room with one roommate, or in a large open bay which is shared by a platoon, can never and should never be equated with a civilian counterpart. Members of the armed forces, even in garrison, are subject to a system of discipline that is absolutely necessary in a military environment.

Wisniewski and *Lewis* implicitly recognize that a soldier's life in the barracks operates upon a substantially lesser expectation of privacy than one might expect to encounter in a college dormitory or in a civilian apartment complex. Finally, these decisions clearly acknowledge and lend active support to the vital role that relatively junior noncommissioned officers play in the maintenance of order and imposition of discipline.

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[10] The military equivalent to the civilian search warrant is the search authorization. Although it must be express, it need not be in writing or based upon a sworn affadavit. Search authorizations may be issued upon probable cause by commanders and, in the Army, by military judges and magistrates. Mil. R. Evid. 315; Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, para. 9-7 (1 July 1984) (C1, 15 Mar. 1985).

[11] Mil. R. Evid. 314, 316.

[12] 19 M.J. at 819.

[13] 21 M.J. at 372.

[14] 439 U.S. 128 (1978).

[15] 21 M.J. at 372-73.

[16] *Id.*

[17] *Id.*

[18] 460 U.S. 730 (1983).

[19] 11 M.J. 188 (1981).

[20] Mil. R. Evid. 316(d)(4)(c).

[21] Washington v. Chrisman, 455 U.S. 1, 5-6 (1982).

[22] When an individual is engaged in otherwise lawful activity and observes *in a reasonable manner* either contraband or evidence of crime, he or she may seize the item in question. *See* Andresen v. Maryland, 427 U.S. 463 (1976); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Sanchez, 10 M.J. 273 (C.M.A. 1981); Mil. R. Evid. 316(d)(4)(C); P. Gianelli, F. Gilligan, E. Imwinkelreid & F. Lederer, Criminal Evidence 267 (1979).

[23] 21 M.J. at 372-73.

Probable Cause for "Shakedown" Generalized Barracks Searches

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Introduction

The purpose of this article is to assist defense counsel in determining whether probable cause exists for "shakedown" generalized barracks searches which result in evidence of criminal activities that the prosecution intends to introduce at trial.[1]

The fourth amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

The Court of Military Appeals has interpreted the application of the fourth amendment to the United States military as follows:

> The protections of the Fourth Amendment are applicable to members of the armed services of the United States, *United States v. Ezell,* 6 M.J. 307 (C.M.A. 1979). It is, of course, true that the concept of "military necessity" has led to holdings that the Fourth Amendment was not applicable in some instances because of the exigencies shown to exist. However, where exigent circumstances which invoke the concept of military necessity are not shown to exist, "the Fourth Amendment applies with equal force within the military as it does in the civilian community."[3]

General Exceptions to Fourth Amendment Requirements

There are a number of categories of searches which do not fall under fourth amendment protection: border searches, searches upon entry to United States installations, searches aboard aircraft and vessels, searches of government property,[4] consent searches, searches incident to a lawful stop or apprehension, searches within confinement facilities, emergency searches to safe life or for related purposes, searches of open fields or woodlands, and certain other searches not requiring probable cause under the Constitution.[5] Additionally, relevant evidence obtained from properly conducted inspections and inventories is admissible without regard to fourth amendment requirements.[6]

An inspection or inventory made for the primary purpose of obtaining evidence for use in trial by court-martial or other disciplinary proceedings, however, is not included in this rule, and probable cause must be established.[7] In *United States v. Hay,* the Army Court of Military Review explained the distinction between a permissible inspection and a generalized search:

> Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose. An inspection is distinguished from a generalized search of a unit or geographic area based upon probable cause in that the latter usually arises from some known or suspected criminal conduct and usually has a law enforcement as well as a possible legitimate inspection purpose.[8]

Accordingly, defense counsel should be alert for the possibility of a subterfuge inspection or inventory with an underlying law enforcement purpose.

Standing: Reasonable Expectation of Privacy of Soldiers in a Barracks Setting

A person may not contest a search unless he or she has a reasonable expectation of privacy in the place searched.[9] The Supreme Court has stated:

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection. . . . But what he seeks to

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[1] The Court of Military Appeals recently granted a petition on the scope of a generalized search of an entire barracks based on stolen items found outside in an open-air stairwell. United States v. Moore, CM 445536 (A.C.M.R. 15 Mar. 1985), *petition granted,* 20 M.J. 305 (C.M.A. 1985).

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

[3] United States v. Fimmano, 8 M.J. 197, 199 (C.M.A. 1980), (quoting United States v. Ezell, 6 M.J. 307 (C.M.A. 1979)) (other citations omitted).

[4] Fourth amendment protection does exist for searches of government property where there is a reasonable expectation of privacy. *See infra* text accompanying notes 9–31.

[5] Mil. R. Evid. 314.

[6] Mil. R. Evid. 313.

[7] *Id.*

[8] 3 M.J. 654, (A.C.M.R. 1977). A good analysis of this dichotomy is found in Teller, *Litigating the Validity of Compulsory Urinalysis Inspections Under Mil. R. Evid. 313(b).* The Army Lawyer, Mar. 1986, at 41.

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

preserve as private, even in an area accessible to the public, may be constitutionally protected.[10]

Justice Harlan, in his concurring opinion, refined this distinction into a "twofold requirement, first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[11]

The Court of Military Appeals has set forth the general test to establish a reasonable expectation of privacy as "whether or not the particular locale is one in which there was a reasonable expectation of freedom from governmental intrusion."[12] Under Military Rule of Evidence 311, which governs whether there is a reasonable expectation of privacy, "it is the burden of the party seeking application of the exclusionary rule to show his entitlement to its invocation."[13]

Various military cases have discussed several areas in a barracks setting which may or may not generate a reasonable expectation of privacy.[14] Military courts have considered the following factors: legitimate presence at the scene of the search or ownership of, or possessory interest in, the place or thing to be searched;[15] accessibility to the public generally or the individual's ability to exclude others from the area or object;[16] and the relative value society grants to the particular type of object or location.[17]

Military courts have held that where the area alongside a barracks is available for general access, there is no reasonable expectation of privacy with respect to passersby, whether casual or official.[18] Further, the Court of Military Appeals has held that there is no reasonable expectation of privacy invaded when a passerby peers through an opening in the blinds of a barracks window, because any curious person might have looked through the opening.[19] Within the barracks, there is no reasonable expectation of privacy in common hallways or common areas.[20] There is no reasonable expectation of privacy in a work area where no personal effects are authorized and the equipment is not assigned to individuals.[21] Nor is there an expectation of privacy in the common latrine of a barracks[22] or a soldier's laundry bag.[23]

Soldiers do have a reasonable expectation of privacy in their barracks quarters to that degree normally associated with a private dwelling, except for intrusions related to a legitimate government interest.[24] That expectation may, however, be reduced by unit policy; for example, a battery policy that rooms in barracks be left unlocked.[25] Also, no reasonable expectation of privacy exists in a cubicle divided from other cubicles by lockers placed perpendicular to the wall, but which is not separated by any barriers from an open passageway running the length of the quarters.[26]

Within the barracks quarters, there is a reasonable expectation of privacy in a wall locker,[27] in the base of venetian blinds,[28] and with respect to the contents of a chest of drawers as well as the contents of containers kept therein.[29]

As for visitors, a casual visitor has a limited expectation of privacy; however, it does not extend to the interior of a dresser placed in the room for use by the assigned occupants.[30] Finally, an item left in possession of another generally results in a gratuitous bailment, in which case a reasonable expectation of privacy may exist.[31]

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[10] Katz v. United States, 389 U.S. 347, 351 (1967).

[11] *Id.* at 361 (Harlan, J., concurring).

[12] United States v. Weckner, 3 M.J. 546 (A.C.M.R. 1977); United States v. Rosado, 2 M.J. 763, 765 (A.C.M.R. 1976). *Accord* United States v. Simmons, 22 C.M.A. 248, 46 C.M.R. 288 (1973).

[13] United States v. Lawless, 18 M.J. 255 (C.M.A. 1984); United States v. Sherman, 13 M.J. 978, 981 (A.C.M.R. 1982).

[14] This section addresses only the reasonable expectation of privacy that a soldier may have in various areas of a barracks. Its scope does not include areas or situations outside the barracks, such as automobiles, personal articles while travelling, etc., nor does it include searches of the person. Because reasonable expectation of privacy is a constitutional question, federal cases may also prove useful to research.

[15] United States v. McCullough, 11 M.J. 599, 601 (A.F.C.M.R. 1981); United States v. Duckworth, 9 M.J. 861, 864 (A.C.M.R. 1980).

[16] United States v. Lewis, 11 M.J. 188 (C.M.A. 1981); United States v. Kozak, 9 M.J 929 (A.C.M.R. 1980); United States v. Bailey, 3 M.J. 799 (A.C.M.R. 1977); United States v. Webb, 4 M.J. 613 (N.C.M.R. 1977).

[17] United States v. Roberts, 2 M.J. 31 (C.M.A. 1976).

[18] United States v. Lewis, 11 M.J. 188 (C.M.A. 1981).

[19] United States v. Wisniewski, 21 M.J. 370, 372 (C.M.A. 1986).

[20] United States v. Peters, 11 M.J. 901 (A.F.C.M.R. 1981).

[21] United States v. Taylor, 5 M.J. 669 (A.C.M.R. 1978).

[22] United States v. Bailey, 3 M.J. 799 (A.C.M.R. 1977).

[23] United States v. Gebhart, 10 C.M.A. 606, 28 C.M.R. 172 (1959).

[24] United States v. Roberts, 2 M.J. 31 (C.M.A. 1976); United States v. Hines, 5 M.J. 916 (A.C.M.R. 1978); United States v. Mitchell, 3 M.J. 641 (A.C.M.R.), *petition denied,* 8 M.J. 76 (C.M.A. 1977); *cf.* United States v. McCormick, 13 M.J. 900 (N.M.C.M.R. 1982).

[25] United States v. Lewis, 11 M.J. 188 (C.M.A. 1981).

[26] United States v. Webb, 4 M.J. 613 (N.C.M.R. 1977).

[27] United States v. Thomas, 1 M.J. 397 (C.M.A. 1976); United States v. Jones, 4 M.J. 589 (C.G.C.M.R. 1977).

[28] United States v. Rosado, 2 M.J. 763 (A.C.M.R. 1976).

[29] United States v. Audain, 10 M.J. 629 (A.C.M.R. 1980).

[30] United States v. Colter, 15 M.J. 1032 (A.C.M.R. 1983); United States v. Gould, 13 M.J. 734 (A.C.M.R. 1982). *Cf.* United States v. Curry, 15 M.J. 701 (A.C.M.R. 1983); United States v. Foust, 14 M.J. 830 (A.C.M.R.), *aff'd,* 17 M.J. 85 (C.M.A. 1983).

[31] United States v. Rollins, 3 M.J. 680 (N.C.M.R. 1977). *Cf.* United States v. Foust, 14 M.J. 830 (A.C.M.R.), *aff'd,* 17 M.J. 85 (C.M.A. 1983); United States v. Sanford, 12 M.J. 170 (C.M.A. 1981); United States v. Weckner, 3 M.J. 546 (A.C.M.R. 1977).

Generalized Searches Ordinarily Are Prohibited in the Federal Courts

Because the fourth amendment applies in the military as it does in the civilian sector, except where exigent circumstances involving military necessity exist,[32] it is useful to see how federal courts have viewed generalized searches. In the federal courts, generalized searches based on warrants covering entire buildings, with certain exceptions, have been universally condemned. These exceptions include instances where there is a minor technical deficiency in the warrant itself; the multi-unit character of the building was neither known to the officer applying for the warrant nor externally apparent; all occupants of the premises had common access to the main living areas, or the defendant owned the entire premises; and illegal actions are suspected of occurring throughout the entire building so that probable cause exists for the whole unit rather than a particular subunit.[33]

In *United States v. Hinton*,[34] the Seventh Circuit Court of Appeals held that, where a search warrant described an entire multi-unit building, there must be probable cause for searching each particular unit. In *Hinton*, the affidavit alleged that criminal activity by certain named persons had taken place somewhere on the premises, but did not specify any particular residence. The court found that, unless every unit in the building was the residence of at least one of the named suspects, a general warrant for search of the entire premises did not sufficiently identify the specific place in which there was probable cause to believe that a crime was being committed, and therefore was void.[35]

In *United States v. Busk*,[36] where illegal gambling was known to have occurred in one unit of a multi-unit dwelling, a warrant authorizing a search of all units was held invalid. The court noted that "[a] search warrant directed against an apartment house will usually be held invalid if it fails to describe the particular apartment to be searched with sufficient definiteness to preclude a search of other units located in the building and occupied by innocent persons."[37]

Generalized Searches Ordinarily Are Prohibited in Military Practice

The Roberts *Decision*

In *United States v. Roberts*,[38] the Court of Military Appeals held that general exploratory searches, with or without a warrant, were forbidden ordinarily as unreasonable. In *Roberts*, the commander, after being advised that 21 of 60 men in the fuels branch were suspected of being involved with drugs, and that two soldiers had been apprehended with drugs at their duty stations, authorized an inspection of the entire barracks for the purpose of discovering marijuana.[39] The court first noted that, although a soldier cannot reasonably expect an Army barracks to be a sanctuary like a civilian home, military quarters have some aspects of a dwelling or home in which soldiers are entitled to fourth amendment protections against unreasonable searches and seizures.[40] Because reasonableness could not be stated in rigid and absolute terms, however, the court found that an appraisal of reasonableness necessarily turned on the particular factors in each situation.[41]

Regarding the general inspection, the court stated:

> The so-called "shakedown inspection" is not a new phenomenon to this Court. . . . Apparently, the event is contemplated as a thorough search of a general area, such as a barracks or a group of buildings (as opposed to a particular living area or room) or all persons and things in that area (as opposed to a particular, suspected person) for specific fruits or evidence of a crime, based upon "probable cause" to believe that such material will be found somewhere in that general area. This Court is unable to discern the constitutional basis for such a fishing expedition, nor is one apparent in this Court's precedents which seem merely to accept such a procedure as one "which has long been recognized."[42]

Accordingly, the court condemned such dragnet-type search operations as being constitutionally intolerable.[43]

As the three judges in *Roberts* expressed different viewpoints, each of their opinions must be analyzed separately. Judge Perry authored the lead opinion and concluded that the generalized search of a barracks building based on suspicion that one-third of its occupants were engaged in drug-related criminal activity, with two actually apprehended at their duty stations, was an unreasonable search under the fourth amendment.[44] Chief Judge Fletcher's concurrence was based on his concurring opinion in *United States v.*

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[32] *See infra* text accompanying notes 50–77.

[33] Annot., 11 A.L.R.3d 1330, 1332–33 (1967 & 1984 Supp.)

[34] 219 F.2d 324 (7th Cir. 1955).

[35] *Id.* at 326.

[36] 693 F.2d 28 (3d Cir. 1982).

[37] *Id.* at 30 (quoting United States v. Higgins, 428 F.2d 232 (7th Cir. 1970)). *See also* United States v. Whitney, 633 F.2d 902 (9th Cir. 1980), *cert. denied*, 450 U.S. 1004 (1981).

[38] 2 M.J. 31 (C.M.A. 1976).

[39] *Id.*

[40] *Id.* at 36 (citations omitted).

[41] *Id.* at 33.

[42] *Id.* at 35 (citations omitted).

[43] *Id.* at 36.

[44] *Id.* at 32, 36.

Thomas,[45] in which he opined that, because of the deleterious effect of drugs on the military mission, he would allow commanders broad discretion to conduct "reasonable" inspections even without probable cause in order to ferret out drug abuse. He would not allow the fruits of such searches to be admitted as evidence, however.[46] Finally, Judge Cook dissented on the ground that, in certain cases, military inspections similar to civilian "area code-enforcement" inspections approved by the Supreme Court should be allowed.[47] He grounded his opinion on the compelling factors establishing that the military unit residing in the barracks was responsible for handling volatile and high-explosive material, and that one-half of the unit was suspected of drug abuse and two had actually been apprehended.[48]

The Army Court of Military Review has taken the position in *United States v. Fontenette*[49] that, because of the divergence of opinion in *Roberts,* the Court of Military Appeals did not necessarily overrule previous cases on generalized searches. Thus, in mounting an attack on a barracks search, counsel should also consider the factors discussed in pre-*Roberts* cases on the issue of reasonableness.

Probable Cause Based on Exigent Military Circumstances

As noted earlier, exigent circumstances of military necessity may require a different application of constitutional rights to soldiers.[50] Analytically, the factors traditionally considered in determining exigent military circumstances generally fall into two categories. One looks to the gravity of the crime, focusing on its potential effect on the military mission of the unit, and the other looks to the immediacy of the crime, focusing on the opportunity the criminal may have had to escape or remove the fruits of the crime.

The first prong focuses is particularly strong when examining the potential effect of drugs on a military unit. In *United States v. Mitchell,*[51] a large amount of marijuana was found in a mortar platoon just before the unit was scheduled to deploy to Alaska for field exercises and training. The company commander, apprehensive about the ability of his unit to perform its mission, decided to reinspect the unit barracks.[52] The court emphasized the view expressed earlier in *Roberts* that ridding a unit of debilitating contraband was a legitimate matter going to the fitness of that unit to perform its military mission.[53] The Army court however, distinguished *Roberts* on the grounds that the need to have tactical units at the peak of readiness on the country's outer defensive perimeter outweighed the accused's expectation of privacy, and upheld a search of that platoon's barracks.[54] The court emphasized that the company commander appropriately confined his search to the fewest number of persons and the least intrusion possible.[55]

In *United States v. Hessler,*[56] the Court of Military Appeals held that, when a staff duty officer smelled burning marijuana outside an overseas barracks room, he was justified in entering that room without a warrant. The court, however, indicated that the scope of such an intrusion was not unlimited, and distinguished the immediate search from a delayed search for dormant marijuana which might require search authorization based on probable cause.[57]

Similarly, in *United States v. Owens,*[58] the Air Force Court of Military Review held that smelling marijuana burning on a barracks floor gave probable cause to search that entire floor. The court, however, expressed reservations about the search of an upper floor (not an issue at trial), where there was no evidence of marijuana being smoked.[59]

Finally, in *United States v. Fontenette,*[60] the Army court held that, where a significant amount of marijuana was found in the common areas of the barracks in two separate places, a search of the entire barracks was justified. The court was careful to distinguish *Roberts,* pointing out that in *Roberts* there was nothing directly connecting marijuana to the personnel living in the barracks, while in *Fontenette* drugs were actually discovered in the barracks.[61]

A case illustrating the impropriety of a search in cases where the command had no real basis for suspicion of illicit activity in the barracks is *United States v. Hay.*[62] In *Hay,* the Army court held that a commander's generalized

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[45] 1 M.J. 397 (C.M.A. 1976).

[46] 2 M.J. at 36 (Fletcher, C.J., concurring in the result).

[47] Such inspections are used to enforce criminal provisions in fire, health and housing codes. United States v. Roberts, 2 M.J. at 37 n.1 (Cook, J., dissenting).

[48] *Id.* at 37 (Cook, J., dissenting).

[49] 3 M.J. 566 (A.C.M.R. 1977).

[50] United States v. Fimmano, 8 M.J. 197 (C.M.A. 1980). *Accord* United States v. Hessler, 4 M.J. 303 (C.M.A. 1978), *reaff'd on rehearing,* 7 M.J. 9 (C.M.A. 1979). In *Hessler,* the Court of Military Appeals noted that the Supreme Court had not yet had the opportunity to directly address what exigent military circumstances would constitutionally justify a different application of the fourth amendment to a service member. 7 M.J. at 305 (C.M.A. 1985).

[51] United States v. Mitchell, 3 M.J. 641 (A.C.M.R.), *petition denied,* 8 M.J. 76 (C.M.A. 1977).

[52] *Id.* at 642.

[53] *Id.*

[54] *Id.* at 643.

[55] *Id.*

[56] United States v. Hessler, 4 M.J. 303 (C.M.A. 1978), *reaff'd on rehearing,* 7 M.J. 9 (C.M.A. 1979).

[57] *Id.* at 305–06.

[58] 48 C.M.R. 636 (A.F.C.M.R. 1974), *aff'd,* 50 C.M.R. 906 (C.M.A. 1975).

[59] *Id.* at 640 n.4.

[60] 3 M.J. 566 (A.C.M.R. 1977).

[61] *Id.* at 569.

