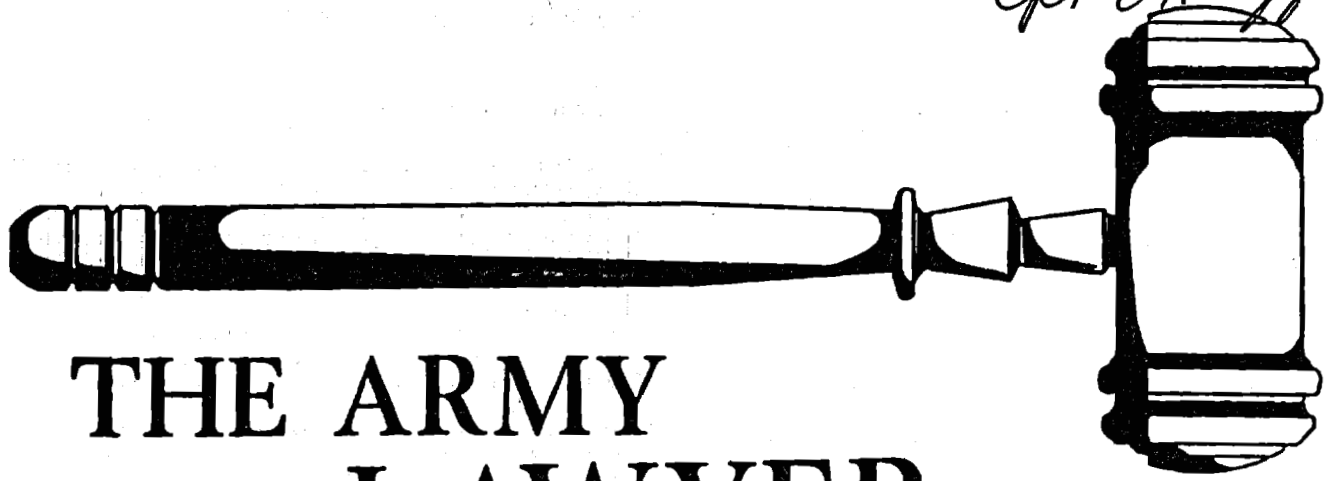


*Cpt O'Keefe*



# THE ARMY LAWYER

Headquarters, Department of the Army

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Editor  
Captain David R. Getz

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By Order of the Secretary of the Army:

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The Adjutant General

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

REPLY TO  
ATTENTION OF

DAJA-IM

11 APR 1986

SUBJECT: JAGC Automation Standards

STAFF AND COMMAND JUDGE ADVOCATES

1. References.

- a. Mission Element Need Statement (MENS) for The Judge Advocate General's Legal Automation Army-Wide System (LAAWS), approved 3 June 1983.
- b. JAGC Information Systems Plan, approved 31 May 1983.
- c. DAJA-ZX letter, Subject: JAGC Automation - Policy Letter 85-4.

2. Computer hardware and software compatibility is critical to successful implementation of LAAWS. Running the same legal application programs, training on the same operating systems, and sharing information in the same way are essential to automated delivery of quality legal services to the Army community. To ensure necessary system integrity and compatibility, the following standards are established. These standards govern acquisition and use of automated data processing equipment (ADPE) in the JAGC.

a. Attorney Workstation. A personal computer (PC) using MS/PC-DOS or UNIX operating system is the standard attorney workstation. The PC must have a minimum of 256K RAM expandable to 640K RAM and must be capable of running the IBM PC compatible software listed at Enclosure 1. Experience has shown that the PC provides the multi-functional capability needed to accomplish essential law office functions such as word processing, automated legal research, data base management, litigation support, case management, time management, and telecommunications. The MS-DOS operating system compatibility is needed to facilitate use of standard off-the-shelf software as well as legal application software developed specifically for LAAWS.

b. Minicomputers. Minicomputers acquired for centralized data processing, networking, and mass storage must have a 16-bit, or larger, central processing unit with a gateway capability to SNA for RJE, 327X terminal and DIA/DCA document interchange. The minicomputer must also be capable of running Version 5 of the UNIX operating system with standard applications interface conventions. A standard Army contract for minicomputers is scheduled to be announced in 3rd Qtr FY86.