[62] 3 M.J. 654 (A.C.M.R. 1977).

search of a barracks for contraband such as knives and illegal ration, meal and identification cards was unlawful.[63] The court reached this conclusion after it noted that the government failed to show that illegal knives were a problem in the barracks or that possession and use of identification cards was plaguing the unit or adversely affecting military security, discipline, or privileges.[64] Moreover, the court could not find any other military necessity for the search, and determined accordingly that there was no probable cause to search the entire barracks.[65]

The second analytical prong focuses on the immediacy of the crime and whether the perpetrator could have escaped with the fruits of the crime. For example, in *United States v. Schafer,*[66] an airman was found brutally murdered, with a trail of blood and bloodstained clothing leading toward the barracks in "the 26th area" of the airbase. Several hours after the body was found, but before the murderer was identified, the base commander authorized a search of the 26th area, including twenty barracks and five other buildings.[67] The Court of Military Appeals held that this generalized search was certainly not unreasonable, but was virtually compelled by the circumstances.[68]

In *United States v. Harman,*[69] the Court of Military Appeals considered the propriety of a generalized search of a barracks building after a larceny was committed. The crime was reported immediately and the building was secured.[70] Under these circumstances, the court concluded that there was little time to carry away the stolen money and it was highly likely that it was still in the possession of an occupant of the barracks.[71] Consequently, with many of the occupants due to ship out later that day, there was probable cause to search the entire barracks.[72]

Similarly, in *United States v. Drew,*[73] a particular pattern of larcenies led to probable cause to search an entire barracks. In that case, a series of thefts occurred in a military police barracks.[74] Subsequently, several occupants were transferred to another barracks, and the thefts stopped in the first barracks but began in the second barracks.[75] On the first duty day after three separate larcenies were committed, the commander authorized a search of the entire barracks.[76] Under these circumstances, the court held that "(i)t was entirely reasonable to search for articles so recently the object of larceny."[77]

Trial Procedure for Suppression Motions

There are several matters which defense counsel should consider in preparing for trial. First, where the government attempts to introduce evidence from a shakedown search, it is incumbent upon defense counsel to make a timely suppression motion.[78] Because defense counsel may be required to specify the grounds for suppression,[79] he or she should investigate all underlying facts leading to the probable cause determination and the issuance of any warrant,[80] analyze those facts in light of the cited legal principles, and clearly articulate a theory of inadmissibility. At trial, defense counsel should endeavor to force the government, which has the burden of proof,[81] to explain its theory underlying probable cause. If the government claims that the search did not require probable cause because it fell within one of the cited exceptions or constituted a legitimate inventory or inspection, defense counsel should be prepared to show why this claim masks a subterfuge "shakedown" search. Assuming none of the exceptions apply, the government must establish probable cause for the general search. Defense counsel should then focus on whether the government had a real or colorable claim of military exigency. Special findings may be requested in order to clarify the grounds for a finding of probable cause.[82] Even if the motion is unsuccessful at trial, the issue will then be well preserved for appeal.

Conclusion

It is apparent from a review of the foregoing principles that the military imposes strict requirements on "shakedown" generalized barracks searches. As is shown by the

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[63] *Id.* at 656.

[64] *Id.*

[65] *Id.*

[66] 13 C.M.A. 83, 32 C.M.R. 83 (1962).

[67] *Id.* at 86, 32 C.M.R. at 86.

[68] *Id.* at 87, 32 C.M.R. at 87.

[69] 12 C.M.A. 180, 30 C.M.R. 180 (1961).

[70] *Id.* at 182, 30 C.M.R. at 182.

[71] *Id.* at 183, 30 C.M.R. at 183.

[72] *Id.*

[73] 15 C.M.A. 449, 35 C.M.R. 421 (1965).

[74] *Id.* at 455, 35 C.M.R. at 427.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Mil. R. Evid. 311(a)(1), 311(d)(2)(A).

[79] Mil. R. Evid. 311(d)(3).

[80] Another ground for suppression may be defective issuance of a search warrant. This topic is beyond the scope of this article. *See* Mil. R. Evid. 315 regarding search warrants.

[81] Once the defense has raised the issue, the government has the burden of proving by a preponderance that the evidence was not obtained as a result of unlawful search of seizure. Mil. R. Evid. 311(e)(1).

[82] Because Mil. R. Evid. 311(d)(4) requires the military judge to state essential findings of facts when ruling on suppression motions, defense counsel may suggest that particular findings of fact are essential to a resolution of the motion.

wide divergence of opinions in *Roberts*, however, the Court of Military Appeals has yet to adopt a unified approach to such searches. Such an approach may be adopted in *United States v. Moore*.[83] In the meantime, it is important for trial defense counsel to litigate cases aggressively in which the government attempts to introduce evidence obtained from generalized searches.

[83] CM 445536 (A.C.M.R. 15 Mar. 1985), *petition granted*, 20 M.J. 305 (C.M.A. 1985).

Chapter 5 Discharge After Court-Martial Conviction Does Not Abate Proceedings

Defense counsel should advise their officer clients that acceptance by the Secretary of the Army of a "resignation in lieu of trial" under the provisions of Army Regulation 635–120,[1] *after* a court-martial conviction, does not require the Army Court of Military Review to set aside the conviction. In *United States v. Woods,*[2] the Army court, contrary to the precedents of *United States v. Gwaltney,*[3] and *United States v. Corcoran,*[4] declined to set aside the conviction, holding that once court-martial jurisdiction attached, it continued until the completion of the appellate process. Woods' intervening administrative discharge, resulting from acceptance at the secretarial level of his resignation, did not deprive the court of jurisdiction or affect the legality of the conviction;[5] it merely affected the execution of the approved sentence. Clients who submit Chapter 5 resignations should be aware that if they are convicted prior to the acceptance of the resignation, the federal conviction will remain, although they probably would receive the benefit of an other than honorable discharge.[6] Captain Joseph Tauber.

Dollars from Heaven

For over twenty years, sentencing authorities have been known to omit the words "per month" from a punishment of partial forfeitures of pay. Standing alone, forfeitures announced in this fashion constitute only a lump sum in the dollar amount stated for the entire period (if any) set out in the announcement.[7] A recent Army Court of Military Review case, *United States v. Henderson,*[8] has reaffirmed the validity of this rule. The court held that where the government failed to detect such an omission during its review and then (either knowingly or inadvertently) inserted the words "per month" into the action and promulgating order, it had erroneously approved an excessive amount of forfeitures. The burden is clearly on the government to detect the omission and take proper corrective action before authentication under Rule for Courts-Martial 1007(b),[9] or via proceedings in revision after authentication.[10] This burden was not altered by the sentence worksheet which clearly included the words "per month."[11] Neither was the Army court's opinion affected by trial defense counsel's post-trial submission which incorrectly stated the court's sentence by adding the words "per month" to the announced forfeitures.[12] Thus, if the announcement as to forfeitures lacks the words "per month," and the government does not correct the omission before the convening authority takes action, the issue may be raised on appeal and relief afforded.

Because most military judges will clarify any such unusual announcements as to forfeitures, or will do so, perhaps without even realizing it, while reviewing a pretrial agreement sentence limitation, cases such as *Henderson* do not occur frequently.[13] On those occasions when the sentencing authority fumbles the announcement and the government fumbles its chance to correct the record, however, the result for the client will truly seem like "dollars from heaven." Captain Stephen W. Bross.

O'Callahan Revisited: Jurisdiction Over Off-Post Offenses

The Court of Military Appeals and the Army Court of Military Review have recently issued opinions that appear to mark a radical departure from established precedent in the area of subject matter jurisdiction over off-post offenses. While the prosecution must still establish that an offense is service connected before court-martial jurisdiction attaches,[14] this task appears to be becoming easier.

In *United States v. Solorio,*[15] the Court of Military Appeals was faced with a fact situation that seemed to require a finding of no service connection. Solorio was convicted of offenses involving sexual abuse of the children of fellow Coast Guardsmen. The incidents occurred off-base in Alaska and on-base at Governors Island. At trial, the military

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[1] Dept. of Army, Reg. No. 635–120, Personnel Separations: Officer Resignations and Discharges (8 Apr. 1968) (C16, 1 Sep. 1982).

[2] CM 446894 (A.C.M.R. 10 Feb. 1986).

[3] 43 C.M.R. 536 (A.C.M.R. 1970) *aff'd,* 20 C.M.A. 488, 43 C.M.R. 328 (1971).

[4] CM 435724 (A.C.M.R. 9 Nov. 1977).

[5] United States v. Woods, slip op. at 8 (quoting United States v. Speller, 8 C.M.A. 363, 367–69, 24 C.M.R. 173, 177–79 (1957)).

[6] The Army court noted its authority to affirm the dismissal, but recognized that the Secretary of the Army still had the authority to disapprove the dismissal or substitute an administrative discharge and had, in fact, already characterized Woods' service as being under other than honorable conditions. United States v. Woods, slip op. at 37–38. Under these circumstances, the court saw no reason not to accept the inevitable and so did not affirm the dismissal. *Id.,* slip op. at 38.

[7] United States v. Johnson, 13 C.M.A. 127, 32 C.M.R. 127 (1962).

[8] 21 M.J. 853 (A.C.M.R. 1986).

[9] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1007(b).

[10] *Henderson,* 21 M.J. at 854. The court's conclusion about proceedings in revision seems contrary to the rationale of the cases cited in its support.

[11] *Id.* at 853.

[12] *Id.*

[13] These cases will not, however, vanish entirely as long as the standard sentence worksheet—the phrasing of which encourages misspoken announcements—is used.

[14] For background on the issue of service connection and subject matter jurisdiction, *see* Relford v. Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1968); United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983); United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). *See also* Cooper, O'Callahan *Revisited: Severing the Service Connection,* 76 Mil. L. Rev. 165 (1977).

[15] 21 M.J. 251 (C.M.A. 1986).

judge made detailed findings of fact concerning the off-base offenses. These findings uniformly militated against subject matter jurisdiction.[16]

In spite of these findings, the Court of Military Appeals decided, contrary to its own precedent,[17] that subject-matter jurisdiction existed over the off-base offenses. The court relied upon the reasoning of *United States v. Trottier*, in which the court moved away from a strict following of the *Relford* factors to a "suitable response to changing conditions that affect the military society."[18]

In *Solorio*, the court found one of these "changing conditions" to be recent increased concern for the victims of crime.[19] The court then determined that, in cases of child sexual abuse, the parents "also are in many ways victims of the crime."[20] This, coupled with the impact on the victim's father's duty performance[21] and the inability to effectively assign Solorio in the future,[22] formed, in the court's view, a satisfactory basis for service connection. The rule of *Solorio* appears to be that, in off-post offenses involving military dependent victims, a showing of a "continuing effect on the victims and their families and ultimately on the morale" of the unit or organization to which the defendant is assigned tends to establish service connection.[23]

In support of its decision, the court noted that offenses about which there was no dispute concerning jurisdiction, *i.e.*, the on-base offenses, were pending before the same court-martial. The court repeated the rule from *United States v. Lockwood* that, while the doctrine of pendent jurisdiction was inapplicable to courts-martial, "some of the factors which underlie that doctrine also tend to establish service-connection."[24] The interest that the government had in disposing of all offenses together, therefore, "helps provide a basis for finding service connection for the off-base offenses."[25]

In *United States v. Stover*,[26] the Army Court of Military Review relied upon *Solorio* to find an off-post assault upon another soldier to be service connected. The court found a detailed application of the *Relford* factors to be unnecessary because "appellant's misconduct had a significant and highly detrimental impact on military discipline, unit morale, and unit cohesiveness and effectiveness; the military had a distinct and overriding interest in deterring off-post assaults of this nature; and that the military's interests could not have been adequately addressed by a civilian court."[27] Based on these factors and not the *Relford* factors, the Court found the offense was service connected.[28]

The Army court also noted the language of *Solorio* dealing with pendent jurisdiction. The court determined that, while the off-post offenses were unrelated to the charged on-post offenses, the military's interest in disposing of all known offenses at a single trial added "additional support for finding an off-base offense to be service connected."[29]

Taken together, the *Solorio* and *Stover* decisions appear to be a harbinger of a significant erosion of *O'Callahan* and *Relford*.[30] Trial defense counsel will be hard pressed to convince a judge that an offense is not service connected if the victim is a soldier or dependent or if other charges are pending before the court. Defense counsel must be aware, however, that no "bright line" rule has yet been developed by either the Court of Military Appeals or the Army court. Further, the Supreme Court has yet to be faced with this erosion of its rulings in *O'Callahan* and *Relford*.[31] Each case must be analyzed on its own facts before determination of service connection can be made.[32] Defense counsel should, therefore, force the government to completely establish the facts upon which subject matter jurisdiction is based. As in *Solorio*, an excellent method for doing so is to request detailed findings of fact from the military judge. Captain Floyd T. Curry.

Correction

There is an error in *The Advocate* section of the March 1986 issue. In the "New Developments" note on page 46,

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[16] *See Relford*, 401 U.S. 355 (1971).

[17] *See, e.g.*, United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Henderson, 18 C.M.A. 610, 40 C.M.R. 313 (1969).

[18] *Trottier*, 9 M.J. at 350.

[19] *Solorio*, 21 M.J. at 254.

[20] *Id.* at 255.

[21] *Id.*

[22] *Id.* at 256.

[23] *Id.*

[24] *Solorio*, 21 M.J. at 257.

[25] *Id.* at 258.

[26] SPCM 21611 (A.C.M.R. 26 Feb. 1986).

[27] *Id.*, slip op. at 3. The court did not detail how the assault had impacted in such a highly detrimental fashion on the military community, why the military's interest overrode that of the civilian community in which the assault occurred, or why the military's interests could not be adequately addressed by a civilian court.

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

[29] *Id.*

[30] An even more significant erosion may be in the wind when the accused is an officer. In a recent case, United States v. Scott, 21 M.J. 345 (C.M.A. 1986), the government argued that mere status as an officer was enough to confer jurisdiction. The Court of Military Appeals did not decide *Scott* on that basis, finding instead that a variety of factors established jurisdiction. *Id.* at 348. Significantly, however, the court did not flatly reject such an analysis, but instead recognized in dicta the special role and unique responsibility of officers. *Id.* In fact, Judge Cox would find all Article 133 offenses to be service connected. *Id.* at 350 (Cox, J., concurring). Such dicta may indeed foreshadow a return to a status-based jurisdiction, at least with respect to officer accused.

[31] The Supreme Court will have an opportunity to review the new jurisdictional approach of the military courts in *Solorio*. A petition for writ of certiorari was filed with the Supreme Court on 26 March 1986.

[32] *Trottier*, 9 M.J. at 345.

the first full sentence should begin "[t]he Army court then addressed several specific factual issues and determined that the commander was engaged in a law enforcement function. . . ." The editors of *The Advocate* regret this error.

The Standard of Proof of Motions for Findings of Not Guilty

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A motion for a finding of not guilty presents the trial judge with unique problems concerning the quantum of evidence required to overcome the motion, along with an extraordinary responsibility to protect fully the rights of the accused without usurping the duties of the court members. Rule for Courts-Martial 917[1] provides a succinct statement of the grounds for the motion, the procedure for hearing it, and an evidentiary standard for use in ruling on it. Ruling on such a motion is not, however, as simple as it might appear from a quick reading of R.C.M. 917. This article outlines the history of R.C.M. 917, explains the development of a constitutional standard for sufficiency of evidence in criminal trials, and shows how the constitutional standard affects R.C.M. 917 motions.

Development of R.C.M. 917

The current provision for a motion for a finding of not guilty in a trial by court-martial is R.C.M. 917. A motion under this rule is normally made at the close of the government's evidence, or at the close of the defense evidence, but can be made at any time after the government's evidence closes until findings are announced. The only ground is that the "evidence is insufficient to sustain a conviction."[2] The motion must specify how the evidence is insufficient, and military judges are encouraged to allow the government to reopen if the defect is curable.[3] The 1984 rule for the first time specifically authorizes the judge to grant the motion sua sponte, but directs that in all cases the parties must be allowed to be heard before a ruling is entered.[4] Another 1984 change authorizes the granting of a partial finding of not guilty in cases in which the evidence is sufficient to support a lesser included offense, but not the greater charged offense.[5] The 1951 and 1969 Manual rules prohibited such a ruling, but the Court of Military Appeals held that appropriate relief should be granted when the evidence was insufficient as to the elements of the greater offense.[6] The relief recommended was tantamount to entry of a finding of not guilty as to the greater offense, so the drafters of the 1984 rule formalized the procedure for such rulings.[7]

Before 1969, motions for findings of not guilty were decided by the law officer subject to objection by the court members, who were to be instructed as to the elements of the offense and the standard of proof for the motion.[8] Thus the motion before 1969 did not serve the same purpose as today, that is, it did not remove the affected specification or the case from the members' consideration. As a result, much of the military case law previous to 1969 concerning this motion is of little practical relevance today because it deals with the procedure for submitting the issue to the members.[9]

Concerning the standard of proof, R.C.M. 917 is only slightly changed from paragraph 71*a*, MCM, 1969. In 1969, the Manual's guidance on the standard of proof for ruling on the motion was amended by changing the wording from "if there is any *substantial* evidence which together with all inferences and all applicable presumptions, reasonably tends to establish every essential element of an offense charged . . ., the motion will not be granted,"[10] to "if there is *any* evidence which, together with all inferences and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged . . ., the motion will not be granted."[11]

The drafters' rationale was that this change would avoid confusion over the appropriate quantum of proof necessary for the government's case to survive the motion.[12] The effect of this change to the Manual was to lighten the government's burden at this stage of the proceedings and to discourage the military judge from unduly exercising his or

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 917 [hereinafter cited as R.C.M. 917].

[2] R.C.M. 917(a).

[3] R.C.M. 917(e) discussion.

[4] R.C.M. 917(e); *compare* Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 71*a* [hereinafter cited as MCM, 1969]. Before 1984, there was neither provision for nor prohibition of a military judge granting a motion for a finding of not guilty sua sponte. As a ruling granting a motion for a finding of not guilty can neither be reconsidered, R.C.M. 917(d), nor appealed, R.C.M. 908(a), protection against a hasty or ill-considered ruling is essential.

[5] R.C.M. 917(e).

[6] United States v. Spearman, 23 C.M.A. 31, 48 C.M.R. 405 (1974).

[7] R.C.M. 917(e) analysis.

[8] Manual for Courts-Martial, United States, 1951, para. 71*a* [hereinafter cited as MCM, 1951]. In a special court-martial, the president ruled, subject to objection by the members under the same procedures.

[9] *See, e.g.*, United States v. McCants, 10 C.M.A. 346, 27 C.M.R. 420 (1959). R.C.M. 801(e) provides for a ruling by the president in the event of a trial by special court-martial without a military judge. The members must vote on whether to uphold this ruling. One other purpose of an R.C.M. 917 motion—testing the government's case for sufficiency before the accused puts on his or her case—is served both by the former and the present procedures.

[10] MCM, 1951, para. 71*a* (emphasis added).

[11] MCM, 1969, para. 71*a* (emphasis added).

[12] Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial (1969) (Rev. ed), para. 71a (July 1970) [hereinafter cited as DA Pam. 27-2].

her newly granted authority to remove a case from the members' consideration based on insufficient evidence.

In 1984, the minimum quantum of proof required was emphasized in R.C.M. 917(d) by a specific prohibition against "an evaluation of the credibility of the evidence."[13] From this language, one could conclude that a motion for a finding of not guilty raises only the somewhat technical question of whether there is "any" evidence on each element of the offense charged. A further look at the history of the federal rule that underlies R.C.M. 917, and at the constitutional requirements for sufficiency of evidence, will demonstrate that this is an incorrect understanding of R.C.M. 917.

The Civilian Rule and Precedents

R.C.M. 917 is the military analogue of Rule 29, Federal Rules of Criminal Procedure.[14] The two rules are similar in substance, but there are differences in procedure and in terminology. Both rules direct the trial judge to enter findings of not guilty if "the evidence is insufficient to sustain a conviction."[15] Rule 29 is a more extensive grant of authority to the trial judge as, unlike R.C.M. 917, it allows a trial judge to enter a finding of not guilty after a guilty verdict by the jury.[16] Another major difference is that, unlike R.C.M. 917, Rule 29 does not attempt to provide any guidance concerning quantum of proof.

Not surprisingly, given this lack of guidance, the standard of proof for Rule 29 motions was the subject of some controversy for several years.[17] At least one federal court of appeals held that a criminal defendant's motion for judgment of acquittal (as the motion is called in civilian practice) was no different from a motion for a directed verdict in a civil case.[18] Another formulation of that view was that the judge had to deny the motion and submit the case to the jury if there was any "substantial" evidence of guilt.[19]

The federal district courts and courts of appeals eventually rejected this view and adopted standards related to the concept of proof beyond a reasonable doubt. Initially they did so because of their own conclusions that a reasonable doubt-based standard was necessary for protection of defendants' rights, and because of the logical necessity to base sufficiency of the evidence at the trial level on cases defining sufficiency at the appellate level. For example, in *United States v. Melillo*,[20] Judge Weinstein explained:

> Effective exercise of the power to grant a judgment of acquittal furnishes defendants with necessary protection against conviction on inadequate proof. Since penalties are more severe in criminal than in civil cases and a greater probability of accuracy in findings of fact is demanded, more stringent control by the trial judge is warranted. This need has not grown less pressing. There has been a strong recent tendency to liberalize the rules of evidence. Control over juries once obtained through exclusionary rules now must be maintained through more direct means.[21]

This reasoning was considered to follow directly from the wording of Rule 29, specifically that portion of the wording that is identical in R.C.M. 917.

> Rule 29 of the Criminal Rules requires the court to grant a motion for judgment of acquittal "if the evidence is insufficient to sustain a conviction." It is insufficient, the Supreme Court has told us in *American Tobacco,* if a reasonable juror would have to entertain a reasonable doubt about defendant's guilt. Thus, even if the courts wished to use the same standards in civil and criminal cases, the rules preclude them from doing so.[22]

The other impetus for change in the federal courts' view of the standard of proof in Rule 29 motions came more directly from the Supreme Court. In a series of decisions involving appellate review of sufficiency of the evidence, the Court raised dramatically the constitutional standard for evaluating the sufficiency of evidence in criminal cases. In 1960, it held in a decision reviewing a state conviction that if there was "no evidence" of guilt, the conviction could not be sustained, as a matter of due process.[23] As this was a significantly lower standard of proof than was relied on at the time by the federal courts to rule on sufficiency of evidence, this case had no direct effect on federal practice.

In 1970, however, the Supreme Court in *In re Winship*[24] held that the rule of proof beyond a reasonable doubt was constitutionally mandated as a matter of due process. Based partly on this decision, lower federal courts (that had not previously done so) adopted the standard of review, both for the trial judge on Rule 29 motions and on appeal, that is today the general rule.[25] The standard adopted was whether, considering the evidence in the light most favorable to the government, reasonable or rational jurors could find the defendant guilty beyond a reasonable doubt.[26]

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[13] R.C.M. 917(d).

[14] R.C.M. 917 analysis. The 1951 and 1969 Manual provisions for motions for findings of not guilty were also based on Rule 29. DA Pam. 27-2, para 71a; Dep't of Army, Legal and Legislative Basis: Manual for Courts-Martial, 1951 (April 1951), at 93.

[15] Fed. R. Crim. P. 29(a) [hereinafter cited in text as Rule 29]; R.C.M. 917(a).

[16] Fed. R. Crim. P. 29(c).

[17] *See* 2 C. Wright, Federal Practice and Procedure: Criminal 2d § 467, at 656 (1982) [hereinafter cited as Wright].

[18] United States v. Feinberg, 140 F.2d 592 (2d Cir.), *cert. denied,* 322 U.S. 726 (1944).

[19] Wright, *supra* note 17, § 467 at 657.

[20] 275 F. Supp. 314 (E.D.N.Y. 1967)

[21] *Id.* at 318 (citations omitted).

[22] *Id.* at 318-19 (citing American Tobacco Co. v. United States, 328 U.S. 781 (1946)).

[23] Thompson v. Louisville, 362 U.S. 199 (1960).

[24] 397 U.S. 358 (1970).

[25] United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

[26] Wright *supra* note 17, § 467 at 655.

In 1979, the Supreme Court adopted this standard, holding in *Jackson v. Virginia*[27] that as a matter of due process, a conviction could not be sustained unless, upon review of the evidence of record in the light most favorable to the prosecution, a court concluded that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[28] Following this decision, the civilian federal courts have universally followed the *Jackson* standard, with minor variations in wording, as the only correct standard of review of sufficiency of evidence in criminal cases, either on Rule 29 motion or on appeal.[29]

Effect of the Constitutional Standard on R.C.M. 917

The civilian courts' development of a constitutional standard for testing the sufficiency of evidence has been recognized in military law, but the test has been applied infrequently and it may not be generally understood.

The unique nature of military appellate review has resulted in a lack of case law on the issue. At the courts of military review, the judges need not concern themselves with the minimum constitutional standard for review of sufficiency of evidence, because unlike other appellate judges, they are themselves fact finders who must determine whether they believe the accused guilty beyond a reasonable doubt.[30]

On the other hand, the Court of Military Appeals is limited to ruling on matters of law.[31] This limitation has consistently been interpreted to allow the court to review convictions for evidence insufficient as a matter of law.[32] In *United States v. McConnico,*[33] Judge Perry wrote in dissent that the doctrines of *Winship* and *Jackson* required the court to reverse because the evidence did not constitute proof beyond a reasonable doubt. The court in *McConnico* found the evidence to be sufficient, but it did not suggest that its review of the sufficiency of evidence was governed by any standard lower than that of *Jackson.* The analysis of R.C.M. 917 indicates that the drafters expected military judges to apply the constitutionally based standard for sufficiency when ruling on motions for findings of not guilty. Besides citing *Jackson,* the analysis cites two federal appeals court cases holding that the same standard must be applied by the trial judge when ruling on motions for judgement of acquittal.[34]

Unfortunately, the language of R.C.M. 917(d), which specifies that the judge must avoid evaluating the credibility of witnesses, tends to obscure the underlying question presented by a motion for a finding of not guilty; that is, whether as a matter of law the evidence is sufficient to sustain the conviction upon review by the appellate courts. Instead, the emphasis placed on not weighing credibility may lead the unwary military judge into applying a test similar to the "no evidence" test that the Supreme Court has found "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt."[35]

While the prohibition against weighing credibility is an important consideration in ruling on an R.C.M. 917 motion, it cannot be applied correctly if the basic, constitutionally mandated standard for review of sufficiency of evidence is not clearly understood. If the evidence in a case is such that the judge believes the witnesses on an element of proof to be so incredible that no rational court member could find proof of the element beyond a reasonable doubt, then the judge must grant a motion for a finding of not guilty. In this situation, the prohibition against weighing credibility must be applied to the extent of preventing the judge from basing a ruling on his or her own belief or disbelief of the witness.[36] But the judge must be prepared, in an appropriate case, to evaluate the potential credibility of witnesses to the extent of deciding whether any rational factfinder could find guilt in reliance on the testimony of the witness.

Conclusion

Trial judges, in ruling on R.C.M. 917 motions, must avoid being misled into believing that their function is a mechanical one that can be discharged by determining whether there has been any evidence at all concerning each element of the offense. To the contrary, ruling on the motion requires a sophisticated reasoning process, in which the judge decides whether the evidence, viewed in the light most favorable to the prosecution, granting the benefit of any inferences that reasonably can be drawn, but without regard for whether the judge believes the evidence, could convince a rational fact finder beyond a reasonable doubt of the guilt of the accused.

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[27] 443 U.S. 307 (1979).

[28] *Id.* at 319.

[29] *See* Wright, *supra* note 17, § 467 at 663.

[30] *See* Uniform Code of Military Justice, art. 66c, 10 U.S.C. § 836 (1982) [hereinafter cited as UCMJ]; *see also* United States v. Teeter, 12 M.J. 716 (A.C.M.R. 1981), *aff'd in part, rev'd in part,* 16 M.J. 68 (C.M.A. 1983) (Standard of proof beyond reasonable doubt applied by Army Court of Military Review in its evaluation of evidence in case.)

[31] UCMJ art. 67.

[32] *See, e.g.,* United States v. Vanzandt, 14 M.J. 332, at 345. (C.M.A. 1982).

[33] 7 M.J. 302, 314–15 (C.M.A. 1979) (Perry, J., dissenting).

[34] The R.C.M. 917(d) analysis cites United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981) and United States v. Beck, 615 F.2d 441 (7th Cir. 1980).

[35] *Jackson,* 443 U.S. at 320.

[36] *See id.* at 318–19. ("[T]his inquiry does not require a court to 'ask itself whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt.' *Woodby v. INS,* 385 U.S. at 282 (emphasis added).")

Finding an "Adequate Substitute" Under R.C.M. 703(d)

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Introduction

Rule for Courts-Martial 703(d)[1] concerns employment of expert witnesses at government expense. The rule provides that a party seeking to employ an expert witness at government expense must submit a request to the convening authority for authorization to do so. It further provides that if such a request is denied, it may be renewed before the military judge who will determine whether the testimony of the expert is relevant and necessary.[2] If he or she determines that the witness is relevant and necessary, the military judge must next determine whether the government has provided or will provide an "adequate substitute." The judge may grant the motion for employment of an expert or find that the government is required to provide a substitute.

This article will examine the provision in R.C.M. 703(d) allowing for substitution of an expert selected by the government and will identify factors which should be considered by convening authorities and military judges in determining whether the government has provided or is capable of providing an "adequate substitute." This will be accomplished through a brief review of R.C.M. 703(d) followed by an examination of the corresponding rule in federal civilian criminal practice. Finally, the recent Supreme Court decision in *Ake v. Oklahoma*[3] will be considered for its possible impact on R.C.M. 703(d). It is hoped that this article will provide military defense counsel with a framework for successfully arguing for retention of a defense selected expert at government expense.

From the outset, it must be understood that an accused in a court-martial always has the option of engaging the services of an expert at his or her own expense.[4] This article is concerned with the accused who cannot afford to pay for the assistance of an expert or who elects to request that the government pay for an expert even though he or she could afford to pay for the expert.

R.C.M. 703(d) and the Provision for an "Adequate Substitute"

When the analysis of R.C.M. 703(d) is read in conjunction with the rule, it becomes clear that the drafters believed that the government should be permitted to substitute its expert for one requested by the defense when the assistance of an expert is necessary.[5] The drafters concluded that the intent of R.C.M. 703(d) was to allow the convening authority to provide a party with the services of a government agency as an alternative to paying for services of the party's requested expert:

> Because funding for such employment is the responsibility of the command, not the courts-martial, and because alternatives to such employment may be available, application to the convening authority is appropriate. In most cases the military's investigative, medical or other agencies can provide the necessary service. Therefore, the convening authority should have the opportunity to make available such services as an alternative.[6]

The drafters indicated that R.C.M. 703(d) was based on paragraph 116 of the Manual for Courts-Martial, 1969,[7] and referred the reader to the cases of *United States v. Johnson*,[8] *Hutson v. United States*,[9] and *United States v. Simmons*.[10] Paragraph 116 of the 1969 Manual did not, however, provide for substitution of a government expert for a defense requested expert as does R.C.M. 703(d). Similarly, a review of *Johnson, Hutson,* and *Simmons* reveals no foundation for a rule permitting substitution of an expert selected by the government for an expert requested by the defense. It thus appears that the basis for the provision in R.C.M. 703(d) allowing for substitution of a government expert for a defense requested expert is not as clear as the drafters seem to imply. As is noted above, however, the language of the rule coupled with the analysis leaves little doubt as to the drafters' intent. The question which remains is: what considerations should a convening authority or

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(d) [hereinafter cited as R.C.M.].

[2] The standard to be applied in determining whether an expert is "necessary" can be confusing and is beyond the scope of this paper. For a discussion of this area, *see* Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 Mil. L. Rev. 77, 87 (1984). For a discussion of the "necessary" analysis under the Criminal Justice Act of 1964, *see* Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982).

[3] 105 S. Ct. 1087 (1985).

[4] Mil. R. Evid. 706(c).

[5] R.C.M. 703(d) refers to employment of "expert witnesses." R.C.M. 703(d) analysis, however, speaks of governmental services which may be made available as an alternative to a requested expert. Included among the services mentioned are investigative services. It thus appears that the analysis recognizes that a party may properly request expert assistance under R.C.M. 703(d) even when that assistance will not necessarily be testimonial in nature.

[6] R.C.M. 703(d) analysis.

[7] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 116 [hereinafter cited as MCM, 1969].

[8] 22 C.M.A. 424, 47 C.M.R. 402 (1973).

[9] 19 C.M.A. 437, 42 C.M.R. 39 (1970).

[10] 44 C.M.R. 804 (A.C.M.R. 1971), *petition denied*, 44 C.M.R. 940 (1972).

military judge apply in determining whether the government is capable of providing an "adequate substitute" for a defense requested expert? An examination of the corresponding provision applicable to federal civilian criminal trials, the policy behind that rule, and judicial interpretation of it may be helpful in this regard.

The Federal Rule

Underlying Policy

Section (e) of the Criminal Justice Act of 1964[11] gives indigent defendants in federal criminal proceedings a means of obtaining expert assistance at government expense:

> Services other than counsel.
>
> (1) Upon request—Counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after an appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain such services.

The Criminal Justice Act of 1964 is applicable to trials in United States district courts.[12] Its goal is to ensure that the quality of legal representation will no longer depend on the accused's financial resources.[13] It is intended to provide a defendant who is financially unable with the same services that any other defendant might secure.[14]

The Criminal Justice Act originated with the Attorney General's Committee on Poverty and the Administration of Criminal Justice (Allen Committee).[15] In stating the premise upon which its proposal rested, the committee said:

> We believe that the system is imperiled by the large number of accused persons . . . unable to finance a full and proper defense. Persons suffering such disabilities are incapable of providing the challenges that are indispensable to satisfactory operation of the [adversary] system. The loss to the interests of the accused individuals occasioned by these failures are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and accuracy.[16]

Applicability of the Federal Rule to Courts-Martial

The purpose and goals of the Criminal Justice Act of 1964 are praiseworthy and cannot be challenged. They are fundamental to a fair system of criminal justice. No defendant facing federal criminal charges should be hindered in presenting a defense because of the lack of financial resources. Neither should a defendant facing trial by court-martial be hindered because of lack of access to expert assistance. Therefore, although the terms of the Criminal Justice Act of 1964 have been determined not to apply to courts-martial,[17] the policy which the Act embodies must be. It follows then that while judicial opinions applying section 3006A(e) are not binding on the military in its application of R.C.M. 703(d), the rationale and requirements expressed therein should be applicable in view of the common underlying policy.

In support of this argument, at least one court has concluded that although section 3006A(e) is not applicable to state courts, the manner in which that section is applied on appellate review should provide reliable guidance as to state trial denials and limitations with respect to investigative funds.[18] Additionally, in a concurring opinion in a case holding that military due process required the government to provide the defense with a transcript of a key witness' testimony in a prior trial, the Chief Judge of the Court of Military Appeals appears to have relied in part upon the result which would have been required under section 3006A(e) in a Federal court.[19]

Qualities Required in Section 3006A(e) Experts

Cases considering section 3006A(e) have recognized that the purpose behind the provision is to put indigent defendants as nearly as possible on par with nonindigents with regard to expert assistance.[20] They have gone beyond that, however, and recognized that in order to achieve this goal, experts provided to indigents must share certain characteristics with experts employed by nonindigents. For example, it has been held that experts retained under section 3006A(e) should be available as partisan witnesses for the defense[21] and need not be neutral and detached.[22] They should be available to assist the defense from the initiation

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[11] 18 U.S.C. § 3006A(e) (1982).

[12] 18 U.S.C. § 3006A(a) (1982).

[13] Subcommittee on Constitutional Rights of the Committee on the Judiciary, 90th Cong., 2d Sess., Report on the Criminal Justice Act in Federal District Courts III (Comm. Print 1969).

[14] Report of the Judicial Conference of the United States, 36 F.R.D. 277, 374 (1965).

[15] Legislative History of the Criminal Justice Act of 1964, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2990, 2994.

[16] Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, Report at 11 (1963).

[17] *Johnson*, 22 C.M.A. at 427, 47 C.M.R. at 405; *Hutson*, 19 C.M.A. at 437–38, 42 C.M.R. at 39–40; United States v. Pearson, 13 M.J. 922 (N.M.C.M.R. 1982).

[18] Mason v. Arizona, 504 F.2d 1345, 1352 (3d Cir. 1974).

[19] United States v. Toledo, 15 M.J. 255 (C.M.A. 1983) (Everett, C.J. concurring).

[20] United States v. Henderson, 525 F.2d 247 (5th Cir. 1975); United States v. Sanders, 459 F.2d 1001 (9th Cir. 1972); United States v. Schappel, 445 F.2d 716 (D.C. Cir. 1971); United States v. Tate, 419 F.2d 131 (6th Cir. 1969). *See* Self v. United States, 574 F.2d 363 (6th Cir. 1978); United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975); *see also* United States v. Bass, 477 F.2d 723 (9th Cir. 1973).

[21] United States v. Reason, 549 F.2d 309 (4th Cir. 1977); United States v. Fratus, 530 F.2d 644 (5th Cir. 1976); United States v. Bass, 477 F.2d 723 (9th Cir. 1973); Loe v. United States, 545 F. Supp. 662 (E.D. Va. 1982).

[22] Loe v. United States, 545 F. Supp. 662 (E.D. Va. 1982).

of proceedings through the conclusion of the trial[23] and have suitable opportunity to observe the defendant (in the case of psychiatrists).[24] Section 3006A(e) experts should be able to maintain a confidential relationship with the defense and not have to report to either the court or the prosecutor,[25] they should have no conflict of interest with the accused,[26] and they should in no way be selected by the prosecutor.[27] Some courts have even gone so far as to suggest that indigents and nonindigents cannot be on par with regard to expert assistance unless the indigent defendant can select his or her own expert.[28]

Although these characteristics deal with a federal statute, they establish guidance which is arguably just as applicable to the military in determining what constitutes an "adequate substitute" under R.C.M. 703(d). For this reason, the holdings in cases distilling these characteristics deserve attention of the military defense counsel and should be cited in argument when counsel seeks to employ an expert witness at government expense.

Constitutional Considerations Raised by *Ake v. Oklahoma*

This article is primarily concerned with identification of factors which should be considered by convening authorities and military judges in determining whether the government has provided or can provide an "adequate substitute" for a defense requested expert. Before any conclusions can be drawn, however, a 1985 Supreme Court decision establishing the minimal constitutional requirements for defense access to expert assistance must also be considered.

In *Ake v. Oklahoma*,[29] which was decided on February 26, 1985, the accused was charged with murdering a couple and wounding their two children. Prior to and at his arraignment, the defendant's behavior was so bizarre that the trial judge on his own motion ordered him to be psychiatrically examined. Ake was subsequently diagnosed as paranoid schizophrenic—chronic with exacerbation, intense rage, poor control, and delusions. He was found to be incompetent to stand trial and committed to a state mental hospital. Six weeks later, the court was informed that the accused had become competent and would remain stable so long as he remained on an antipsychotic drug. The state resumed proceedings.

At a pretrial conference, the defense informed the prosecution of its intent to raise an insanity defense and requested that the accused be psychiatrically evaluated concerning his mental condition at the time of the offense, something which had not yet been done. The defense requested that the court arrange for the evaluation or that the defense be provided with the funds to do so. The request was rejected on the basis of the Supreme Court's decision in *United States ex rel. Smith v. Baldi*.[30]

The accused's sole defense at trial was insanity and there was no expert testimony for either side concerning his mental state at the time of the offense. He was convicted of all charges. The states requested the death sentence and the psychiatrists who had examined the accused as to competence testified that he was still dangerous. The defense had no expert to rebut this testimony or to present mitigation, and the accused was sentenced to die. On appeal, the Oklahoma Court of Criminal Appeals concluded that, based upon the Supreme Court's decision in *Baldi*, the state had no constitutional duty to provide the accused with a psychiatrist.[31]

In reversing and remanding the case for a new trial, the United States Supreme Court stated its belief that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[32] The Court further recognized that "when the state has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."[33] It went on to say:

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing cross examination of a State psychiatric witness, the risk of inaccurate resolution of insanity issues is extremely high.[34]

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[23] United States v. Bass, 477 F.2d 723 (9th Cir. 1973); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971). *See* United States v. Thierault, 440 F.2d 713 (5th Cir. 1971), *later appealed*, 474 F.2d 359 (5th Cir.), *cert. denied*, 411 U.S. 984 (1973); *see also* United States v. Reason, 549 F.2d 309 (4th Cir. 1977); United States v. Walker, 537 F.2d 1192 (4th Cir. 1976); United States v. Chavis, 486 F.2d 1290 (D.C. Cir. 1973).

[24] United States v. Taylor, 437 F.2d 371 (4th Cir. 1971); Loe v. United States, 545 F. Supp. 662 (E.D. Va. 1982). *See also* United States v. Schappel, 445 F.2d 716 (D.C. Cir. 1971).

[25] United States v. Harris, 707 F.2d 653 (2d Cir. 1983); United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); United States v. Bass, 477 F.2d 723 (9th Cir. 1973); United States v. Theirault, 440 F.2d 713 (5th Cir. 1971), *later appealed*, 474 F.2d 359 (5th Cir.), *cert. denied*, 411 U.S. 984 (1973). *See* United States v. Grammar, 513 F.2d 673 (9th Cir. 1975); United States v. Sutton, 464 F.2d 552 (5th Cir. 1972).

[26] United States v. Marshall, 423 F.2d 1315 (10th Cir. 1974).

[27] United States v. Bass, 477 F.2d 723 (9th Cir. 1973); United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973). *See also* United States v. Davis, 481 F.2d 425 (4th Cir.), *cert. denied*, 414 U.S. 977 (1973).