DAJA-IM

SUBJECT: JAGC Automation Standards

c. Automation Architecture. JAGC office automation architecture is based on a configuration of one PC per attorney and one PC per each person performing one or more of the automated law office functions described above. Networking of PC workstations, using local area networks (LANs) or minicomputers, will be developed at the branch/office level. The number and type of networking devices will be determined by the size and nature of the information sharing requirements. Distribution of system printers, plotters, modems, and other peripheral devices will be based on needs of each office. Integration of JAGC networks with command-wide networks will occur as required for JAGC operational interaction.

d. Telecommunications. Communication of data from one office to another will utilize the Defense Data Network (DDN) to the extent possible.

e. Software. The off-the-shelf software listed in Enclosure 1 is recommended for use with the standard PC workstation. Use of the recommended software will facilitate program, document, and data transfer between JAGC offices. It will also reduce or eliminate the need to retrain personnel who transfer from one JAGC office to another.

3. Offices with ADPE which is not compatible with the standards described above should plan to replace that equipment by attrition or as resources become available.


4. Acquisition of microcomputers and minicomputers for JAGC activities should make use of the standard requirements contracts to the maximum extent possible. The microcomputer contracts are: the Joint Micro contract awarded to Zenith; the SMS Micro-C contract for Intel 310 and Wyse PCs; and the ADM 8a contract for WANG. The minicomputer contract is expected to be awarded in 3rd Qtr FY86. Exceptions to this policy must be processed through the OTJAG Information Management Office.

5. This statement of JAGC automation standards has been coordinated with, and approved by, the Office of the Assistant Chief of Staff for Information Management (OACSIM), HQDA. Acquisition of ADPE for LAWS implementation is in accordance with the approved FY86 Army Information Management Master Plan (IMMP). A copy of this letter should be given to your Director of Information Management (DOIM).

6. Questions concerning these standards should be directed to the JAGC Information Management Office, AV: 227-8655.

FOR THE JUDGE ADVOCATE GENERAL:

Encl

  
DANIEL L. ROTH LISBERGER  
LTC, JAGC  
Information Management Officer

RECOMMENDED SOFTWARE FOR  
LAAWS WORKSTATIONS

1. Enable (The Software Group, Inc).\* This is a totally integrated software system that provides five major productivity tools: word processing, database management, spreadsheet, graphics and telecommunications. It may be the only software program you need to purchase. All modules are full featured and compare favorably with stand alone products. Some features of the Enable modules are:

- Word processing includes footnote capability, mail merge, spelling checker, special character and line drawing set, and a built-in calculator. It can use files created by Multi-Mate, Wordstar, EasyWriter I, Volkswriter or ASCII.

- Spreadsheet offers full compatibility with LOTUS 123 and full utilization of the 8087 math co-processor. Can be used for budgeting or other tasks which require rows and/or columns of numbers.

- Graphics creates graphs from either Spreadsheet or Database Management System. Graphs can be copied into a word processing document. Graphic ability is comparable to LOTUS 123.

- Database Management creates a database structure for using data entry, file management, information retrieval, and reports generation. It has file compatibility with dBASE II. Can be used for case tracking, records keeping, and inventory control.

- Telecommunications offers access to other personal computers or to large computer-based services such as WESTLAW and LEXIS. Compares favorably to Hayes' Smartcom II. To use this module you must have an internal or external modem and a telephone jack.

2. Displaywrite 3 (IBM Corporation). This word processing program has a powerful spelling checker, is menu driven, has "cut and paste", column math, page header/footers and more. Allows for easy transfer of documents (including control codes) to IBM System 36 and to other IBM mini and mainframe computers.

3. ZyIndex (ZyLab Corporation). This program allows full text searching of documents created by a wide variety of word processing packages. It is similar to using WESTLAW or LEXIS on data created and stored on your own computer.

4. dBASE III (Ashton-Tate).\* This software program is like the database management module of Enable. It has a powerful programming language, similar to BASIC, which allows you to create programs for complex reports.

5. Supercalc 3 (SORCIM/IUS Corporation).\* This is a spreadsheet program with graphics capability. Column width can be set from 0 to 255 (compared to 2 to 72 for Enable or LOTUS 123). It is similar in function to the spreadsheet module of Enable.

6. BASIC by Microsoft Corporation for IBM. This is a programming language. Useful for those who have training or knowledge of programming or who want to learn this skill. Programs written in BASIC should be used only when off-the-shelf software cannot satisfy your requirements.

7. Hayes SmartcomII (Hayes Microcomputer Products, Inc). This telecommunications program is free when you buy the Hayes 1200B internal modem. (There is a charge for it if you buy an external modem.) It allows you to create and store telephone numbers and other protocol information for automatic dial-in to other computers.

\* These software products can be acquired through the Joint Microcomputer Contract, contract number F19630-86-D-0002.