[28] United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); United States v. Bass, 477 F.2d 723 (9th Cir. 1973); United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973); Report of the Judicial Conference of the United States, 36 F.R.D. 277, 374 (1965). *See* United States v. Reason, 549 F.2d 309 (4th Cir. 1977). *Contra* United States v. Lincoln, 542 F.2d 746 (8th Cir.), *cert. denied*, 429 U.S. 406 (1976); United States v. Chavis, 486 F.2d 1290 (D.C. Cir. 1973); United States v. McNally, 485 F.2d 398 (8th Cir. 1973), *cert. denied*, 485 U.S. 978 (1974).

[29] 105 S. Ct. 1087 (1985).

[30] 344 U.S. 561 (1953).

[31] Ake v. State, 663 P.2d 1 (Okl. Crim. App. 1983).

[32] 105 S. Ct. at 1093.

[33] *Id.* at 1095.

[34] *Id.* at 1096.

The Court apparently agreed on constitutional grounds with those courts of appeal which, on statutory grounds, have concluded that to present an adequate defense, an indigent may need more than a mere psychiatric evaluation. He or she may require the assistance of an expert throughout the preparation and presentation of his or her defense. Accordingly, the Court established the following rule:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that indigent defendants have access to a competent psychiatrist for the purpose we have discussed, and as in the case of provision of counsel we leave to the State the decision on how to implement this right.[35]

In determining the extent of a state's constitutional duty to provide an indigent with an expert to assist in his or her defense, at least so far as psychiatrists are concerned, the Supreme Court was not willing to go as far as some courts of appeal in their interpretation of section 3006A(e). For example, the Court did not require states to allow indigents to choose their own psychiatrist, nor did the Court require states to provide funds for indigents to hire their own. It appears that the Court will require certain minimal qualities in psychiatrists provided to indigents, however. As is noted above, they will be required not only to conduct an evaluation, but also to be available to the defense to assist throughout the case. Additionally, they will apparently have to be detached from the prosecution.

> The trial court in this case believed that our decision in *United States ex rel. Smith v. Baldi* . . . absolved it completely of the obligation to provide access to a psychiatrist. . . . [W]e disagree. . . . [N]either *Smith* nor *McGarty v. O'Brian* . . . to which the majority cited in *Smith* even suggested that the Constitution does not require any psychiatric examination or assistance whatsoever. Quite to the contrary, the record in *Smith* demonstrated that *neutral* psychiatrists in fact had examined the defendant as to his sanity and testified on that subject at trial, and it was on that basis that the Court found no additional assistance was necessary. . . . Similarly in *McGarty* the defendant had been examined by two psychiatrists who were *not beholden to the prosecution.*[36]

In the wake of *Ake v. Oklahoma,* it appears that not only will psychiatrists, and arguably other experts, have to be provided to indigent defendants when the necessity for such assistance is demonstrated, but also the psychiatrist (or other expert) who is provided will have to meet minimal standards concerning availability to the defense and detachment from the prosecution.

Conclusion

The provision in R.C.M. 703(d) allowing the government to provide an "adequate substitute" for a defense requested expert when assistance of an expert is necessary is relatively new and untested. No standards are provided to assist in determining whether a potential substitute for a defense requested expert will be "adequate," yet convening authorities and military judges will have to make that determination whenever the defense proposes to hire an expert at government expense. To assist them in this regard, guidelines which can be applied on a case-by-case basis will have to be developed.

Section 3006A(e) was designed to make expert assistance available to indigent defendants in federal civilian criminal trials. Its underlying purpose is equally applicable to the military. Therefore, the manner in which section 3006A(e) has been applied on appellate review, coupled with the constitutional requirements set forth in the recent Supreme Court decision of *Ake v. Oklahoma,* should provide reliable guidance as to determinations in the military concerning whether a government expert is an "adequate substitute" for a defense requested expert. These sources suggest a series of questions which can be asked by convening authorities and military judges when trying to make that determination:

Will the expert be made available to assist the defense during all phases of the trial?;

Will he or she be given the professional freedom to assume the role of a partisan on behalf of the defense without fear of retribution?;

If a psychiatrist, will he or she be permitted to take the time to conduct the complex evaluation necessary to determine the defendant's mental responsibility at the time of the offense?;

Will he or she be able to maintain a confidential relationship with the defense?;

Will he or she be personally selected by someone other than the trial counsel, the staff judge advocate, or the convening authority?; and

Will he or she be able to function on behalf of the accused without any feeling of obligation toward the prosecution, for whatever reason?

If the answer to each of these questions is an unqualified "yes," then the expert will probably be an "adequate substitute." If, however, the answer to any of the questions is "no," then the defense should argue that the convening authority or military judge should permit the defense to retain an expert of its own selection at government expense.

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[35] *Id.* at 1097.

[36] *Id.* at 1097–1098 (emphasis added).

Corroboration of Accomplice Testimony: The Military Rule

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Introduction

The accused, Sergeant Smith, is a platoon sergeant. He is charged with stealing boots and socks from his company supply room. At trial, the government's evidence against Sergeant Smith consists chiefly of the testimony of Private Jones, a newly assigned supply clerk. Private Jones testifies that on Jones's first day of work Sergeant Smith handed him some boxes containing boots and socks and told Jones to put the boxes in Smith's car. Sergeant Smith told Jones that he would "fix him up" with some boots and socks at a later time. Jones further testifies that he complied with the order even though he knew that the property belonged to the United States Government.

On cross-examination, Private Jones concedes that when he was initially questioned by military police investigators, he denied knowing anything about the theft of boots and socks from the supply room. Additionally, Private Jones is uncertain whether the boxes were labeled or whether he actually noticed the items in the boxes. Further, Jones is uncertain concerning the model and color of Sergeant Smith's car. He testifies only that the car was a dark "compact" model. After Private Jones's testimony, the trial counsel calls the company executive officer, who testifies that an audit of the supply room disclosed that twelve pairs of boots and fifty pairs of socks were missing. The government then rests its case, and the defense in turn rests its case.

The defense counsel now faces a number of questions. First, is Private Jones an accomplice? If so, does this fact result in application of a special rule of legal sufficiency, *i.e.*, is corroboration required? In addition, how should counsel argue a motion for a finding of not guilty? Finally, if a motion for a finding of not guilty is unsuccessful, what instructions should counsel request regarding accomplice testimony corroboration? This article will examine these questions and suggest responsive defense arguments.

Accomplice Testimony

An accomplice is an individual who is "culpably involved in the crime with which the accused is charged."[1] In determining whether a witness is an accomplice, courts generally inquire as to whether the witness could have been convicted of the crime for which the accused is on trial.[2] The presence of a witness at the scene of the crime, for example, is not sufficient to establish that the witness is an accomplice.[3] Further, a witness' knowledge that the crime was going to be committed does not establish that the witness is an accomplice.[4] Likewise, the accused's use of a witness' property in the commission of the crime is insufficient to support a finding that the witness is an accomplice.[5] Moreover, if a witness lacks the *mens rea* necessary to a finding that he or she is guilty of the crime with which the accused is charged, the witness is not an accomplice.[6] Accordingly, a law enforcement officer or confidential informant working at the behest of government authorities who participates in the commission of a crime for the sole purpose of gathering evidence against the other participant or participants is not an accomplice.[7] If there is conflicting testimony concerning whether a witness is an accomplice, the military judge must submit the question to the court-martial members; but if it is undisputed that the witness was culpably involved in the crime, the military judge must rule as a matter of law that the witness is an accomplice and instruct the members accordingly.[8]

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[1] United States v. Hopewell, 4 M.J. 806, 807 (A.F.C.M.R. 1978); *see* United States v. Schreiber, 6 C.M.A 602, 609, 18 C.M.R. 226, 233 (1955) ("an accomplice is one who aids or abets the principal wrongdoer in the commission of an offense"); *see generally* W. Lafave & A. Scott, Criminal Law, 502–03 (1972).

[2] Stephenson v. United States, 211 F.2d 702 (9th Cir. 1954); United States v. Foushee, 13 M.J. 833 (A.F.C.M.R.), *petition denied*, 14 M.J. 213 (C.M.A. 1982); 3 F. Wharton, Criminal Evidence 343 (1973 & Supp. 1985) [hereinafter cited as Wharton]; *see* United States v. Adams, 19 M.J. 996, 998 (A.C.M.R. 1985) (court reasoned that fraternization "victim" was accomplice because she could have been convicted of the crime with which the accused was charged); *but see* United States v. Allums, 5 C.M.A. 435, 18 C.M.R. 59 (1955) (court assumed that buyer of illegal drug was accomplice of seller); United States v. Bey, 4 C.M.A. 665, 16 C.M.R. 239 (1954) (trainee who gave money to platoon sergeant in exchange for official favors was accomplice of platoon sergeant). A split of authority exists concerning whether a receiver of stolen goods is an accomplice of the thief. Annot., 74 A.L.R. 3d 560 (1976). The general rule is that a suborner of perjury and the person suborned are not accomplices. Wharton, *supra*, at 359.

[3] United States v. Garcia, 22 C.M.A. 8, 46 C.M.R. 8 (1972); United States v. Hopewell, 4 M.J. at 807; United States v. McCue, 3 M.J. 509, 512 (A.F.C.M.R. 1977) (citing United States v. Holt, 427 F.2d 1114 (8th Cir. 1970)).

[4] *See, e.g.*, Miller v. State, 290 Ala. 248, 275 So. 2d 675 (1973); Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (1973); *see generally* Wharton, *supra* note 2, at 343 n.47.

[5] *See* People v. Cobos, 57 N.Y.2d 798, 441 N.E.2d 1106, 455 N.Y.S.2d 588 (1982).

[6] *See, e.g.*, Halquist v. State, 489 S.W.2d 88 (Tenn. Crim. App. 1972); Tibbetts v. State, 494 S.W. 2d 552 (Tex. Crim. App. 1973); *see generally* Wharton, *supra* note 2, at 343 n.47.

[7] Wharton, *supra* note 2, at 343 n.47. *see also* United States v. Baker, 2 M.J. 360 (A.F.C.M.R. 1977) (individual working for Air Force Office of Special Investigations is not an accomplice).

[8] *See* United States v. McCue, 3 M.J. 509 (A.F.C.M.R. 1977); United States v. Graalum, 19 C.M.R. 667 (A.F.C.M.R.) (in federal and military courts, if there is no dispute in evidence, trial judge must instruct jury that witness is an accomplice, but if dispute exists, witness' status should be submitted to jury for resolution), *petition denied*, 19 C.M.R 413 (C.M.A. 1955); Annot., 19 A.L.R.2d 1352 (1951). For cases in which the issue whether a witness was an accomplice was submitted to the jury, *see, e.g.*, People v. Small, 55 A.D.2d 994, 391 N.Y.S.2d 192 (N.Y. App. Div. 1977); Bethany v. State, 565 S.W.2d 900 (Tenn. Crim. App. 1978). For cases in which the court ruled as a matter of law that a witness was an accomplice, *see, e.g.*, People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928); Francis v. State, 636 S.W.2d. 591 (Tex Civ. App. 1982).

Traditionally, courts have concluded that a witness' culpable involvement in the commission of the crime with which the accused is charged is a special circumstance affecting the witness' credibility.[9] Almost all jurisdictions require the trial judge to specifically instruct the jury to view accomplice testimony with caution because accomplices have an incentive to falsify or slant their testimony.[10] Jurisdictions differ, however, on the necessity for a special rule of legal sufficiency of the evidence requiring corroboration of accomplice testimony.

Generally, three approaches have been taken to the question of accomplice corroboration. At common law, no requirement existed that the prosecution corroborate an accomplice; convictions could be based on an accomplice's testimony alone if the jury believed the witness beyond a reasonable doubt.[11] The majority of American jurisdictions continue to follow the common law rule and permit juries to convict solely on the basis of an accomplice's testimony.[12] In almost half of the states and in the United Kingdom, however, a rule of law has been created requiring that the prosecution corroborate accomplice testimony in order to obtain a legally sufficient conviction[13] Finally, in a number of jurisdictions, a conviction may rest on the uncorroborated testimony of an accomplice unless the accomplice's testimony is insufficient under a test developed to measure the facial adequacy of an accomplice's testimony. For example, in Mississippi, an accomplice's testimony alone is sufficient for a conviction unless it is "self-contradictory," "improbable," or "impeached."[14] Similarly, in a number of federal circuits, an accomplice's testimony need not be corroborated unless it is facially "incredible or unsubstantial."[15] In jurisdictions where a rule of law regarding the legal sufficiency of accomplice testimony has been created, the trial court must apply the rule of law prior to sending the case to the jury and, in appropriate cases, instruct the jury regarding its application.[16]

The Military Rule

The military accomplice corroboration rule was first established by the boards of review.[17] In 1951, the President codified the rule in paragraph 153*a* of the Manual for Courts-Martial.[18] The military rule under the early board of review decisions, subsequently codified in paragraph 153*a*, fell into the third category of accomplice corroboration rules described above; that is, it required that the government corroborate an accomplice's testimony only under limited circumstances. Specifically, the rule provided that "a conviction cannot be based . . . upon uncorroborated testimony given by an accomplice in a trial for an offense, if . . . the testimony is self-contradictory, uncertain, or improbable."[19] After promulgation of the Military Rules of Evidence and the resultant reorganization of the Manual for Courts-Martial, the accomplice corroboration rule was placed in the Manual section on findings.[20] The language of the rule was unchanged.

The 1984 Manual, however, contains no specific mention of the accomplice corroboration rule. The question whether the military accomplice corroboration rule remains in effect under the new Manual has not been resolved. A number of arguments can be made by defense counsel in support of a conclusion that the rule remains in effect. First, the drafters' analysis to the findings provision of the 1984 Manual, Rule for Courts-Martial (R.C.M.) 918, indicates that the accomplice corroboration rule is still applicable in courts-

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[9] Wharton, *supra* note 2, at 349.

[10] Wharton, *supra* note 2, at 349–50; *see* United States v. Cheung Kin Ping, 555 F.2d 1069 (2d Cir. 1977); *but see* United States v. Lee, 6 M.J. 96, 98 (C.M.A. 1978) (Fletcher, C.J., concurring in the result) ("I am convinced that an instruction on the testimony of an accomplice should not be given, requested or not. I believe it is improper to call attention to the testimony of any witness."). For a discussion of the cautionary instruction on accomplice testimony given in the federal courts, *see* Annot., 17 A.L.R. Fed. 249 (1973).

[11] Caminetti v. United States, 242 U.S. 470 (1917); *see e.g.*, Ellis v. United States, 321 F.2d 931 (9th Cir. 1963); United States v. Moran, 151 F.2d 661 (2d Cir. 1945); 7 J. Wigmore, EVIDENCE § 2056, at 404–08 (Chadbourne Rev. 1978 & Supp. 1985) [hereinafter cited as Wigmore].

[12] For a state by state list of the jurisdictions that require accomplice corroboration and those that do not, *see* H. Underhill, Criminal Evidence § 182, at 532 (1973, & Supp. 1979) [hereinafter cited as UNDERHILL].

[13] *See id;* Wigmore, *supra* note 11, at 415–16.

[14] Young v. State, 212 Miss. 460, 54 So.2d 671 (1951); *see* Feranda v. State, 267 So.2d 305 (Miss. 1972).

[15] *See, e.g.*, United States v. Turner, 528 F.2d 143, 161 (9th Cir. 1975), *cert. denied*, 423 U.S. 996 (1976); United States v. Andrews, 455 F.2d 632, 633 (9th Cir. 1972); Darden v. United States, 405 F.2d 1054, 1056 (9th Cir. 1969); Bass v. United States, 324 F.2d 168 (8th Cir. 1963); Lyda v. United States, 321 F.2d 788 (9th Cir. 1963); Haakinson v. United States, 238 F.2d 775, 779 (8th Cir. 1956); McGinniss v. United States, 256 F.2d 621 (2d Cir. 1919).

[16] *See* Wigmore, *supra* note 11, at 415–16.

[17] *See* United States v. McPherson, 12 M.J. 789 (A.C.M.R.), *petition denied*, 13 M.J. 243 (C.M.A. 1982). The Legal and Legislative Basis, Manual for Courts-Martial, 1951 at 241 provided in pertinent part:

> It has also been mentioned that a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in a trial for any offense, if in either case such testimony is self-contradictory, uncertain, or improbable. This rule has often been applied by the boards of review. See CM 260611, Wilkinson, 39 B.R. 309, 326; CM 243927, Strong, 28 B.R. 129, 146; CM 298830, Pridgen, 7 B.R. (ETO) 225, 245; CM 267651, Boswell, 44 B.R. 35, 42; and CM 259987, Loudon, 39 B.R. 104, 114.

In the *Wilkinson, Pridgen, and Strong* cases cited by the Legal and Legislative Basis, Manual for Courts-Martial, 1951, the board of review ruled that a conviction could not be based on the uncorroborated testimony of a alleged sex crime victim whose testimony was self-contradictory, uncertain, or improbable. *See* United States v. Wilkinson, 39 B.R. 309 (A.B.R. 1944); United States v. Pridgen, 7 B.R. (ETO) 225 (A.B.R. 1944); United States v. Strong, 28 B.R. 129 (A.B.R. 1944). This sex crime victim corroboration rule was codified in the Manual for Courts-Martial in 1951 and remained a part of the Manual until promulgation of the Military Rules of Evidence in 1980 when it was omitted. In the *Boswell* and *Loudon* opinions, the Board of Review ruled that a conviction could not be based on the uncorroborated testimony of an accomplice if the testimony was self-contradictory, uncertain, or improbable. *See* United States v. Boswell, 44 B.R. 35 (A.B.R. 1944); United States v. Loudon, 39 B.R. 104 (A.B.R. 1944).

[18] The accomplice corroboration rule was first codified in para. 153*a*, Manual for Courts-Martial, United States, 1951 and remained a part of the Manual until 1984. Manual for Courts-Martial, United States, 1984 [hereinafter cited as MCM, 1984]; *see* paras. 74*a*(2), 153*a*. Manual for Courts-Martial, United States, 1969.

[19] Manual for Courts-Martial, United States, 1969, para. 153*a*.

[20] Manual for Courts-Martial, 1969 (Rev. ed.), para 74*a*(2).

martial. The analysis to R.C.M. 918 states, "As to instructions concerning accomplice testimony, *see United States v. Lee*, 6 M.J. 96 (C.M.A. 1978); *United States v. Moore*, 8 M.J. 738 (A.F.C.M.R. 1980), *aff'd*, 10 M.J. 405 (C.M.A. 1981) (regarding corroboration)."[21] Significantly, both opinions cited by the drafters state the traditional military accomplice corroboration rule. In *Lee*, the court held, "[There are] two limitations upon accomplice testimony. The first precludes conviction upon such testimony if it is uncorroborated and is 'self contradictory, uncertain, or improbable.' "[22] Likewise, the court in *Moore* reasoned, "The law on accomplice testimony is well settled. A conviction cannot be based upon uncorroborated testimony given by an accomplice in a trial for any offense if the testimony is 'self-contradictory, uncertain or improbable.' "[23] The specific citation of the drafters of the 1984 Manual in the analysis to R.C.M. 918 to the *Moore* and *Lee* decisions is thus a strong indication that the President, in approving the new Manual, did not intend to change military law with respect to the corroboration of accomplice testimony. This argument is particularly persuasive in light of the fact that the accomplice corroboration rule originally was judicially established and the Manual merely codified the rule after it was fully effective in courts-martial.[24]

Another argument exists in support of the continuing validity of the accomplice corroboration rule. Military Rule of Evidence 101(b)(1) requires that courts-martial follow federal district court practice as closely as practicable. A number of federal courts apply an accomplice corroboration rule analagous to the long-standing military rule.[25] These courts hold that a conviction cannot be based on the uncorroborated testimony of an accomplice if the accomplice's testimony is facially "incredible or unsubstantial."[26] Defense counsel should argue that Military Rule of Evidence 101(b)(1) requires that military judges apply the federal accomplice rule and that as the language employed by the federal courts is virtually identical to the language of the traditional military rule, military law on the issue is unchanged by the omission of a specific reference to accomplice corroboration in the new Manual. This argument, however, is undermined by the fact that a number of federal courts opinions hold that no special accomplice corroboration rule exists and the question whether an accomplice's testimony alone is sufficient for a conviction is a factual issue for the jury to resolve.[27] In any event, no clear answer exists to the question concerning the continuing validity of the accomplice corroboration rule; the issue awaits resolution in the appellate courts. Until the question is resolved, defense counsel should adamantly assert its validity.