# Current Effective Assistance of Counsel Standards

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For decades, courts across the nation have been struggling with the proper meaning of "effective" assistance of counsel. Different standards have been developed. Some courts adopted a "farce and mockery" test, others some version of a "reasonable competence" standard.

On May 14, 1984, the United States Supreme Court rendered a landmark decision, *Strickland v. Washington*.<sup>1</sup> This case set the standard to be used for measuring ineffective assistance of counsel claims that are raised on appeal. Never before had the Supreme Court squarely decided what the appropriate test was for settling the issue of the effective assistance of counsel at trial.<sup>2</sup> This article will analyze *Strickland v. Washington* and how the federal courts and military courts have dealt with ineffective assistance of counsel claims since *Strickland*.

## *Strickland v. Washington*

David Leroy Washington committed numerous offenses during a ten day period in September 1976, the most serious being three heinous murders all involving repeated stabbings.<sup>3</sup> His defense counsel was an experienced criminal lawyer who was appointed to represent him. Although his counsel was active during the pre-trial stages of Washington's case, he "experienced a sense of hopelessness" when his client acted contrary to his advice, the most damaging action being confessing to two of the murders.<sup>4</sup>

Washington pled guilty to all charges, including the capital murder charges, again contrary to his counsel's desire.<sup>5</sup> In preparing for the sentencing hearing, his defense counsel did very little. He spoke with his client about his past, and spoke with Washington's wife and mother, but sought out no other character witnesses.<sup>6</sup> No other extenuation or mitigation evidence was sought. No psychiatric examination was requested because conversations with Washington did not indicate any psychological problems.<sup>7</sup>

The defense counsel's lack of investigation during the sentencing phase was explained as reflecting his sense of

hopelessness in the face of overwhelming evidence of gruesome crimes and the strategic decision to rely on the plea colloquy for evidence of Washington's background.<sup>8</sup> During the plea colloquy, Washington had informed the trial judge that he was under extreme stress during his crime spree which was caused by his inability to support his family, although he accepted responsibility for the crimes.<sup>9</sup> The trial judge apparently was impressed at that point in the trial as he stated he had "a great deal of respect for people who are willing to step forward and admit their responsibility."<sup>10</sup> The respect was short lived, however, as the trial judge sentenced twenty-six-year-old David Washington to death on each of the three counts of murder. Numerous aggravating circumstances were found but no mitigating ones.<sup>11</sup>

Among Washington's challenges on appeal was an attack on his counsel's effectiveness at the sentencing proceeding. The Florida Supreme Court affirmed the previous denial of collateral relief wherein the trial court concluded under the Florida standard that there was no showing "that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding."<sup>12</sup>

Washington's petition for a writ of habeas corpus in the federal court system wound its way to an en banc decision by the U.S. Court of Appeals for the Eleventh Circuit, which remanded the case for new findings of fact under their newly announced standards for judging ineffectiveness claims.<sup>13</sup>

The United States Supreme Court granted certiorari to decide what the proper standard for measuring ineffective assistance of counsel claims should be. Although most state courts and all the federal courts of appeals had adopted a type of "reasonably effective assistance" standard, the Supreme Court appeared concerned that in this case the Eleventh Circuit had rejected any need for a showing of

<sup>1</sup> 104 S. Ct. 2052 (1984).

<sup>2</sup> *Id.* at 2062.

<sup>3</sup> *Id.* at 2056. Other offenses included torture, kidnapping, assault, attempted extortion, theft, robbery, breaking and entering, attempted murder, and conspiracy to commit robbery.

<sup>4</sup> *Id.* at 2057.

<sup>5</sup> *Id.* Washington also rejected his counsel's advice to elect an advisory jury at his capital sentencing. He waived that right.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* This strategy in effect prevented the state from cross-examining Washington about his claims and precluded any psychiatric evidence by the state's witnesses.

<sup>9</sup> *Id.*

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

<sup>11</sup> *Id.* at 2058.

<sup>12</sup> *Id.* at 2059.

<sup>13</sup> *Id.* at 2062.

prejudice, that is, that the deficient conduct of counsel was likely to have affected the outcome of the proceedings.<sup>14</sup>

All but two of the Justices joined Justice O'Connor as she articulated the proper standard to apply in dealing with ineffective assistance claims.<sup>15</sup> The tenor of the opinion was set when the Court noted that the sixth amendment right to counsel existed in order to protect the right to a fair trial.<sup>16</sup> A defense counsel's skill and knowledge is necessary to give the defendant an opportunity to fairly meet the adversary. The guide when examining actual ineffectiveness claims is "whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>17</sup> The Court noted that the capital sentencing proceeding in *Strickland* was like a trial because of its adversarial format (like the military sentencing proceeding).<sup>18</sup>

After this introduction, the Court articulated the two pronged standard to be used in judging claims of ineffective assistance:

(1) There must be a showing that counsel's performance was deficient. The defendant must show serious errors committed by the counsel such that he was not functioning as the "counsel" guaranteed by the sixth amendment; and

(2) There must be a showing that the deficient performance prejudiced the defense. The serious errors must have deprived the defendant of a fair trial.