Assuming that the military accomplice corroboration rule remains in effect, another issue requiring discussion is whether application of the rule is a question of law for the military judge or a question of fact for the court members. In other words, should the military judge determine the legal sufficiency of the government's case under the rule in deciding a motion for a finding of not guilty, or should the military judge submit the question to the court members by instructing on the rule? Further, the rule contains two separate parts: the determination of whether the accomplice's testimony is self-contradictory, uncertain, or improbable; and the determination of whether the accomplice's testimony has been corroborated. Should the judge decide one of these questions and the jury the other? Even though the accomplice corroboration rule has long been a part of military law, there is no definitive answer to these questions.

The Court of Military Appeals discussed these questions in *United States v. Allums*.[28] Corporal Allums was charged with wrongful possession and sale of marijuana. The chief government witness was the alleged buyer of the substance. The government also introduced a confession. Prior to findings, the defense requested that the law officer instruct the court members that the buyer was an accomplice and that the accused could not be convicted upon uncorroborated testimony of an accomplice if the testimony was "self-contradictory, vague, or uncertain." The law officer refused to give this instruction. Allums was convicted, and he argued on appeal that this refusal was prejudicial error.

After holding that the buyer was an accomplice, the Court of Military Appeals ruled that the buyer was uncertain as to "some points."[29] Because the Court of Military Appeals resolves only legal questions, this ruling indicated that the court considered the determination as to whether testimony was self-contradictory, uncertain, or improbable to be a legal question that must be resolved by the trial

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[21] MCM, 1984, Appendix 21, at A21–59.

[22] United States v. Lee, 6 M.J. 96, 97 (C.M.A. 1978).

[23] United States v. Moore, 8 M.J. 738, 740 (A.F.C.M.R. 1980), *aff'd*, 10 M.J. 405 (C.M.A. 1981).

[24] In arguing for the continuing validity of the accomplice corroboration rule, defense counsel also should cite the Military Judge's Benchbook, Dep't of Army, Pam. No. 27–9 (1 May 1982) (C1, 15 Feb. 1985). On 15 February 1985, the Benchbook was amended to reflect changes in military law resulting from the promulgation of the 1984 Manual. After reviewing the 1984 Manual, the drafters of the Benchbook retained a specific delineation of the accomplice rule.

[25] United States v. Scales, 10 C.M.A. 326, 27 C.M.R. 400 (1959) provides support for an argument that the military accomplice corroboration rule is identical to the rule applied in the federal courts. In *Scales*, the court referred to the military accomplice corroboration rule as the equivalent of federal practice, citing United States v. Carengella, 198 F.2d 3 (7th Cir. 1952) and United States v. Wilson, 154 F.2d 802 (2d. Cir. 1946).

[26] *See, e.g.*, cases cited in *supra* note 15.

[27] United States v. Owens, 460 F.2d 268 (10th Cir. 1972); Lebron v. United States, 241 F.2d 885 (1st Cir. 1957); Johns v. United States, 227 F.2d 374 (10th Cir. 1955).

[28] 5 C.M.A. 435, 18 C.M.R. 59 (1955).

[29] *Id.* at 438, 18 C.M.R. at 62.

judge.[30] After apparently concluding that this initial determination was a legal one, the *Allums* court discussed whether the determination of corroboration was also a question of law.[31] The court commented that corroboration was a technical concept which, like admissibility, was difficult for court members to apply and usually beyond the expertise of the members. Further, the court observed that introduction of the problems of corroboration into courts' deliberations would serve only to confuse the triers of fact. The court, however, expressly refused to rule on whether corroboration questions should be submitted to the members.[32] Instead, the court stated that in the case before it, the court had no doubt that Allum's confession constituted sufficient corroboration and, therefore, Allums was not prejudiced by the omission of an instruction on accomplice testimony corroboration.

Subsequently, in *United States v. Lippincott,*[33] the Air Force Board of Review adopted the suggestions in *Allums* that application of both parts of the accomplice corroboration rule was a matter for the military judge, not the court members.[34] Sergeant Lippincott was charged with three specifications of larceny; the law officer *sua sponte* instructed the court members that accomplice testimony was of doubtful credibility and should be viewed with great caution, but omitted reference to accomplice corroboration. On appeal, Lippincott argued that the law officer's failure to instruct on accomplice corroboration required reversal.[35] The board of review rejected this argument, citing *Allums* and reasoning that the accomplice corroboration rule involved application of technical concepts to determine the legal, as opposed to the factual, sufficiency of the evidence, and thus law officers should not instruct on the issue.

The reasoning of the *Allums* court and the *Lippincott* board is consistent with the current military practice under the confession corroboration rule. Military Rule of Evidence 304(g) provides that an admission or confession of an accused may not be considered as evidence against him or her unless the essential facts of the statement are corroborated by evidence independent of the accused. Significantly, Military Rule of Evidence 304(g)(2) requires corroboration as a condition of admissibility and, therefore, unequivocally makes the existence of corroboration a legal question for resolution by the military judge, not a factual matter for resolution by the court members.[36]

Similarly, the determination of accomplice corroboration should be made by the military judge. As noted in *Allums* and *Lippincott,* the existence of corroboration is an abstract legal concept, more appropriately left to the judge. Moreover, the determination as to whether testimony is self-contradictory, uncertain, or improbable requires a careful analysis of case law interpreting the terms and application of technical legal concepts. This determination should also be made by the military judge. Finally, the accomplice corroboration rule is a rule of legal sufficiency; ordinarily the determination of the legal sufficiency of the evidence is made by the judge, not the members.[37] In short, under the best reasoned view, the military judges should apply both parts of the accomplice corroboration rule.

Substantial authority exists, however, in support of the position that the court members should be instructed on the accomplice corroboration rule. Paragraph 74*a* (2) of the 1969 Manual and its predecessor, paragraph 153*a*, required that the military judge instruct on the issue.[38] In addition, the drafters' analysis of R.C.M. 918 indicates the propriety of instructing on accomplice corroboration.[39] Furthermore, numerous appellate court opinions state the necessity of instructing the court members on the rule upon defense request.[40] Thus the law on this issue is not settled, and defense counsel properly may request that the military judge

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[30] The Uniform Code of Military Justice art. 67(d), 10 U.S.C. § 867(d) (1982) provides in pertinent part, "The Court of Military Appeals shall take action only with respect to matters of law." In United States v. Bennington, 12 C.M.A. 565, 31 C.M.R. 151 (1961), the Court of Military Appeals treated the determination as to whether an accomplice's testimony was self-contradictory, uncertain, or improbable as a legal question. In *Bennington,* the accused was convicted *inter alia* of consensual sodomy. *Id.* at 566, 31 C.M.R. at 152. The Court of Military Appeals ruled that the testimony of Bennington's accomplice was self-contradictory, uncertain, and improbable. The court also found that the accomplice's testimony was uncorroborated and, therefore, reversed the convictions. *Id.* at 568–69, 31 C.M.R. at 154–55; *see* United States v. Leyva, 8 M.J. 74 (C.M.A. 1979); United States v. Lee, 6 M.J. 96 (C.M.A. 1978) ("our examination of the record fails to convince us that the testimony is self-contradictory, uncertain, or improbable"); United States v. Donati, 14 C.M.A. 235, 34 C.M.R. 15 (1963) (court treats determination whether accomplice's testimony is self-contradictory, uncertain, or improbable as a legal question).

[31] 5 C.M.A. 438–39, 18 C.M.R. at 62–63.

[32] *Id.* at 439, 18 C.M.R. at 63.

[33] 39 C.M.R. 932 (A.F.B.R. 1968). Previously, in United States v. Newsom, 38 C.M.R. 833 (A.F.B.R. 1967), *petition denied,* 38 C.M.R. 441 (C.M.A. 1968) the board noted that the Court of Military Appeals had repeatedly expressed reservations regarding the propriety of instructing on the accomplice corroboration rule, citing United States v. Zeigler, 12 C.M.A. 604, 31 C.M.R. 190 (1962); *United States v. Scales;* United States v. Polak, 10 C.M.A. 13, 27 C.M.R. 87 (1958).

[34] 39 C.M.R. at 934.

[35] *Id.*

[36] For cases applying the confession corroboration rule, *see, e.g.,* United States v. Lowery, 13 M.J. 961 (A.F.C.M.R.) *petition denied* 14 M.J. 310 (C.M.A. 1982); United States v. Woodley, 13 M.J. 984 (A.C.M.R.) *petition denied* 15 M.J. 77 (C.M.A. 1982).

[37] *See* United States v. Seigle, 22 C.M.A. 403, 47 C.M.R. 340 (1973) (court notes that generally the legal sufficiency of the evidence is a matter for the judge, not the jury); *see generally* Fed. R. Crim. P. 29(a) (motions for judgement of acquittal by reason of legal insufficiency of the evidence are resolved by federal district judge prior to submission of the case to the jury).

[38] *Compare* Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 74*a*(2) *with* Manual for Courts-Martial, United States, 1969, para. 153*a*.

[39] *See supra* text accompanying note 21.

[40] *See e.g.,* United States v. Weeks, 15 C.M.A. 583, 36 C.M.R. 81 (1966); United States v. Scales, 14 C.M.A. 14, 33 C.M.R. 226 (1963); United States v. Borland, 12 M.J. 855 (A.F.C.M.R. 1981) *petition denied* 13 M.J. 235 (C.M.A. 1982); United States v. Hopewell, 4 M.J. 806 (A.F.C.M.R. 1978); United States v. Wilson, 2 M.J. 683 (A.F.C.M.R. 1976), *aff'd,* 3 M.J. 186 (C.M.A. 1977). For a recent case indicating that it is ordinarily appropriate to instruct on the accomplice corroboration rule, *see* United States v. Heyward, 17 M.J. 942 (A.F.C.M.R.), *petition granted,* 19 M.J. 29 (C.M.A. 1984). The court stated that military judges should instruct on the accomplice corroboration rule if an accomplice's testimony "may be found to be self-contradictory, uncertain, or improbable." *Id.* 17 C.M.R. at 946.

instruct the court members on accomplice corroboration even after the judge has denied a motion for a finding of not guilty.

"Self-Contradictory, Uncertain, or Improbable" in the Military

Neither the Manual for Courts-Martial nor the appellate case law has precisely defined the terms "self-contradictory, uncertain and improbable." Appellate decisions, however, have established a number of rules governing application of the criteria. First, the law is settled that an accomplice's testimony must be corroborated only if it is self-contradictory, uncertain or improbable in its "essential aspects."[41] Unfortunately, the term "essential aspects" has not been clearly defined. It is doubtful, however, that courts will find that an accomplice's testimony requires corroboration unless the witness' testimony is self-contradictory, uncertain or improbable with respect to the identity of the accused as the perpetrator of the crime or a fact material to proving that a crime was committed.

The term "self-contradictory" has undergone some judicial interpretation. The courts have held that the self-contradictory factor relates solely to the testimony of the witness during trial.[42] The fact that an accomplice has made prior statements does not establish that the witness' testimony is self-contradictory. Furthermore, the fact that one accomplice testifying for the government contradicts another accomplice testifying for the government does not establish that the testimony of either witness is self-contradictory.[43] The testimony of an accomplice at trial must be internally inconsistent to trigger the corroboration requirement.

Appellate opinions likewise have narrowed the scope of the term "improbable." The courts have ruled that a witness' testimony is not improbable unless reasonable minds could not disagree concerning the veracity of the witness' testimony.[44] In other words, if some reasonable minds could find part or all of the accomplice's testimony believable while others may not, the witness's testimony is not improbable for purposes of the accomplice corroboration rule.[45] The appellate courts narrow reading of the term "improbable" is well-illustrated by the Army Court of Military Review's opinion in *United States v. McPherson.*[46] Private First Class McPherson was charged with *inter alia,* housebreaking and larceny of stereo equipment. The government's case was based primarily on the testimony of two accomplices who claimed that they conspired to steal stereo equipment from their company supply room. The two men claimed that they climbed through a fourth floor window onto the roof of the building in which the supply room was located and entered a window of the supply room. Both accomplices testified that McPherson was not originally part of the plan, but when they entered the supply room, they found McPherson already in the room stealing the equipment. At this point, the accomplices claimed, the three men agreed to take the equipment. Further, the accomplices contradicted each other concerning the roles the three individuals played in the removal of the equipment from the supply room. The court specifically noted that it found the testimony of the two accomplices "unusual," but nonetheless ruled that it was not improbable.[47] Although the court did not specifically state the analysis it used in determining whether the accomplices' testimony was improbable, the conclusion reached by the court is consistent with the general rule that military courts will not find testimony improbable for purposes of the accomplice corroboration rule unless no reasonable person could find the testimony believable.[48]

The "uncertain" language in the military accomplice corroboration rule has been the subject of very little judicial interpretation. In *United States v. Allums,*[49] the Court of Military Appeals provided some guidance for the term's application; the court, however, did not carefully analyze the term.[50] The court addressed whether the testimony of Allum's accomplice, Griffin, was uncertain for the purposes of the accomplice corroboration rule. Private Griffin testified that Corporal Allums handed him several packages of a vegetable substance which Griffin believed was marijuana. During this meeting, Griffin agreed to pay twenty dollars to Allums. Griffin, however, denied that he requested Allums to obtain the marijuana for him, and denied that he initially

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[41] United States v. Lippincott, 39 C.M.R. at 933.

[42] *See, e.g.,* United States v. Hubbard, 18 M.J. 678 (A.C.M.R. 1984), *petition granted,* 19 M.J. 312 (C.M.A. 1985); United States v. Rehberg, 15 M.J. 691 (A.F.C.M.R.), *petition denied,* 16 M.J. 185 (C.M.A. 1983); United States v. McPherson, 12 M.J. 789 (A.C.M.R.), *petition denied,* 13 M.J. 243 (C.M.A. 1982); United States v. Copeland, 21 C.M.R. 838, 859 (A.F.B.R.), *petition denied,* 22 C.M.R. 331 (C.M.A. 1956); United States v. Jones, 15 C.M.R. 664, 671 (A.F.B.R.), *petition denied,* 15 C.M.R. 431 (C.M.A. 1954). The Court of Military Appeals' opinion in United States v. Bennington, 12 C.M.A. 565, 31 C.M.R. 151 (1961) provides an example of testimony the court deemed self-contradictory. In this case, the alleged accomplice in consensual sodomy claimed at one point in his testimony that the acts of sodomy with the accused were distasteful to him, and he would not have consented to them but for his indulgence in alcohol. Later in his testimony, however, the accomplice admitted he had voluntarily removed his pants to facilitate the act. Further, he admitted that in the past he had voluntarily engaged in numerous acts of unnatural copulation with men and, indeed, on one occasion had agreed to engage in homosexual activity to steal from his partner. As a result, the Court concluded that these contradictions in his testimony established that the witness' testimony was self-contradictory for purposes of the accomplice corroboration rule. *Id.* at 568–69, 31 C.M.R. at 154–55.

[43] United States v. McPherson, 12 M.J. 789 (A.C.M.R.), *petition denied,* 13 M.J. 243 (C.M.A. 1982).

[44] United States v. Diaz, 22 C.M.A. 52, 46 C.M.R. 52 (1972).

[45] *Id.* For example, in United States v. Scales, 10 C.M.A. 326, 27 C.M.R. 400 (1959), the accused argued on appeal that an accomplice's testimony was improbable because there was a one to three week delay between the alleged sodomy and the reporting of the incident by the accomplice. The accused averred that it was unlikely that an individual would delay this long in reporting such a heinous act and, therefore, the accomplice's testimony was improbable. The court, however, rejected this argument, ruling that the witness' testimony was not improbable. *Id.* at 328, 27 C.M.R. at 402.

[46] United States v. McPherson, 12 M.J. 789 (A.C.M.R.), *petition denied,* 13 M.J. 243 (C.M.A. 1982).

[47] *Id.* at 791.

[48] *See United States v. Diaz.* In *United States v. Hubbard,* the court stated that it would find testimony improbable if the testimony "strain[ed] logic" or "contradict[ed] the physical evidence." 18 M.J. at 683.

[49] United States v. Allums, 5 C.M.A. 435, 18 C.M.R. 59 (1955). *See supra* notes 28–32.

[50] *Id.* at 438, 18 C.M.R. at 62.

offered to pay Allums for the marijuana. Also, Griffin averred that he never complied with his promise to pay twenty dollars to Allums.

Private Griffin's testimony was uncertain on a few matters. He testified he did not know "if you could call it a purchase or not." Griffin also testified that he was not sure the substance was marijuana. But Griffin was certain that Allums gave him a vegetable substance (that Griffin believed to be marijuana) that he promised to pay Allums twenty dollars in exchange for the substance, and that he smoked a portion of the vegetable substance that Allums transferred to him. Nevertheless, the Court ruled that his testimony was uncertain on "some points" and, accordingly, invoked the corroboration requirement.[51] The *Allums* case establishes, therefore, that even if an accomplice's testimony is certain on facts sufficient to establish the elements of the crime, the corroboration requirement will be invoked if the accomplice is uncertain on "some points" which are logically relevant to the case. Accordingly, the term "uncertain" in the accomplice corroboration rule is the least narrowly construed portion of the rule and provides the best opportunity for defense counsel to obtain invocation of a corroboration requirement.

Corroboration

If an accomplice's testimony is self-contradictory, uncertain, or improbable, the next question is what amount and what nature of evidence are necessary to corroborate the accomplice. *United States v. Thompson*[52] is the leading military case on the question of what evidence is necessary to corroborate an accomplice's testimony. In this case, Sergeant Thompson, a marine, was accused of multiple sales of heroin. The government's case was based on the testimony of a series of accomplices. The defense case consisted of a general denial of the allegations and testimony regarding Thompson's good character. After presentation of evidence, the military judge instructed the court members on the accomplice corroboration rule. Additionally, however, he instructed the court members that the testimony of one accomplice may corroborate the testimony of another. He further instructed the court that corroboration of an accomplice's testimony "may be evidence substantiating the credibility of the accomplice as distinguished from evidence relating to the commission of the crime by the accused."[53]

On appeal, Sergeant Thompson argued that the latter two instructions by the military judge were improper. The Navy Court of Military review agreed, holding that the testimony of an accomplice was never sufficient to corroborate the testimony of another accomplice.[54] Further, the Court stated that the evidence necessary to corroborate an accomplice's testimony not only must be independent of the accomplice or accomplices, but also must "connect the accused with the commission of the crime charged."[55] Thus, evidence regarding the good character of the accomplice or accomplices is insufficient corroboration. Likewise, independent proof that the crime was committed is insufficient. The corroborating evidence must identify the accused as the perpetrator of the crime. Additionally, defense counsel should note that an accused's confession universally has been held sufficient to corroborate an accomplice's testimony.[56]

Assuming that the prosecution adduces corroborating evidence independent of the accomplice or accomplices, what standard of proof is applied? The *Thompson* case does not address this question, and there is little military law on the subject. Courts may analogize to Military Rule of Evidence 304(g), the confession corroboration rule. Military Rule of Evidence 304(g)(1) specifically delineates the quantum of evidence necessary for corroboration of an accused's confession or admission. The rule provides that the independent corroboration evidence "need raise only an inference of the truth of the essential facts [of the accused's statement.]" Further, the evidence for confession corroboration need not be sufficient to establish the accused's guilt beyond a reasonable doubt, and the corroborating evidence may be susceptible of other equally plausible inferences. Defense counsel should vigorously dispute application of the confession rule to accomplice corroboration. First, a persuasive military authority exists in support of an argument that evidence offered to corroborate an accomplice must be of a "substantial and confirming" nature.[57] Furthermore, courts traditionally hold that the evidence necessary to corroborate an accomplice must be consistent only with guilt.[58]

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[51] *Id.* Likewise, in *United States v. Bennington*, the Court of Military Appeals concluded that corroboration was required if an accomplice's testimony was uncertain "as to some details." 12 C.M.A. at 569, 31 C.M.R. at 155. *See supra* notes 30 and 42.

[52] 44 C.M.R. 732 (N.C.M.R. 1971).

[53] *Id.* at 736.

[54] *Id.* at 736–37; *accord* United States v. McCue, 3 M.J. 509, 513 n.2 (A.F.C.M.R. 1977).

[55] 44 C.M.R. at 737. The Air Force Court of Military Review adopted this analysis in United States v. Wilson, 2 M.J. 683 (A.F.C.M.R. 1976), *aff'd*, 3 M.J. 186 (C.M.A. 1977). In this case, an accomplice testified that Airman Wilson was in possession of heroin on the day Wilson left to assume temporary duties at Zargoza Air Base, Spain. The government attempted to corroborate the accomplice by introducing Wilson's written orders requiring that he report to Zargoza Air Base on a certain date for temporary duty. The military judge instructed the court members that they must determine whether this evidence constituted sufficient corroboration. The Air Force court ruled that the judge's instruction was improper, reasoning that the military judge should have instructed the court members that insufficient corroboration existed as a matter of law because the orders did not connect Wilson with possession of heroin. *Id.* at 685–86. The court further opined, however, that in some cases the determinations: (1) whether an accomplice's testimony is self-contradictory, uncertain, or improbable; and (2) whether an accomplice's testimony is corroborated, should be made by the court members. *See supra* text accompanying note 40. *See also* United States v. Moore, 8 M.J. 738 (A.F.C.M.R. 1980) *aff'd*, 10 M.J. 405 (C.M.A. 1981).

[56] United States v. Lee, 6 M.J. 96 (C.M.A. 1978); *United States v. Wilson.* In *Wilson*, the accused argued that his confession was insufficient to corroborate an accomplice's testimony because the accused also was an accomplice and one accomplice's testimony is never sufficient to corroborate that of another. 2 M.J. at 686. The court however, refused to adopt this analysis. *Id.*

[57] United States v. Wilson, 2 M.J. at 685–86. Under this view, however, the question of corroboration sometimes is a matter for the court members. *See supra* text accompanying notes 38–40. The best reasoned and modern view is that of Mil. R. Evid. 304(g)(1). Under the analysis of Rule 304 (g)(1), the existence of corroboration is a technical, legal determination not dependent on the weight of the evidence, and the ruling is always made by the trial judge. *See supra* text accompanying notes 36–37.

[58] *See* Underhill, *supra* note 12, at 552 and cases cited therein; *cf.* Mil. R. Evid. 304(g)(1).

These latter rules specifically address the question of accomplice corroboration; defense counsel should contend, therefore, that they should be applied in lieu of the corroboration rule tailored to address the admissibility of confessions.

Conclusion

Even though the accomplice corroboration rule has been a part of military law for over thirty-five years, the courts have not given extensive guidance on its application. This fact is particularly true with respect to the question whether application of the rule is a question of law for the military judge or a question of fact for the members of the court. Defense counsel should attempt to capitalize on the indefiniteness in the law. In the example at the beginning of this article, defense counsel should move for a finding of not guilty, and argue that Private Jones's testimony established that he was culpably involved in the commission of the crime and, therefore, he is an accomplice as a matter of law. Further, defense counsel should contend that because Private Jones is uncertain on "some points" logically relevant to the case, the government must corroborate his testimony.[59] Finally, the defense should argue to the military judge that as the government did not present corroborating evidence, its case is insufficient as a matter of law. Counsel should emphasize to the judge that corroborating evidence must identify the accused in the commission of the crime, and thus the fact that an audit showed that boots and socks were missing from the supply room is insufficient.

In the event the military judge rules that the accomplice corroboration rule's omission from the Manual establishes that it is no longer effective, the defense has preserved this issue for appeal. Furthermore, if the military judge rules that application of the accomplice corroboration rule is a question of law, denies the motion for a finding of not guilty, and does not instruct the court on the rule, the issue whether application of the rule is a matter for the judge or members will be preserved for appeal. If the military judge declines to apply the rule because he or she believes its application is a factual matter for the court members, defense counsel should request instructions on the accomplice corroboration rule.[60] Specifically, defense counsel should request that the judge instruct the court-martial that a conviction cannot be based on the uncorroborated testimony of an accomplice whose testimony is self-contradictory, uncertain or improbable. In addition, the judge should be requested to instruct the court that if an accomplice is uncertain on "some points," his testimony is uncertain. Finally, the defense should request that the court-martial be instructed that corroborating evidence must identify the accused in the commission of the crime and must be of a substantial and confirming nature.

By understanding the intricacies of the accomplice corroboration rule, defense counsel not only can achieve better results at trial, but also can force resolution on appeal of issues which long have remained unsettled.

[59] An argument that Jones's testimony is self-contradictory because he made a prior inconsistent statement to military police investigators would be in contravention of well-settled law. *See supra* text accompanying note 42. Likewise, an argument that Jones's testimony is improbable would have no legal or logical basis. *See supra* text accompanying notes 44–48.

[60] Failure to request instructions on the accomplice corroboration rule constitutes a waiver of the question whether the instructions were appropriate unless the appellate court finds "plain error." United States v. Lee 6 M.J. 96 (C.M.A. 1978); United States v. Stephen, 15 C.M.A. 314, 316, 35 C.M.R. 286, 288 (1965). The appellate courts will find plain error only if the accomplice's testimony was of "pivotal" importance to the government's case, and the defense "seriously attacked" the credibility of the accomplice. United States v. Moore, 8 M.J. at 740; *see* United States v. McFarlin, 19 M.J. 790 (A.C.M.R.), *petition denied*, 20 M.J. 314 (C.M.A. 1985).

Court-Martial Processing Times

Court-martial processing times for the first quarter, Fiscal Year 1986 (October–December 1985) show no significant differences from Fiscal Year 1985 processing times reported in the January issue of *The Army Lawyer*. The first quarter report is based on 396 general court-martial records and 198 BCD special court-martial records processed in the Clerk of Court office.

Average trial and review processing times were as follows:

PERIOD MEASURED	GCM	BCDSPCM
From Charges or Restraint to Sentencing	48 days	33 days
From Sentencing to Action of Convening Authority	52 days	46 days
From Convening Authority Action to Dispatch	6 days	
From Dispatch to Receipt by Judiciary, CONUS cases	7 days	
From Dispatch to Receipt by Judiciary, USAREUR cases	11 days	
From Dispatch to Receipt by Judiciary, EUSA cases	14 days	

Summarizing Specifications in Initial Promulgating Order

Rule for Courts-Martial 1114(c)(1) permits the order promulgating the initial action in a court-martial case to include a summary of the charges and specifications rather than a verbatim recital. The rule analysis in Appendix 21 explains that "[t]he charges and specifications should be summarized to adequately describe each offense, including allegations which affect the maximum authorized punishments." Further instructions and some examples of correctly summarized specifications are shown in Appendix 17 of the 1984 Manual for Courts-Martial, at page A17–1.

One jurisdiction's Special Court Martial Order Number 3 of 1985 summarized the Specification of Charge I as follows: "Dereliction of Duty, on or about 15 September 1984." The Specification of Charge II was summarized as follows: "Larceny of US Government property, on or about 15 September 1984." The Army Court of Military Review made no correction in the promulgating order. The Court of Military Appeals, however, after granting review and upon deciding the case with a summary disposition, commented critically that, "In order to provide an adequate description of each offense, the court-martial order in this case should have included a statement of the act constituting the dereliction, and the value of the property stolen." *United States v. Templin*, CMR 21134 (C.M.A. 1986).

The value of money or property involved is a matter affecting the maximum authorized punishment of several offenses. These and other matters affecting maximum punishment, which must always be reflected in a summarized specification, are conveniently listed in Appendix 12 of the Manual. In addition to dereliction of duty, offenses that may require a more adequate description than the mere name of the offense include conspiracy, solicitation, and conduct unbecoming an officer, as well as the various offenses involving disobedience or disrespect.

Examination and New Trial Note

Review of Special Courts-Martial

In processing applications for relief under Article 69(b), UCMJ, it has been noted that some jurisdictions have failed to complete an R.C.M. 1112 review. A non-BCD special court-martial requires an R.C.M. 1112 review after the convening authority has taken his or her action. A post-trial recommendation to the convening authority regarding the findings and sentence, similar to the one prepared pursuant to R.C.M. 1106, is not a substitute for the review required by Article 64(a), UCMJ, and R.C.M. 1112.

Contract Appeals Division Note

Lieutenant Colonel David C. Zucker & Major John T. Jones, Jr.
Trial Attorneys

Appeals of General Dynamics, Pomona Division

The Armed Services Board of Contract Appeals (ASBCA) issued two decisions in March, 1986, in the General Dynamics Division Air Defense gun (DIVAD) litigation. The decisions provided guidance on the time in which a contracting officer must issue a final decision on a claim, and on the board's jurisdiction over matters subject to a criminal indictment. The Army's position was upheld on both issues. General Dynamics and four senior company officials were indicted on 5 December 1985 for allegedly fraudulently shifting costs incurred under a fixed price Army Research & Development contract for a prototype DIVAD system to its Independent Research & Development and Bid & Proposal overhead accounts. This allegedly permitted General Dynamics to seek reimbursement for a portion of its multimillion dollar overrun through overhead allocated to several cost reimburseable contracts.

General Dynamics appealed to the ASBCA, characterizing the indictment as a "constructive final decision." The Army promptly moved to dismiss for lack of jurisdiction. Shortly thereafter, General Dynamics and its co-defendants moved in federal district court to dismiss the criminal action, arguing that "primary jurisdiction" lay with the ASBCA because of the underlying cost accounting contract issue.

General Dynamics then filed claims with the administrative contracting officer seeking reimbursement of the

mischarged overhead costs. General Dynamics simultaneously asked the ASBCA to direct that a final decision be issued on its claims within ten days.

The Army at the ASBCA and the Department of Justice in federal district court argued in the two motions that the ASBCA lacked jurisdiction pursuant to 41 U.S.C. § 605(a) (1982).

The issue in ASBCA No. 32494–197 (6 Mar. 1986) was whether the failure of the contracting officer to issue a final decision in a period less than the sixty days permitted by the Contract Disputes Act could be "undue delay." The ASBCA held that the contracting officer need only comply with the Disputes Act and dismissed the appeal.

In ASBCA No. 32297 (12 Mar. 1986), the ASBCA held that there was no jurisdiction over the subject matter of the indictment. Not only was there no appealable final decision, constructive or otherwise, but also the indictment divested both the contracting officer and the ASBCA of jurisdiction over the subject matter of the indictment. Thus, where an indictment alleges fraud, agency heads, their contracting officers, and agency boards of contract appeals are deprived of jurisdiction over subject matter "inseparable" from the subject matter of the indictment. In future appeals involving allegations of fraud it appears that the ASBCA will be receptive to jurisdictional motions that meet two tests: there must be an indictment for fraud (or a species of fraud such as conflicts of interest); and the subject matter of the appeal must be inseparable from the subject matter of the indictment. When these two tests are met, the appeal will be dismissed, not as a matter of discretion, but as a matter of law.

USALSA Electronic Mail Addresses

Facilities are available at the U.S. Army Legal Services Agency (USALSA) for the electronic transfer of documents directly to this agency. The following is a list of telephone numbers to be used in making these transfers:

Service	Address	Point of Contact	Telephone Number
DDN*	BRUNSON@OPTIMIS-PENT	MAJ Brunson	AV 289–1374, (202) 756–1374
Message (TWX)	CDRUSALSA FALLS CHURCH VA//JALS–XX**//	Admin Office	AV 289–1774, (202) 756–1774
OPTIMIS***	BRUNSON	MAJ Brunson	AV 289–1374, (202) 756–1374
Telefax	USALSA, ATTN: JALS–XX**	USAISC	Data: AV 289–2040, (202) 756–2040 Voice: AV 289–2041, (202) 756–2041
USATDS	Modem Connection	Ms. Nancy DePalma	AV 289–1390, (202) 756–1390

*Defense Data Network (DDN). DDN is a world-wide communication system capable of transmitting electronic messages to USALSA via the OPTIMIS system (see below). To obtain access to DDN within CONUS, contact the OPTIMIS office, AV 295–5772, commercial (202) 695–5772; overseas contact your local Information Management Office.
**Substitute the office symbol for the appropriate division, e.g., JALS–DA for Defense Appellate Division (DAD).
***Operation Management Information System (OPTIMIS). OPTIMIS is an electronic mail system capable of transmitting messages throughout CONUS and world-wide via DDN. To obtain an OPTIMIS account, contact OPTIMIS Office, AV 295–5772; commercial (202) 695–5772.

In addition to the above listings, many USALSA divisions have the capability to send and receive documents electronically via direct telephone connection. Contact the appropriate USALSA division or MAJ Brunson, AV 289–1374, (202) 756–1374, for further information.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Contract Law Note

Commerce Business Daily Publication Requirements

Contracting officers and their legal advisors should be aware of Army Acquisition Letter 85–42, 30 December 1985. This letter adds a requirement at Army FAR Supplement § 5.203 (AFARS § 5.203) that contracting officers verify the date of synopsis publication in the *Commerce Business Daily* (CBD), document the contract file, and issue the solicitation no earlier than fifteen days from the date of publication. This requirement was highlighted by Brigadier General Henry, the Competition Advocate General of the Army, in a memorandum to competition advocates on 6 February 1986. The procedure is intended to help promote competition and assist in preventing protests alleging regulatory and statutory violations concerning publication of procurement actions in the CBD.

The impetus for the above action is the increasingly strict standards that Congress has imposed on executive agencies requiring procurement-related materials to be published in the CBD, and makes several recent decisions of the Comptroller General more noteworthy than might otherwise be the case. The thrust of these statutes and decisions has been to promote full and open competition in procurement actions.

Generally, Federal Acquisition Regulation § 5.203(a) (FAR § 5.203(a)) requires that a proper notice of a contract action be published at least fifteen days before issuance of a solicitation. FAR § 5.203(b) requires an agency to allow at least thirty days response time for receipt of bids or proposals from the date of issuance of a solicitation. (Special situations requiring other periods are outlined in FAR § 5.205.) Finally, FAR § 5.203(f) permits contracting officers, absent evidence to the contrary, to *presume* that notice has been published 10 days (6 days if electronically transmitted) following transmittal of the synopsis to the CBD. The recent protest decisions eliminate this presumption and put teeth into the other two above-stated publication requirements.

The first case to touch on the issue was *Harris Corporation.*[1] Harris protested the sole-source award of a delivery order to another corporation, contending that the United States Army had made the award in less than the required thirty day period after synopsizing the procurement. The Comptroller General sustained the protest, holding that the Army improperly rejected a potential source of supply by making the sole-source award prior to the expiration of the mandatory publication period as outlined in the Small Business Act as amended by Public Law No. 98–72.[2]

In *AUL Instruments, Inc.*,[3] the Comptroller General discussed the presumption of publication provision contained in Department of Defense FAR Supplement § 5.203 (DFARS § 5.203) and found it invalid. The Army had transmitted the synopsis of the proposed procurement to the CBD for publication on 9 August. The actual date of award of the contract was 21 September. The Army argued that the DFARS provision allowed a *presumption* of publication two days after transmittal to the CBD, or 11 August, even though, because of error, publication did not actually occur until 15 September. The Comptroller General held, however, that the notice requirement of the Small Business Act, as amended by Public Law No. 98–72, referred to the date of *actual* publication and could not be negated by a regulatory provision establishing a presumption. Further, the decision noted that subsequent statutory enactments in the Small Business and Federal Procurement Competition Enhancement Act of 1984 (Public Law No. 98–577) expressly required actual advance publication in the CBD. In the face of these congressional mandates, any presumptions created a basic conflict. This included not only the DFARS provision (which has since been eliminated), but also the FAR provision noted above which allowed presumption after six days. Responsible officials were encouraged to devise means to ensure prompt publication.

Finally, in *Kavouras, Inc.*,[4] the Comptroller General sustained a protest where the agency had failed to properly synopsize the procurement in the CBD fifteen days prior to issuing an order under a General Services Administration (GSA) schedule contract as required by regulation. As a result, the protestor had insufficient time to prepare its proposal. Notable in this case was the decision to award costs as an incentive to pursuing the protest as competition had been limited by the agency's improper award of the contract.

While competition has been the watchword, an agency is not accountable simply because a prospective bidder did not receive notice of the proposed procurement. If the agency has met statutory and regulatory requirements, the burden shifts to the contractor to acquire procurement information. In *Neighborhood Ranger, Inc.*,[5] the protestor sought to have the Comptroller General extend its notice rulings to cover actual notice in a situation where the CBD was not reliably delivered to a remote area of Alaska. In this case, the Comptroller General held to precedent and determined that the agency had complied with all the notice requirements and that actual publication was constructive notice of the procurement to all potential offerors. There was no procuring agency failure that would support a protest.

The Comptroller General has determined that the statutory mandates for notice, publication, and competition will be enforced as literally stated in the legislation. Agencies will have to ensure compliance with these requirements and, upon doing so, will protect themselves from protests for failure to properly synopsize procurement actions. Major Pedersen.

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[1] Comp. Gen. Dec. B–217174 (22 Apr. 1985), 85–1 CPD para. 455.

[2] 97 Stat. 403 (1983) (codified at 15 U.S.C. § 637(e) (Supp. I 1983).

[3] Comp. Gen. Dec. B–216543 (24 Sept. 1985), 85–2 CPD para. 324.

[4] Comp. Gen. Dec. B–219508 (11 Nov. 1985), 85–2 CPD para. 535.

[5] Comp. Gen. Dec. B–220717 (23 Oct. 1985), 85–2 CPD para. 452.

Criminal Law Notes

United States v. Solorio[6] and Service Connection

The Court of Military Appeals has again[7] stretched the boundaries of the service connection doctrine in a recent case on the subject. Yeoman First Class Solorio was charged with various sex offenses against minor females who were the dependents of fellow Coast Guardsmen. The offenses in issue occurred off-base in Alaska. The military judge dismissed these offenses at a court-martial in New York that also involved similar sex offenses allegedly committed on-base at Governor's Island. The Coast Guard Court of Military Review reversed the trial judge[8] pursuant to Article 62, Uniform Code of Military Justice.[9] The Court of Military Appeals affirmed that court-martial jurisdiction existed over the off-base sex offenses with these minor dependent children in Alaska. In doing so, the court further broadened the scope of courts-martial's service connection jurisdiction.

The Court of Military Appeals began in *Solorio* by noting that its prior service connection decisions for this type of offense were ripe for reexamination "in light of more recent conditions and experience."[10] Furthermore, the Supreme Court's opinions in *O'Callahan v. Parker*[11] and *Relford v. Commandant*[12] permitted this evolutionary approach to defining service connection jurisdiction. In reaching this conclusion, the court relied upon the concept of a "living" Constitution that has a fixed meaning to its several guarantees but those guarantees may be applied in the context of the current conditions of society. In *Solorio*, the relevant conditions which justified a different conclusion as to the existence of court-martial jurisdiction over this type of offense were our society's recent concern for the victims of crimes, especially where children are the victims of sex offenses, and a recognition that the parents of such victims are themselves victims.

From this starting point, the court moved to examine the relevant law. *O'Callahan*, it said, was primarily concerned with "the impact of crimes on the armed forces and their missions."[13] Unless an offense had the requisite impact, it could not be tried by a court-martial. This was because a court-martial trial deprives a soldier of the guarantees of the fifth and sixth amendments of the Constitution, specifically, indictment by grand jury and trial by petit jury. Of less concern was the Supreme Court's interpretation of article I, section 8, clause 14, as a limited grant of authority to Congress to make rules for the control of the nation's military forces.[14]

These two initial conclusions, that society now recognizes a greater interest of the victim(s) in the criminal prosecution of an offense and that the *O'Callahan* service connection doctrine was foremostly concerned with the impact of crime on the military, led the court to three specific findings. First, the continuing effect on the victims of this type of crime impacts on the morale of the military.[15] Second, service connection may be measured by considering the circumstances at the time of trial rather than just measuring the effects at the time of the offense.[16] Third, the pendency of a court-martial for subsequent offenses is relevant in determining service connection.[17] Each of these conclusions may be treated in a generic sense and applied to any offense. Taken together, they significantly expand the concept of service connection jurisdiction.

In some ways, *Solorio* is the functional equivalent of *Trottier*.[18] What *Trottier* did for drug offenses, *Solorio* does for sex offenses against dependent children. While not creating a per se categorization for service connection jurisdiction purposes, it is hard to imagine such an offense that would not be service connected in the future.

But where *Trottier* narrowly focused on the offense in issue, *Solorio*, like *United States v. Lockwood*,[19] also addressed the whole of the service connection doctrine. The analysis used in *Solorio* clearly justifies the broadest view of who is the victim of an offense (*e.g.*, parents of a minor child who is sexually abused) and how an offense impacts on military morale (*e.g.*, potential adverse consequences of having the offender continue to serve at the victim's place of duty). *Solorio* also justifies the practice of several Courts of Military Review in considering the impact on military medical services to determine the service connection of an offense.[20] Of potentially greater impact is the court's conclusion that the service connection doctrine is more concerned with protecting fifth and sixth amendment rights, which are waivable, rather than acting as a real limit

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[6] 21 M.J. 251 (C.M.A. 1986).

[7] *See* Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After* O'Callahan v. Parker, 25 A.F.L. Rev. 1, 31–33 (1985).

[8] United States v. Solorio, 21 M.J. 512 (C.G.C.M.R. 1985), *aff'd*, 21 M.J. 251 (C.M.A. 1986). Despite being reversed by two appellate courts, the military judge did an excellent job of rendering factual findings and legal conclusions in accordance with the format of the then-current legal standards.

[9] 10 U.S.C. § 862 (1982) [hereinafter cited as UCMJ].

[10] 21 M.J. at 254.

[11] 395 U.S. 258 (1969).

[12] 401 U.S. 355 (1971).

[13] 21 M.J. at 255.