Both prongs must be shown before the defendant can prevail.<sup>19</sup>

The first component measures counsel's performance. The proper standard, essentially followed by all federal courts of appeal, is reasonableness under prevailing professional norms.<sup>20</sup> The basic duties of the defense counsel from the Court's view are to advocate the defendant's cause, to consult on important decisions, and to keep the defendant informed.<sup>21</sup> The Court, however, would not provide a checklist for measuring performance under the first prong; rather, the performance is tested by looking at all the circumstances to see if the assistance was reasonable.<sup>22</sup> American Bar Association Standards are only guides in determining what is reasonable in view of the latitude counsel need in making tactical decisions and vigorously advocating

the defendant's cause.<sup>23</sup> In fact, the Court did not favor detailed guidelines for defense counsel as they may be distracting.<sup>24</sup>

The presumption that the counsel's conduct fell within the wide range of reasonable professional assistance is difficult to overcome.<sup>25</sup> Strategic choices made after thorough investigation of law and facts are "virtually unchallengeable." Less than a complete investigation or no investigation will be judged as to whether or not this was a reasonable decision by the counsel.<sup>26</sup> This presumption gives the counsel the overriding benefit of the doubt to perform based on the circumstances as they see them at the time of their decisions without concern for "Monday morning quarterbacking."

The second prong of the new standard, the prejudice prong, will be even more difficult for the defendant to surmount. Even if the counsel committed egregious unprofessional errors, the judgment will not be set aside if the errors did not affect the outcome of the case. Without this prejudice, there is no ineffective assistance under the sixth amendment.

The burden is on the defendant to show prejudice except for actual or constructive denials of the assistance of counsel, where the state may have interfered with counsel's assistance, and for conflict of interest cases.<sup>27</sup> Other than those limited exceptions, the defendant must show that unreasonable error or errors had an actual adverse effect on the defense so as to undermine the reliability of the outcome of the case. The fact that an error conceivably could have affected the outcome will not meet the test. This prong does not require that errors more likely than not altered the outcome, however. The Court felt that the preponderance of the evidence standard was too high and fashioned the test to require a showing by the defendant that there was a *reasonable probability* that, *but for* the unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the proceeding's outcome.<sup>28</sup>

In determining whether there was a reasonable probability that the factfinder would have had a reasonable doubt as

<sup>14</sup> *Id.* at 2063.

<sup>15</sup> Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens were in the majority with Justice O'Connor. Justice Marshall dissented and Justice Brennan concurred in part and dissented in part.

<sup>16</sup> *Strickland*, 104 S. Ct. at 2063.

<sup>17</sup> *Id.* at 2064.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2064.

<sup>20</sup> *Id.* at 2065.

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.* at 2066.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2067. The leading Supreme Court case dealing with conflict of interest is *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

<sup>28</sup> 104 S. Ct. at 2068.



to the defendant's guilt without the errors, the Court considered the totality of the evidence.<sup>29</sup> The focus of inquiry was on the fundamental fairness of the proceedings.<sup>30</sup>

The two prong test is an "and" test. If the defendant fails to meet either prong, the ineffectiveness claim is defeated. It makes no difference which prong a court considers first. The Supreme Court noted that it may be easier to dispose of the claim on the ground of lack of sufficient prejudice (second prong) and not even examine the first prong.<sup>31</sup>

After fashioning the test, the Court applied it in this case and found that the defense counsel's strategic choices on what to rely on in the sentencing hearing were reasonable judgments in view of the overwhelming aggravating circumstances. Further character and psychological evidence would have been of little help.<sup>32</sup> Although it was unnecessary, the Court then examined the case in light of the prejudice component and found even less merit to the claim under the second prong. There was no reasonable probability that the omitted evidence would have changed the conclusion and in fact it probably would have hurt Washington's case.<sup>33</sup> Thus the sentencing proceeding was not fundamentally unfair and the sentence was not rendered unreliable by a breakdown in the adversarial process due to any deficiencies in counsel's assistance.<sup>34</sup>