[14] *Id.* at 256. This conclusion was not particularly critical to the result reached in *Solorio*, but it does lay the foundation to make service connection jurisdiction a waivable requirement. The fifth and sixth amendment protections are waivable (*see* Fed. R. Crim. P. 7(a) and 23(a)), so if that is all the service connection doctrine was meant to secure, its provisions should likewise be subject to waiver.

[15] 21 M.J. at 256.

[16] *Id.* at 257.

[17] *Id.*

[18] United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

[19] 15 M.J. 1 (C.M.A. 1983).

[20] *See, e.g.*, United States v. Shorte, 18 M.J. 518 (A.F.C.M.R. 1984); United States v. Mauch, 17 M.J. 1033 (A.C.M.R. 1984).

on Congress' power to make certain offenses by soldiers crimes against the UCMJ. Under this analysis, a soldier could, under appropriate waiver standards (voluntary, knowing, intelligent, and with the advice of counsel) elect trial by court-martial for the purpose of avoiding trial by a competent civilian jurisdiction instead of contesting court-martial jurisdiction.[21]

Taken together, the several rationales and conclusions of *Solorio* do not break new ground so much as they furrow wider and deeper the course of the service connection doctrine as it has developed since 1980 under the guidance of Chief Judge Everett. Notably, Judge Cox is ready to go further and in *United States v. Scott*[22] would hold offenses prosecuted under Article 133, UCMJ, to be per se service connected because of the offender's status as an officer of the armed forces. As yet, the Chief Judge has not gone so far.[23] But counsel may look for additional developments in the service connection doctrine as the composition of the Court of Military Appeals changes and as service connection jurisdiction issues are petitioned for review to the United States Supreme Court. Major Clevenger.

Ethical Questions Concerning Speedy Trial

Writing for the court in *United States v. Burris*,[24] Judge Cox commented on the conduct of defense counsel. Both the trial judge and the Court of Military Appeals were displeased with the "mascinations which went on in bringing this case before the court."[25] While the trial judge specifically declined to state that there had been "sharp practice involved," the Court of Military Appeals indicated that "another judge may not have been as reticent."[26] The Court of Military Appeals apparently believed the defense counsel may have requested a date beyond 120 days, hoping it would go unnoticed and the time would be charged against the government. Judge Cox stated the court "would not hesitate to hold that a defendant is 'estopped' from claiming he lacked a speedy trial if the delay is caused by defense misconduct."[27] The court, however, found insufficient evidence in the record to support a finding of misconduct. The court cautioned that defense counsel who elect to negotiate a trial date ex parte with a docketing clerk or the trial judge have "an ethical responsibility to insure that the clerk or judge is not misled or inadvertently deceived into setting a date which violates the speedy-trial rule."[28] While the court did not specify how this rule might work in practice, counsel should exercise caution. Clearly, defense counsel must not mislead the court or misrepresent the facts, but it is doubtful the defense has an affirmative obligation to see the government brings its case to trial with the speedy trial period.[29]

Legal Assistance Items

Legal Assistance to Survivors of Gander, Newfoundland Tragedy

Since the occurence of the Gander, Newfoundland tragedy on 12 December 1985, in which 248 soldiers of the 101st Airborne Division (Air Assault) at Fort Campbell died, numerous electronic messages have been sent through legal channels to offer guidance and providing updates on efforts to assist survivors. Legal Assistance Update messages 1–6 were published in the February 1986 issue of *The Army Lawyer*, at 52.

Following are messages which have been sent as of 10 April 1986, arranged chronologically.

Air Crash Legal Assistance Update #7

This message, dispatched 15 January 1986, has the following date-time group: P151914Z Jan 86.

Subject: Air Crash Legal Assistance Update #7

1. SJAs should ensure that their legal assistance office receives and retains all previous messages involving the Gander tragedy. Family members are relocating and while a SJA may not be assisting anyone at this time, a requirement to do so may develop in the near future. Copies of prior messages can be obtained by calling the numbers in paragraph 7 below.

2. SJAs are reminded that DAJA–LA message no. 3 (P262055Z Dec 85, Subj: Aircraft Legal Assistance Update No. 3) requires SJAs to advise this office when designating a LAO to assist a SAO and family member. DAJA–LA message R091910Z Jan 86, Subj: Aircraft Legal Assistance Update No. 6, requires telephonic confirmation concerning intention to attend the special course for LAOs at TJAGSA 18–19 Feb 86. TJAG has asked that all assisting LAOs attend.

3. Family members have received their $3000 death gratuity and are starting to receive their $50,000 SGLI and private insurance payments. They are vulnerable to dubious sales and investment solicitations. LAOs and SAOs should counsel families concerning solicitations. LAOs and SAOs

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[21] In *Lockwood*, for example, the accused faced a much less severe punishment at a special court-martial than he would have faced in a Texas criminal prosecution for the same offenses. The concept of waiver, it should be noted, was specifically rejected in United States v. Scott, 21 M.J. 345, 347 (C.M.A. 1986), decided a month after *Solorio*.

[22] 21 M.J. 345 (C.M.A. 1986) (Marine Corps officer's off-base sexual offenses with young female dependents of a retired Marine NCO were service connected). *Scott* is significant in its own right for asserting, without exception, that all on-post and all overseas offenses are service connected.

[23] Perhaps the Chief Judge is mindful, as government counsel should be, of Lieutenant Colonel Tomes' warning in his article on the service connection doctrine (*supra* note 7, at 40) that the expanding scope of service connection is not "a license to try by court-martial off-post offenses that have no real connection to the military."

[24] 21 M.J. 140 (C.M.A. 1985). For a discussion of other issues in this case, *see* Wittmayer, *Appellate Courts Address Speedy Trial Issues*, The Army Lawyer, Mar. 1986, at 63.

[25] 21 M.J. at 144.

[26] *Id.*

[27] *Id. Cf.* United States v. Cherok, 19 M.J. 559 (N.M.C.M.R. 1984) (defense gamesmanship condemned), *petition granted*, 20 M.J. 122 (C.M.A. 1985).

[28] 21 M.J. at 144.

[29] Model Code of Professional Responsibility DR 1-102(A)(4) (1979).

should counsel families concerning the importance of sound investing and saving for the future. They should be encouraged to seek advice from knowledgeable, reliable, and trusted persons concerning the use of these payments. LAOs and SAOs should not recommend any specific companies but, if knowledgeable in the area, should discuss in general terms the advantages and disadvantages of such investments as stocks and bonds, mutual funds, tax exempt investments, certificates of deposit, insured savings accounts, life insurance, annuities, etc. LAOs and SAOs will also ensure that they understand the families' military and veterans' benefits. Families should also be counseled on the tax consequences of these payments.

4. The Legal Assistance Office, Office of The Judge Advocate General (Phone: (202) 697–3170; AV 227–3710) should be advised if any family member has a claim for private life insurance rejected because the soldier was in the military or was on a mission excluded from coverage by the terms of the policy. To date we are unaware of any such rejections.

5. Family members may need wills or may have to revise their wills. At the appropriate time this matter should be discussed with them.

6. Some families are receiving phone calls from unidentified individuals claiming to be attorneys or agents of a "manufacturer" of the Arrow airplane that crashed. The caller then asks if the family has an attorney so that the possibility of a settlement can be discussed. This appears to be a means of getting information that could be used for an unlawful solicitation of clients. LAOs should advise family members to get the name and phone number of the caller, and refuse to answer any questions by stating: "Before I give you the information you want I would like to talk to my survivor assistance officer. If he indicates I can give you the information I will call you back in a few days." The matter should be reported to the SAO and the LAO.

7. The Legal Assistance Office, Office of The Judge Advocate General, is committed to providing all necessary assistance to LAOs and SAOs. Direct requests for assistance to either COL Richard S. Arkow or MAJ John T. Meixell at (202) 697–3170 or AV 227–3170 from 0730 to 1630 EST. During nonduty hours, calls may be directed to COL Arkow at (703) 644–4137 or MAJ Meixell at (703) 425–1093. Collect calls will be accepted.

Aircraft Legal Assistance Update #8

This message, dispatched 23 January 1986, has the following date-time group: P231315Z Jan 86.

Subject: Air Crash Legal Assistance Update #8

A. DA msg P271848Z Dec 85, Subj: Legal Support for Survivor Assistance Officers Major General Overholt Sends

B. DAJA–LA msg P151914Z Jan 86, Subj: Air Crash Legal Assistance Update #7.

1. Ref A states "All judge advocates (will) devote their full effort to providing quality legal assistance and advice to the primary next of kin. . . ." This requirement extends to providing all possible legal assistance to these family members. If a requirement arises which is outside the normal office area of practice, every effort should be made to find the answer. While this maximum support of family members is necessary, LAOs should be careful not to provide advice beyond their capabilities. When necessary, seek help from more experienced attorneys, both active and reserve.

2. Due to the complexity and time consuming nature of this area of the law, the Army will not establish a centralized procedure to settle all claims against Arrow Air. The extent of assistance that will be available should be decided NLT 31 Jan 86. This decision will be forwarded ASAP. However, it is apparent that where lengthy litigation will not work a hardship on the family, it may be in their best interest to consider retaining an attorney. Prior to discussing this matter, LAOs must ensure that family members are ready emotionally to discuss this subject. SAOs should be consulted in this regard.

3. If assistance of the civilian bar is required to pursue liability claims, LAOs should actively assist family members to secure counsel fully qualified and experienced in that specialized area of law. Fee arrangements should also be considered in recommending civilian counsel. UP para 2–3, AR 27–3, LAOs may refer clients to a particular firm as long as the appearance of favoritism by constantly referring clients to that particular firm is avoided. Unless based on personal knowledge, LAOs should avoid recommendations concerning the capabilities of a firm. However, a firm's reputation may be conveyed to the client. As general practitioners, LAOs have an obligation to make referrals to specialists when advising clients in certain areas of the law. Commercial aircraft accident cases fall into this category.

4. In cases where the client determines that civilian counsel should be retained, the LAO should actively assist the client in getting the best possible attorney and in negotiating the most favorable fee arrangement possible. It is advisable for the LAO to review the retainer agreement before the client signs it. This review should include: a statement of the fee arrangement (to include any provisions for it to decrease if multiple clients retain the same attorney; whether the fee can be increased, and if so, under what conditions (it should be clear that the fee cannot increase); discussion of how expenses are calculated (to include how they will be shared among multiple clients); and if local counsel is necessary, who will pay for them (the retained counsel should pay for the local counsel out of his contracted fee).

5. To assist LAOs in this task, this office called a number of law firms that deal in this highly specialized area of the law and learned that their fee structures range from 15%–40%. Those LAOs whose clients desire to retain civilian counsel should contact MAJ Meixell of this office for more information.

6. Further information has been gathered concerning the incident described in para 6, Ref B. The caller claims to be a Mr. Buckley representing American International Insurance Company, the carrier for the aircraft manufacturer. This office has confirmed that this is a misrepresentation. Attorneys should alert their clients to this ruse, and should attempt to gather any information which could assist in identifying the individual responsible for it. This office is particularly interested in the identity of any law firm that attempts to contact the survivor shortly after they receive a call from "Mr. Buckley."

7. Active duty legal assistance officers (AD LAO) are reminded that they have an obligation to assist the Reserve Component legal assistance attorneys (RLAO) designated to provide support as a result of the Gander tragedy. While

the RLAO will have primary contact with the PNOK, the AD LAO must be able to provide assistance and support to the RLAO. It is particularly important to serve as a conduit for information to those individuals. On receipt of any DA messages, AD LAOs should contact RLAOs they area assisting ASAP and convey this information.

Aircraft Legal Assistance Update #9

This message, dispatched 31 January 1986, has the following date-time group: P311530Z Jan 86.

Subject: Air Crash Legal Assistance Update #9

1. Within the parameters set forth in AR 27–3, active duty and Reserve legal assistance officers (LAOs) must provide the highest quality legal assistance to family members of soldiers killed in the Arrow Air crash on 12 Dec 85. When deciding what they can do to assist, LAOs must take into account their experience, the extent of assistance required, whether the office has permission to practice in local courts, whether the LAO is admitted or may be allowed to practice before local courts, etc. After consulting with their SJA, LAOs should decide whether the assistance is appropriate within these guidelines. An aggressive and proactive attitude is important. The following is a list of areas where assistance is generally appropriate, subject to the above considerations. The list is not intended to be all inclusive; however, LAOs will coordinate additional initiatives with the Chief, Legal Assistance Office, OTJAG, DA (Phone (202) 697–3170; AV 227–3170).

A. Assistance in filing private life insurance claims and in resolving disputes arising therefrom.

B. Preparation of personal federal and state income tax returns for deceased soldiers and family members. Special IRS assistance in this regard is being explored.

C. Immigration problems of foreign spouses. This office will provide assistance for problems that cannot be resolved locally.

D. Bills for Puerto Rican excise tax on household goods shipments. LAOs should contact this office if they have this problem.

E. Transfer of bank accounts, car titles, stocks, bonds, etc. Probate or administration proceedings may not be required in many states.

F. Settling debt disputes.

G. Getting property released from private storage facilities.

H. Settling lease termination problems.

I. Advice on and probating wills.

J. Securing letters of administration and the appointment of guardians.

K. Actively assist clients in retaining civilian counsel, to include calling firms and negotiating fee arrangements. See Air Crash Legal Assistance Update #8 (DAJA–LA msg, P231315Z Jan 86). Fees in the range of 15 to 25 percent are usually charged by large firms specializing in aviation accident law. A referral list is available from DAJA–LA.

2. The Army will not establish a centralized procedure to settle claims by family members against Arrow Air. In most cases, families would be well advised to secure civilian counsel. Families should be advised to expect that claims will not be settled for a lengthy period of time. Generally this delay inures to their benefit because results of the crash investigation will be helpful in determining damages. However, in some cases (such as those involving aged parents) delay may not be in the best interest of the client. The extent of LAO involvement in the settlement process is still under review. This issue will be covered at the Special Legal Assistance Course at Charlottesville, VA on 18–19 Feb 86. Clients should be advised to contact their attorney, either retained civilian counsel or their appointed LAO. LAOs contacted in this regard must keep this office informed. LAOs should determine which of their clients have not retained counsel and do not desire to retain counsel. This information should be communicated to this office immediately.

Aircraft Legal Assistance Update #10

This message, dispatched 6 February 1986, has the following date-time group: P061615Z Feb 86.

Subject: Air Crash legal Assistance Update #10

1. Legal assistance officers (LAOs) are reminded that their primary role is to serve as an attorney and advocate for their client, i.e., the primary next of kin (PNOK). To the extent possible, the LAO may serve as a legal advisor to the Casualty Assistance Officer (CAO-formerly the Survivor Assistance Officer). If a conflict (or the appearance of a conflict) of interest arises, the CAO should be provided with another attorney from the local SJA office. Further, the LAO must make clear that he or she is not a spokesman for the Army, but is acting in the role of personal counsel for the PNOK.

2. A number of instances of competing claims for benefits are confronting LAOs. These claims are usually from an individual who claims to be a common law spouse, or from a representative of an illegitimate child not recognized by the decedent. In these cases, LAOs may not provide any assistance until the Army has recognized the claimant's status. The LAO may provide information to these individuals as to how they can assert their claim. Once the claim is perfected, the LAO may provide assistance, unless there is a conflict with the PNOK who has been a client. In those cases, the LAO should initiate action to obtain a separate LAO for the newly recognized NOK.

3. A number of questions have arisen concerning the income tax consequences of various death benefits. These questions should be discussed personally between the LAO, CAO, and the PNOK. The LAO should also provide all assistance possible in the preparation of the personal tax returns for the PNOK (to the extent the returns relate to the taxation of death benefits) and the decedent's estate. The following is general guidance concerning the federal income tax consequences of various payments:

SGLI—No federal income tax
Death Gratuity—No federal income tax
DIC—Federal income tax
Social Security—Varying tax consequences
Accrued pay and allowances—Taxable to the recipient
SBP—Taxable to the recipient

This guidance relates only to federal tax consequences. The laws of each state must be examined separately to determine the state tax consequences.

4. The IRS has designated "by name" representatives to assist soldiers' families and executors/administrators in the preparation of federal tax returns. A list of these representatives will be distributed at the Special Legal Assistance Course at TJAGSA on 18–19 Feb 86.

5. LAOs are reminded that they must keep this office informed of any contacts they have with Arrow Air or its insurance representatives. The decision has not yet been made as to the extent of the LAOs (or the Army's) role in assisting family members to settle claims resulting from this accident.

6. Active duty LAOs who are not authorized to practice in local courts should affiliate themselves with reserve JAs to provide in-court representation, where possible, under the guidelines set forth in DAJA–LA msg P311530Z Jan 86, Subject: Air Crash Legal Assistance Update #9.

7. All LAOs are reminded of their ethical responsibility to report misconduct by fellow members of the Bar (DR 1–103, ABA Code of Professional Responsibility and Rule 8.3, ABA Rules of Professional Conduct). Both DR 2–103 of the ABA Code and Rule 7.3 of the ABA Rules prohibit solicitation of professional employment. While para 5–3, AR 27–1, makes the code applicable to military and civilian attorneys of the Judge Advocate Legal Service, the conduct of private attorneys is governed by either the ABA Code or the ABA Rules depending on the state involved. Pending further guidance, all LAOs should keep accurate records to include affidavits and MFRs of cases of improper solicitation. This matter will be addressed at the Special Legal Assistance Course.

Aircraft Legal Assistance Update #11

This message, dispatched 11 February 1986, has the following date-time group: P111615Z Feb 86.

Subject: Air Crash Legal Assistance Update #11

1. This office has informally learned that Arrow Air has filed a petition for reorganization under Chapter 11 of the Bankruptcy Act.

2. These proceedings should not impact upon claims, filed or unfiled, for wrongful death against Arrow Air.

Aircraft Legal Assistance Update #12

This message, dispatched 5 March 1986, has the following date-time group: R051515Z Mar 86.

Subject: Air Crash Legal Assistance Update #12

This message updated aviation accident lawyer referral information which was distributed at the Special Legal Assistance Course.

Aircraft Legal Assistance Update #13

This message, dispatched 14 March 1986, has the following date-time group: P140800Z Mar 86.

Subject: Air Crash Legal Assistance Update #13

1. The following guidance addresses questions which arose from the Special Legal Assistance Course held 18–19 Feb 86.

A. Legal assistance support should be given to those primary next of kin who are being furnished with survivor/casualty assistance officers. In the case of divorced parents, this will include support for each parent, even if one has been designated as the primary next of kin (PNOK) and the other is the secondary next of kin. The same will apply if the decedent's child by a prior marriage is in the custody of its natural parent but the decedent's current spouse is designated as the PNOK. Care must be exercised to avoid becoming involved in a conflict of interest situation. If necessary, this office can assist in providing an additional LAO.

B. In the case of alleged illegitimate children or common law spouses, assistance will not be provided until the Army has recognized them as a next of kin. Generally this is not done through an official declaration, but by extending to them certain privileges, *i.e.*, SGLI payments, appointment of a casualty assistance officer, etc. If the claimant appears to have a valid claim, they may be furnished information on how to perfect that claim; however, they may not be assisted in perfecting such claim. Care must be exercised to ensure that this assistance does not raise a conflict with an existing client. In case of doubt, this office should be consulted.

C. LAOs should render all possible legal assistance on matters relating to the decedent's personal affairs. This may include establishment of a guardianship for minor beneficiaries, preparation of wills for survivors, and probate of the decedent's estate. Such assistance should be given even if it exceeds the normal range of office practice. This does not mean that assistance should be attempted which exceeds the LAOs range of expertise. If assistance is needed in the probate area (or other area) and the designated LAO is unable to provide such service, either because they don't have the experience or aren't licensed to practice in that jurisdiction, a local reserve judge advocate should be obtained to provide the service. If the survivor has retained civilian counsel for any matter arising out of this accident, your action should be coordinated through that counsel to avoid inconsistent or repetitive actions.

D. Copies of the official personnel and health records of the decedents may be obtained by writing to: Commander; 101st Airborne Division (Air Assault); ATTN: AFZB–AG; Fort Campbell, KY 42223–5000. The finance records can be obtained by writing to: Mr. David L. Gagermeier, USA Finance and Accounting Center, Legal Office; Indianapolis, IN 46249. These documents can be released only upon written authorization of the PNOK or by subpoena.

E. Those LAOs who are not receiving these messages in a timely fashion should coordinate with their message center to expedite delivery. Direct contact with the message center should help in facilitating this task.

2. Arrow's insurance company, Associated Aviation Underwriters (AAU), will be attempting to establish contact with the survivors. The office is maintaining its position that we will not disclose the addresses of these family members. Therefore, we are forwarding a letter from AAU to them. This does not constitute an endorsement or approval of the letter. We reiterate our guidance that direct contact between a survivor and AAU is unwise. Our forwarding letter urges that AAU's letter be referred to a retained counsel if any or to the LAO. You should anticipate contact on this matter.