Justice Brennan, concurring in part and dissenting in part, agreed with the new standard and noted that lower courts could continue to develop constitutional doctrine in this area on a case-by-case basis as the decision was largely consistent with the approach taken in the past by lower courts.<sup>35</sup>

Justice Marshall dissented, arguing that the majority's standards were not helpful.<sup>36</sup> In his opinion, more detailed standards governing defense counsels performance should be delineated rather than just acting like a "reasonably competent attorney," which tells counsel and judges virtually nothing.<sup>37</sup> He would also not require the defendant to show prejudice, as this would be difficult or impossible to review based solely on the record.<sup>38</sup> Philosophically, he differed markedly from the majority in that he would have held that the sixth amendment right to counsel should ensure that convictions are obtained only through

fundamentally fair procedures, even if a defendant is manifestly guilty and cannot show prejudice resulting from counsel's errors.<sup>39</sup> He would have held in this case that counsel's failure to investigate the availability of mitigating evidence was unreasonable and that a violation of the sixth amendment had been established, thus entitling Washington to a new sentencing proceeding.<sup>40</sup>

*United States v. Cronin*,<sup>41</sup> a companion case decided the same day as *Strickland v. Washington*, helps shed some light on how *Strickland* is to be applied. In *Cronin*, the Court dealt with the Tenth Circuit's presumption of ineffective assistance based on the circumstances surrounding the representation. Specifically, five criteria were noted: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.<sup>42</sup> In this case, a young lawyer with real estate experience was appointed to defend Cronin on mail fraud charges involving a check kiting scheme that involved over \$9,400,000. This was the defense attorney's first criminal case and jury trial. He was allowed twenty-five days to prepare the case while the government had over four-and-one-half years to investigate and marshal its evidence.<sup>43</sup> Cronin was convicted on 11 of the 13 counts and received a 25 year sentence.

A unanimous Supreme Court reversed the Court of Appeals presumption of ineffectiveness in this case because there had been no showing of any *specific errors* made by the trial counsel.<sup>44</sup> The Court reiterated its view that the presumption in criminal cases was that the lawyer is competent, seeking conscientiously to discharge his duties, and the burden is on the accused to demonstrate a constitutional violation. There was no demonstration in the lower court that the defense counsel failed to function in a meaningful way as the prosecution's adversary.<sup>45</sup> It appeared to the Court that the counsel had sufficient time to prepare and had provided adequate representation in his first criminal case, noting that every experienced attorney has to have his first case sometime.<sup>46</sup> The case was remanded to the court of appeals to consider any specific trial errors that might be

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<sup>29</sup> *Id.* at 2069.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 2069-70.

<sup>32</sup> *Id.* at 2070-71.

<sup>33</sup> *Id.* at 2071.

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

<sup>35</sup> *Id.* at 2072. He dissented in part in that he viewed the death penalty to be cruel and unusual punishment forbidden by the eighth and fourteenth amendments, and thus would vacate Washington's death sentence.

<sup>36</sup> *Id.* at 2075.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2076.

<sup>39</sup> *Id.* at 2077.

<sup>40</sup> *Id.* at 2081.

<sup>41</sup> 104 S. Ct. 2039 (1984).

<sup>42</sup> *Id.* at 2043.

<sup>43</sup> *Id.* at 2041.

<sup>44</sup> *Id.* at 2051.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2050.

raised by Cronic's attorneys in light of the new standards enunciated in *Strickland v. Washington*.<sup>47</sup>

### Post-Strickland Application

It would appear that defendants will now find it more difficult to be successful in ineffectiveness claims because they will have to meet the two prong *Strickland* test. The defendant must show both serious errors by his or her counsel and that the errors or deficient performance affected the outcome of the trial. This second prong goes directly to the defendant's guilt. If the defendant would have been found guilty despite egregious errors by counsel, he cannot prevail as there was no prejudice. When the focus is on the defendant's actual guilt in the second prong of the test, the question then centers on whether the attorney's poor performance is only harmless error. No longer can an appeal center solely on an unreasonable effort by a defense counsel without regard for the real issue of the defendant's guilt or innocence. The Supreme Court has closed a potential loophole wherein a guilty client can receive another bite at the apple (a new trial or sentencing proceeding) because of counsel errors that did not affect the outcome of the trial or because of factors such as in *Cronic* where the defendant would have received a new trial without even a showing of serious counsel errors.<sup>48</sup>

The burden to show ineffectiveness by counsel in the past has been on the defendant and this has not been changed. The burden to overcome the strong presumption that the counsel was acting within the wide range of reasonably competent assistance has increased. One commentator has indicated that the defendant actually must have a colorable claim of innocence, or that the attorney's performance must be of the type to shock one's conscious so as to create a miscarriage of justice, before one can prevail under *Strickland*.<sup>49</sup>

### Supreme Court

The Supreme Court has had few occasions to deal with ineffective assistance cases since *Strickland* was decided.

In a number of cases, the Supreme Court denied the petition for writ of certiorari with Justices Brennan and Marshall consistently dissenting with an opinion. Although it is always dangerous to glean anything from certiorari denials, the dissents present an interesting portrayal of situations wherein they feel that an ineffective assistance claim had been raised.<sup>50</sup>

In *Hamilton v. Zant*,<sup>51</sup> Roland Hamilton was sentenced to death for felony murder, robbery being the underlying

felony. Defense counsel's conduct at trial which was under attack included (among other things): questioning only three jurors on voir dire examination; conducting no independent investigation; interviewing no witnesses prior to their testimony; failing to interview the medical examiner prior to trial who had testimony that would corroborate Hamilton's account of the victim's death; failing to investigate the state's key witness' background for impeachment and to require the state to disclose that this key witness had an agreement with the state that she would not be prosecuted for her part in the incident; and neglecting to develop possible exculpatory evidence involving the victim's propensity for violence.<sup>52</sup> During sentencing, according to the dissenters, the defense attorney continued his "pattern of indifference and incompetence," presenting no evidence whatsoever as a basis for mercy, giving only the briefest speech.<sup>53</sup>

The Georgia Supreme Court had reversed Hamilton's death sentence because of ineffective assistance at the sentencing phase but would not grant him a new trial. The Supreme Court denied certiorari in Hamilton's case on the same day *Strickland* was decided. The dissenters to the denial of certiorari felt that Hamilton should have been granted a new trial because he had met the *Strickland* test in that there was a reasonable probability that the outcome would have been different but for the substandard performance by counsel. They indicated that it was reasonably probable that the jury would have found Hamilton guilty of something less serious than capital murder if the attorney had functioned anywhere within the range of professional conduct expected of attorneys.<sup>54</sup>

In *Alvord v. Wainwright*,<sup>55</sup> Justices Marshall and Brennan dissented from a denial of a writ of certiorari petition where the issue was whether the counsel's assistance was effective. Alvord had been adjudged insane at a prior criminal trial and refused to rely on the insanity defense in his present case. His defense attorney accepted his client's refusal and made no independent investigation of his client's mental history and proceeded with an unsupported alibi defense.<sup>56</sup> Alvord had escaped from a mental hospital in Michigan and traveled to Florida where he committed the three murders for which he was convicted and received the death penalty.<sup>57</sup>

Alvord's defense counsel had met with him only fifteen minutes prior to his trial. The dissenters felt that allowing the client to decide not to raise the insanity issue without any investigation was ineffective assistance. The American Bar Association Standards of Criminal Justice indicated that which trial motions should be made are the exclusive

<sup>47</sup> *Id.* at 2051 n.41.

<sup>48</sup> *Cronic*, 104 S. Ct. 2051.

<sup>49</sup> Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Decisions of the United States Supreme Court*, the Army Lawyer, June 1985, at 1, 14.

<sup>50</sup> See generally Winzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227 (1980).

<sup>51</sup> 104 S. Ct. 2371 (1984).

<sup>52</sup> *Id.* at 2372.

<sup>53</sup> *Id.* Also, no member of the defendant's family was contacted prior to trial.

<sup>54</sup> *Id.* at 2373.

<sup>55</sup> 105 S. Ct. 355 (1984).

<sup>56</sup> *Id.* at 356.

<sup>57</sup> *Id.*

province of the attorney after consultation with the client,<sup>58</sup> although an ethical consideration of the American Bar Association Code of Professional Responsibility suggests that the insanity defense decision might ultimately be made by the client after the lawyer has fully informed himself and the client on the issue.<sup>59</sup> The dissenters recognized that these standards were only guides in determining the reasonableness of counsel's assistance after *Strickland*. Although in their opinion the attorney's performance in the case was "unquestionably inappropriate and constitutionally ineffective," they did not apply the *Strickland* test.<sup>60</sup> Probably because they realized that the majority of lower courts would not have required the trial defense counsel to meet the standards they proposed in their dissenting from the denial of a writ of certiorari petition.

These denials of certiorari indicate how difficult it may be to get four Justices even to grant a hearing or remand a case on an ineffectiveness allegation. In any event, one can see the frustration of Justices Marshall and Brennan with the majority's denials as they highlight performances which would make a reasonably competent attorney cringe.