3. The bankruptcy court had appointed a special committee of unsecured creditors representing parties having claims against Arrow Air for the death of persons killed in the 12 December crash. After presentation of additional evidence, the judge believed that the insurance is adequate to meet all claims and has dissolved the committee. He is maintaining the order that he must review all settlements prior to distribution of funds. But that order is expected to be lifted within a few weeks. You will be kept informed of future developments.

Aircraft Legal Assistance Update #14

This message, dispatched 21 March 1986, has the following date-time group: P211530 Mar 86.

Subject: Air Crash Legal Assistance Update #14

We have recently received notice from the Canadian Aviation Safety Board inviting surviving family members to their public hearing into the crash. These hearings will extend over 8 days and will be held at the Palais De Congres, Hull, Quebec, Canada. Any family members who attend would be limited to being a part of the general public and attendance would have to be approved by the chairman prior to the opening of the hearings. Forty witnesses have been scheduled, and much of the discussion will be technical in nature. While these hearings may serve as a discovery vehicle for plaintiff's counsel, it is doubtful that the survivors would gain anything from attending. Any potential benefit that the survivors may feel that they will get must be weighed against the potential of reopening emotional wounds. Travel arrangements and funding are the responsibility of the family member.

Reserve Judge Advocate Legal Support

This message regarding Reserve judge advocate legal support in reference to the Gander aircraft accident was sent from the Commander, Fifth Army, Fort Sam Houston, TX, to the Commander, 122d ARCOM, Fort Sam Houston, TX.

This message, dispatched 7 February 1986, has the following date-time group: R071400Z Feb 86.

Subject: Gander Aircraft Accident—Reserve Judge Advocate Legal Support

A. Reference FORSCOM msg 301815Z Jan 86, SAB (NOTAL).

1. Commanders concerned are requested to provide support as requested in reference. Members of your command named in reference have been contacted by TJAGSA through ARCOM SJA or MLC Cdr and have agreed to assignment.

2. Reference is quoted less names of people not assigned to Fifth Army as follows:

A. DAJA–LA msg P262055Z Dec 85, Subj: Aircraft Legal Assistance Update #3.

B. AFJA–RP msg 131910Z Jan 86, Subj: Aircraft Accident Legal Assistance.

C. DAJA–ZX msg 280930Z Jan 86, Subj: Reserve Judge Advocate Legal Support for Gander Disaster.

1. HQDA has directed maximum support to the survivors/PNOKs of the Gander air crash. Reference A. required designation of a legal assistance officer (LAO) to serve as advisor to the survivor assistance officer (SAO) and to serve as legal advisor to the designated primary next of kin (PNOK). Reference A further suggested designating USAR judge advocates as special LAOs when such JAs are located closer to the SAO PNOK. The Assistant JAG for Military Law has now designated at least seventeen such special LAOs. Reference B. reflects FORSCOM support of this program.

2. Reference C. provided notification that a workshop for all Gander air crash legal advisors will be held on 18–19 February at the JAG School, Charlottesville, VA. This workshop is designed to ensure that legal advice is both uniform and comprehensive.

3. The FORSCOM Commander and his staff strongly support all assistance efforts for the families of the Gander air crash. Request your support of this program to ensure attendance at the workshop. FORSCOM Comptroller/DCSOPS advises that TDY costs to attend the workshop should be paid from existing school training funds. Since the date of the workshop is fast approaching and to ensure orders are published in a timely manner, request maximum use of telephonic coordination. Further, this command directs that these LAOs are afforded maximum flexibility in providing legal advice to SAO/PNOKs, to include maximum use of constructive attendance provisions of para 3–10, AR 140–1, Use of Concept. Request maximum command emphasis to support this worthwhile effort.

4. The following list reflects the names of TPU USAR JAs who have been designated as aircraft SLAOs as of the date of this message. Confirmation of the designation as an air crash SLAO may be obtained from The Judge Advocate General's School [names deleted]. (coml (804) 293–6121) or DAJA–LA (AV 227–3170).

5. POC at Fifth Army is LTC Anderson, AV 471–2208.

Representative Schroeder's Address to 18th Legal Assistance Course

Representative Patricia Schroeder, Representative for the First District of Colorado, visited the Judge Advocate General's School on March 24, 1986, to address the 18th Legal Assistance Course. Mrs. Schroeder discussed past and present initiatives taken by the Armed Services Committee on behalf of military families. Reprinted below is the text of a letter which Mrs. Schroeder passed out to the students that explains some of the provisions in the recently passed Military Family Act of 1985:

March, 1986

Dear Friend,

Thank you for your letter about military families. My experience as a member of the House Armed Services Committee for the last 13 years convinces me that a critical component of readiness is the strength of military families. The issue of retention is also closely affected by the status of military families. Studies show that family satisfaction with military life is a determining factor in the decision to reenlist.

During the first session of the 99th Congress, I introduced the Military Family Act of 1985, which contained numerous provisions designed to enhance

the well-being of military families. I also sponsored additional amendments to the Defense Authorization Act of 1986 which benefit families. I am pleased to report that many of these provisions were adopted and are now law as part of the Defense Authorization Act of 1986, which was signed by the President on November 9, 1985. The provisions do the following:

—Establish an Office of Family Policy within DOD.

—Require DOD to conduct a study on the availability of housing for each rank in each service.

—Authorize a temporary lodging expense for four days at a rate of $110 per day.

—Reimburse members of the military for costs associated with travel in privately-owned vehicles at the rate of which civilians are reimbursed.

—Provide military dependent students who are enrolled in school in the U.S. one round trip per year to their parents' duty station in Hawaii or Alaska.

—Allow for limited commercial activity in family members' homes on base.

—Provide that DOD child care facilities on military installations be operated on a 24-hour a day basis when necessary to mission requirements.

—Improve employment opportunities for spouses in DOD child care facilities.

—Establish a youth sponsorship program on military installations.

—Provide a voluntary dental plan for active duty members and their dependents.

—Require DOD to make recommendations to assist children in secondary schools who must transfer with their parents to an area with different graduation requirements.

—Require generally that DOD take steps to improve employment opportunities for spouses seeking DOD civilian positions.

—Give spouses preference in hiring for DOD civilian positions at grades of GS–8 or above, if they are on the list of best-qualified candidates, while maintaining veterans' preference.

—Require DOD to make sure spouses of military personnel are notified of any vacant position at military bases in the same area that the military person is stationed.

—Authorize DOD to noncompetitively hire spouses of military personnel stationed outside the United States.

—Require DOD to report to Congress on the activities of the Family Policy office and on recommendations enhancing the well-being of military families.

—Authorize DOD to conduct periodic surveys to determine the effectiveness of existing federal programs relating to military families without clearance from any other federal agency.

—Require DOD to do a study on the feasibility and desirability of entering into contracts with relocation firms to provide professional relocation assistance to members and their families making PCS moves.

—Prohibit DOD from charging enlisted personnel and their families prices for food sold at messes in excess of a level sufficient to cover food costs.

—Require DOD to request that every state set up mechanisms for reporting known or suspected instances of child abuse and neglect in any case involving military personnel.

—Decrease charges for parking facilities for house trailers and mobile homes at DOD parking lots, by increasing the amortization period for such facilities from 15 to 25 years.

Tax News

Dependency Exemptions

The Tax Reform Act of 1984 changed the law concerning which of two divorced or separated parents would be entitled to claim the dependency exemption for their children. The new law attempted to minimize disputes between the parents by providing that the custodial spouse will be entitled to the exemption unless he or she signs a written release to the exemption (IRS Form 8332). The new law, however, indicates that pre-1985 decrees or agreements will be honored by the IRS if the agreement or decree grants the dependency exemption for the child to the noncustodial parent as long as the noncustodial parent provides at least $600 child support per child per year.

A frequent question concerns whether a noncustodial spouse who is paying substantial child support pursuant to a pre-1985 decree or agreement may be entitled to the dependency exemption for the child without obtaining the signed written release which would otherwise be required since passage of the Tax Reform Act of 1984. The Internal Revenue Service's position on that question was recently provided to a taxpayer in IRS Letter Ruling 8609034. That ruling involved a father who, by a 1973 divorce decree, was required to pay $300 per month in child support to the mother who was granted custody of the child. The decree was silent as to which parent was entitled to the dependency exemption. The order was issued under the old tax law, which provided a presumption that the noncustodial parent would be entitled to the dependency exemption whenever the noncustodial parent provided at least $1200 per year ($100 per month) in child support. Clearly, the father in this case was required to pay far in excess of the amount which would, under the old law, presumptively permit him to claim the dependency exemption for the child.

Although the father would have been able to claim the dependency exemption under the old law, the letter ruling clarified that this pre-1985 decree did not qualify him to claim the exemption. Only pre-1985 decrees or agreements which specifically grant the dependency exemption to the noncustodial parent will be effective for income tax purposes to permit the noncustodial parent to claim the dependency exemption. Further, the IRS took the position that it would be futile for the father to attempt to modify the old decree to specify that he was entitled to the dependency exemption, as the altered agreement would then not be considered as a pre-1985 decree. Accordingly, the father would have to obtain a signed waiver from the mother if he

wanted to claim the dependency exemption. If the father could get the mother to agree, which may be unlikely, he could obtain a permanent waiver from her so that in future years, he would only have to attach a copy of the waiver to his tax return. Major Mulliken.

Claims Service Note

U.S. Army Claims Service

The Affirmative Claims program reported record high recoveries in CY 1985 for both medical care costs ($8,938,052.10) and property damage ($1,457,630.80). The total recoveries for both medical care and property damage was $10,396,582.90. This is a combined increase of $432,920.53, or approximately four percent, above the record recoveries of 1984.

Due to its outstanding recovery efforts, the Army once again ranks first among the military services required to report annual medical care recovery statistics to the Department of Justice. The Air Force collected $8.3 million, and the Navy collected $8.1 million.

The ten CONUS offices with the highest medical recoveries were:

1. Fort Bragg	$510,300
2. Fort Knox	418,700
3. Fort Hood	415,200
4. Fort Carson	413,600
5. Fort Bliss	356,500
6. Fort Sam Houston	349,300
7. Fort Campbell	343,500
8. Fort Stewart	328,500
9. Fort Sill	258,500
10. Fort Jackson	234,700

The ten CONUS offices with the highest property recoveries were:

1. Fort Lee	$44,900
2. Fort Hood	41,100
3. Fort McNair	31,300
4. Fort Knox	28,500
5. Fort Benning	26,600
6. Fort Bragg	23,600
7. Carlisle Barracks	21,700
8. Fort Ord	20,700
9. Fort Campbell	19,500
10. Fort Riley	15,700

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

New USAR JAGC Brigadier General Selected

Colonel Thomas P. O'Brien of Cincinnati, Ohio, has been selected to replace Brigadier General Daniel W. Fouts as the Chief Judge, USALSA (IMA) and for promotion to brigadier general. Colonel O'Brien assumed his new duties as Chief Judge on 1 May 1986.

Colonel O'Brien was born in Wheeling, West Virginia. He received his Bachelor of Arts degree and his law degree from Washington and Lee University in Lexington, Virginia, and was commissioned through the Army's ROTC program. After completing the JAGC Basic Course in residence, Colonel O'Brien served on active duty from 1961 to 1964 with the U.S. Army Port Area Command in LaRochelle, France.

Since 1964, Colonel O'Brien has served in a variety of assignments within the USAR. He was an Individual Mobilization Augmentee assigned to the U.S. Army Combat Developments Command Judge Advocate Agency in Charlottesville; a legal instructor with the 2093d USAR School in Charleston, West Virginia; Commander of the 146th (Legal Assistance), 144th (Legal Assistance), and 135th (Trial) JAG Detachments in Ohio; Staff Judge Advocate of the 83d Army Reserve Command; and is currently the Commander of the 9th Military Law Center in Columbus, Ohio.

In addition to the Basic Course, his military schooling includes the JAGC Advanced Course, Command and General Staff College, and the Air War College.

Colonel O'Brien is a corporate attorney with the Kroger Company in Cincinnati. He is a member of the West Virginia and Ohio Bars. Colonel O'Brien and his wife, Anne Marie, reside in Cincinnati with their three children, Thomas, Christopher and Caroline.

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: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

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

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

June 16–27: JATT Team Training.

June 16–27: JAOAC (Phase II).

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

July 14–18: Professional Recruiting Training Seminar.

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

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

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

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

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

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

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

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	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.

4. Civilian Sponsored CLE Courses

August 1986

3–8: ATLA, Specialized Courses in Trial Advocacy, Vail, CO.

4–5: PLI, Blue Sky Laws: State Regulation of Securities, Chicago, IL.

4–7: NWU, Short Course for Defense Lawyers in Criminal Cases, Chicago, IL.

4–7: NWU, Short Course for Prosecuting Attorneys, Chicago, IL.

4–8: AAJE, Constitutional Criminal Procedure, San Diego, CA.

7–8: NELI, Employment Discrimination Law Update, Washington, DC.

7–9: NCBF, Annual Estate Planning Seminar, Litchfield, SC.

7–17: NITA, Northeast Regional Program in Trial Advocacy, Hempstead, NY.

13–15: MOB, Practical Skills Course, St. Louis, MO.

15: GICLE, Patents & Copyright Law, Atlanta, GA.

17–21: ATLA, Advanced Course in Trial Advocacy, Oakland, CA.

17–22: AAJE, The Law of Evidence, Palo Alto, CA.

18–21: NCBF, Practical Skills Course, Raleigh, NC.

18–22: FPI, The Skills of Contract Administration, Las Vegas, NV.

20–22: MOB, Practical Skills Course, Kansas City, MO.

21–22: PLI, Aircraft Crash Litigation, San Francisco, CA.

21–22: PLI, Bankruptcy Practice for Bank Counsel, San Francisco, CA.

21–23: PLI, Product Liability of Manufacturers, San Francisco, CA.

21–23: ALIABA, Trial Evidence & Litigation in Federal & State Courts, San Francisco, CA.

22: GICLE, Family Law for General Practitioners, Savannah, GA.

22–23: NCLE, Bankruptcy, Omaha, NE.

29: GICLE, Family Law for General Practitioners, Atlanta, GA.

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. Professional Writing Award for 1985

Each year, the Alumni Association of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The award consists of a citation signed by The Judge Advocate General and an engraved plaque. The award is designed to acknowledge outstanding legal writing and to encourage others to add to the body of scholarly writing available to the military legal community.

The award for 1985 was presented to Major Richard D. Rosen for his article, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, which appeared at 108 Mil. L. Rev. 5 (1985). The article, which had originally been submitted in fulfillment of the 32d Judge Advocate Officer Graduate Course, discusses the history and legal development of the involvement of the federal civilian courts in the review of the military justice system. The lack of a uniform approach among the federal courts to the proper scope of review to be accorded determinations of the military justice system is noted and a standard approach is posited.

2. New Additions to DTIC

Several TJAGSA publications have been added to the inventory of the Defense Technical Information Center. Identification numbers are listed in the next paragraph. The new materials include updated criminal law deskbooks on evidence, a revised fiscal law deskbook, and several new and updated administrative law and legal assistance publications. In addition, there are contract law and criminal law practical exercise publications designed for use by the Reserve Components.

3. TJAGSA Publications Available Through DTIC

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 B100234	Fiscal Law Deskbook/ JAGS-ADK-86-2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 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 B100236	Federal Income Tax Supplement/ JAGS-ADA-86-8 (183 pgs).
AD-B100233	Model Tax Assistance Program/ JAGS-ADA-86-7 (65 pgs).
AD-B100252	All States Will Guide/JAGS-ADA-86-3 (276 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 B100235	Government Information Practices/ JAGS-ADA-86-2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS-ADA-86-1 (298 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 B100238	Criminal Law: Evidence I/ JAGS-ADC-86-2 (228 pgs).

AD B100239	Criminal Law: Evidence II/ JAGS–ADC–86–3 (144 pgs).
AD B100240	Criminal Law: Evidence III (Fourth Amendment)/JAGS–ADC–86–4 (211 pgs).
AD B100241	Criminal Law: Evidence IV (Fifth & Sixth Amendments)/ JAGS–ADC–86–5 (313 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).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 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.

4. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 600–15	Indebtedness of Military Personnel		14 Mar 86

5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

The ABA Criminal Justice Mental Health Standards, 53 Geo. Wash. L. Rev. 338 (1985).

Berliner, *The Child Witness: The Progress and Emerging Limitations,* 40 U. Miami L. Rev. 167 (1985).

Bradmiller & Walters, *Seriousness of Sexual Assault Charges: Influencing Factors,* 12 Crim. Just. & Behav. 463 (1985).

Buchanan, *In Defense of the War Powers Resolution:* Chada *Does Not Apply,* 22 Hous. L. Rev. 1155 (1985).

Caldwell, *Name Calling at Trial: Placing Parameters on the Prosecutor,* 8 Am. J. Trial Advoc. 385 (1985).

Copelan & Cruden, *Military Law: Constitutional Torts and Official Immunity After* Chappel v. Wallace, Fla. B. J., Mar. 1986, at 51.

Davis, *Child Abuse: A Pervasive Problem of the 80s,* 61 N.D.L. Rev. 193 (1985).

DeFoor & Kalbac, *Prosecutorial Misconduct in Closing Argument: Remedial Measures,* 8 Am. J. Trial Advoc. 397 (1985).

Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law,* 1985 Duke L.J. 849.

Dondanville, *Defense Counsel Beware: The Perils of Conflicts of Interest Revisited,* 29 Trial Law. Guide 249 (1985).

Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem,* 37 Hastings L.J. 91 (1985).

Fentiman, *"Guilty But Mentally Ill": The Real Verdict is Guilty,* 26 B.C.L. Rev. 601 (1985).

Folz, *When Rollover IRAs Are Best,* 125 Tr. & Est. 39 (1986).

Gelwan, *Civil Commitment and Commitment of Insanity Acquittees,* 11 New Eng. J. Crim. & Civ. Confinement 328 (1985).

Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence,* 46 Ohio St. L.J. 596 (1985).

Graham, *Evidence and Trial Advocacy Workshop: Trial Objections; Lack of Foundation; Refutation,* 22 Crim. L. Bull. 47 (1986).

Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions,* 40 U. Miami L. Rev. 19 (1985).

Hawkes, *The Second Reformation: Florida's Medical Malpractice Law,* 13 Fla. St. U.L. Rev. 747 (1985).

Healey, *Intoxication, Sobriety Checkpoints, and Public Policy,* 6 J. Legal Med. 465 (1985).

Heffernan, *The Moral Accountability of Advocates,* 61 Notre Dame L. Rev. 36 (1986).

Imwinkelried, *Uncharged Misconduct,* 12 Litigation 25 (1985).

The Incident as a Decisional Unit in International Law, 10 Yale J. Int'l L. 1 (1985).

Joseph, *Videotape Evidence in the Courts—1985,* 26 S. Tex. L.J. 453 (1985).

Levin, *Identifying Questions of Law in Administrative Law,* 74 Geo. L. Rev. 1 (1985).

Lund, *Infanticide, Physicians, and the Law: The "Baby Doe" Amendments to the Child Abuse Prevention and Treatment Act,* 11 Am. J.L. & Med. 1 (1985).

Mlyniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?,* 40 U. Miami L. Rev. 115 (1985).

O'Kelly, *Entitlements to Spousal Support After Divorce,* 61 N.D.L. Rev. 225 (1985).

Restraints on the Unilateral Use of Force: A Colloquy, 10 Yale J. Int'l L. 261 (1985).

Robinson, *Joint Custody: Constitutional Imperatives,* 54 U. Cin. L. Rev. 27 (1985).

Roe, *Expert Testimony in Child Sexual Abuse Cases,* 40 U. Miami L. Rev. 97 (1985).

Susman, *Risky Business: Protecting Government Contract Information Under the Freedom of Information Act,* 33 Fed. B.N. & J. 67 (1986).

Turnier & Kelly, *The Economic Equivalence of Standard Tax Credits, Deductions and Exemptions*, 36 U. Fla. L. Rev. 1003 (Tax 1984).

Comment, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press a Right of Access to Wartime News?*, 58 Temp. L.Q. 873 (1985).

Comment, *The Uniformed Services Former Spouses' Protection Act of 1982: Problems Resulting From Its Application*, 20 U.S.F.L. Rev. 83 (1985).

Note, *KAL 007: A Definitive Denouement*, 8 Suffolk Transnat'l L.J. 301 (1984).

Note, Schoenborn v. Boeing Co.: *The Government Contract Defense Becomes a "Windfall" for Military Contractors*, 40 U. Miami L. Rev. 287 (1985).

Note, *The War Powers Resolution: After A Decade of Presidential Avoidance Congress Attempts to Reassert its Authority*, 8 Suffolk Transnat'l L.J. 75 (1984).

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