In the next term after *Strickland*, the Court decided *Evitts v. Lucey*,<sup>61</sup> declaring that the effective assistance of counsel is guaranteed to a criminal defendant on his or her first appeal as of right. The Court did not decide, however, what appropriate standards would be used to judge claims of ineffective assistance of appellate counsel.<sup>62</sup> As in *Strickland*, the *Evitts* majority was concerned that the adversarial system of criminal justice perform as it was designed by convicting the guilty and allowing the innocent to go free. This is best promoted when there is effective partisan advocacy on both sides in cases where there is a constitutional right to counsel.<sup>63</sup> Thus, because a defendant has the right to counsel on a first appeal as of right,<sup>64</sup> he is entitled to the effective assistance of that counsel during the appeal.

Another recent case held that the *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In *Hill v. Lockhard*,<sup>65</sup> the Court looked at a

claim by Hill that his guilty plea to murder and theft was involuntary by reason of ineffective assistance because his attorney had misinformed him as to his parole eligibility date.<sup>66</sup> He thought he would be eligible for parole after serving one third of his sentence when as a second offender he would serve as least one half.

The court applied the *Strickland* test and found no prejudice because there had been no allegation that Hill would have pled not guilty if he had been properly informed.<sup>67</sup> Thus in this situation there must be a reasonable probability that, but for the counsel's errors, the accused would have insisted on going to trial.<sup>68</sup> The Court apparently applied the prejudice requirement in guilty plea cases because this tougher standard would serve the fundamental interest in the finality of guilty pleas.<sup>69</sup>

### The Federal Courts

A review of some of the decisions from the federal courts indicates that they are not having difficulty applying the *Strickland* test.

As noted in *Strickland*, strategic choices by a defense counsel should be "virtually unchallengeable."<sup>70</sup> Thus the defense attorney who made the strategic choice to present one of two possible defenses (self-defense rather than the battered wife syndrome defense) and abandon the other one was not rendering ineffective assistance of counsel under *Strickland* according to one federal circuit court.<sup>71</sup> Another federal case held that the presumption of effectiveness was not overcome by the defense attorney's strategic choice to forego the usual motion for a judgment of acquittal in order to keep the state from bringing a more serious charge.<sup>72</sup>

As the Supreme Court predicted, the federal courts have found it easier to go first to the prejudice prong of the *Strickland* test in deciding ineffectiveness claims. The Eleventh Circuit (from which the *Strickland* case arose) used the new focus of analysis in *Boykins v. Wainwright*,<sup>73</sup> decided a few months after *Strickland*. The defendant alleged the following errors: the defense attorney had only a short time

<sup>58</sup> A.B.A. Standard of Criminal Justice 4-5.2, (2d ed. 1980).

<sup>59</sup> Model Code of Professional Responsibility EC 7-7 (1979).

<sup>60</sup> *Alvord*, 105 S. Ct. at 359.

<sup>61</sup> 105 S. Ct. 830 (1985).

<sup>62</sup> *Id.* at 833. One aspect of appellate advocacy had previously been decided. An appellate counsel does not have to raise every issue requested by the defendant where counsel's conduct served the goal of "vigorous and effective advocacy." *Jones v. Barnes*, 463 U.S. 745, 754 (1983).

<sup>63</sup> 105 S. Ct. at 835. If there is no constitutional right to counsel, then one cannot be deprived of the effective assistance of counsel. See *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam).

<sup>64</sup> *Ross v. Moffitt*, 417 U.S. 600 (1974).

<sup>65</sup> 106 S. Ct. 366 (1985).

<sup>66</sup> *Id.* at 368.

<sup>67</sup> *Id.* at 371.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 370. One case pending before the Court that has been argued but not decided raises an interesting ineffectiveness claim. A lawyer told his client that if he insisted on testifying and committing perjury that he would move to withdraw, advise the judge of the perjury and also testify against him. One issue before the Court is whether the threats by the attorney compromised the defendant's right to effective assistance of counsel in that it created a conflict of interest that resulted in the attorney's abandonment of a diligent defense. *Nix v. Whiteside*, 744 F.2d 1323 (8th Cir. 1984), argument reported at 54 U.S.L.W. 3161 (Sept. 24, 1985).

<sup>70</sup> *Strickland*, 104 S. Ct. at 2066.

<sup>71</sup> *Meeks v. Bergen*, 749 F.2d 322 (6th Cir. 1984). The court held that even if the defense counsel's conclusions were erroneous, there was no reasonable probability that the outcome would have been different.

<sup>72</sup> *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984).

<sup>73</sup> 737 F.2d 1539 (11th Cir. 1984).

(two weeks) to prepare for his trial for assault and robbery; the defendant and defense attorney met just once prior to trial; the defense attorney had a heavy case load and had never before presented an insanity defense; and the defense attorney failed to interview the state's expert psychiatric witness, failed to contact relatives and friends to collect evidence concerning his mental state, did not demand a pretrial competency hearing, and did not raise the fact that the defendant was sedated at trial.<sup>74</sup>

Applying the burden of showing prejudice, the court held that the defendant was not able to show how the errors could have altered the outcome. There had been no breakdown in the adversarial process to render the result unreliable.<sup>75</sup> Errors that created a conceivable effect on the trial's outcome were simply not sufficient to overcome the strong presumption of reliability in the challenged proceedings.<sup>76</sup>

In another Eleventh Circuit case, *Warner v. Ford*, the court relied on the prejudice prong of *Strickland* to defeat the defendant's claim of ineffective assistance. Due to the overwhelming evidence against the clearly guilty defendant, the defense attorney's "virtual silence" strategy was not ineffective assistance and may have been the best strategy under the circumstances.<sup>77</sup>

At the trial, the defense attorney played an inactive role. He did not participate in voir dire, exercised no preemptory challenges, made no pretrial motions, made no cross examination, offered no objections to evidence offered against his client, presented no character evidence or any other type of evidence, made no closing argument, requested no jury instructions, and did not poll the jury.<sup>78</sup>

The Court did not second guess the silent strategy in this multiple defendant trial where all the co-defendants eventually received the same fifteen year sentence. The defense attorney's decision to maintain a low profile was strategic, had worked in the past, and had been discussed with the defendant throughout the trial.<sup>79</sup> The court held that even if the attorney had been more active, there was no reasonable probability that the defendant would have been acquitted or would have received a lighter sentence in the face of the overwhelming evidence.<sup>80</sup>

In *Mitchell v. Scully*,<sup>81</sup> a case from the Second Circuit, the court noted that failing to advise a criminal defendant of an affirmative defense when facts known to the attorney

suggested that the defense might be meritorious might constitute ineffective assistance of counsel under prevailing professional norms. The court held, however, that this issue did not have to be decided after *Strickland* because of the requirement to affirmatively prove prejudice. In *Mitchell*, there was little likelihood of the affirmative defense being successful, therefore the defendant could not show there was a reasonable probability that but for the unprofessional errors the result would have been different.<sup>82</sup> Thus the court sidestepped the issue of whether an attorney's actions were unreasonable under professional norms and went right to the heart of the *Strickland* analysis—was there prejudice?

In *Stokes v. Procunier*, the Fifth Circuit found that the failure to object to a *Miranda/Doyle* post arrest silence comment fell beneath the objective standard of reasonable professional assistance because it was not possible for this to be sound trial strategy.<sup>83</sup> The prejudice prong of *Strickland* was not met, however, because there were two eyewitnesses to the crime and incriminating evidence was found on the accused.<sup>84</sup> Thus there was no reasonable probability that the outcome would have been different.

One court suggested during an ineffectiveness case that defense attorneys must continue to put forth their best efforts and not rely on the prejudice prong to prevail when attacked on ineffectiveness grounds. Regardless of whether there has been a constitutional violation, a defendant has recourse to civil proceedings for the deficiencies.<sup>85</sup>

A few federal cases show how a defendant has successfully met the strict standards in *Strickland*. During the sentencing phase of a first degree murder case, the defense counsel made an argument that dehumanized his client. He emphasized the reprehensible nature of the crime and indicated that he had reluctantly represented the defendant.<sup>86</sup> Thus the attorney made errors that were outside the range of reasonable professional assistance by trying to separate himself from his client and breaking his duty of loyalty. These errors were also prejudicial as the defendant had been convicted with circumstantial evidence and there was a reasonable probability that effective counsel could have convinced the sentencer not to give the death penalty. The case was sent back for resentencing as the court's confidence in the outcome had been undermined by the attorney's constitutional ineffectiveness.<sup>87</sup>

<sup>74</sup> *Id.* at 1541-42.

<sup>75</sup> *Id.* at 1543.

<sup>76</sup> *Id.*

<sup>77</sup> 752 F.2d 622 (11th Cir. 1985).

<sup>78</sup> *Id.* at 623-24.

<sup>79</sup> *Id.* at 625.

<sup>80</sup> *Id.* at 626.

<sup>81</sup> 746 F.2d 951 (2nd Cir. 1984).

<sup>82</sup> *Id.* at 955.

<sup>83</sup> 744 F.2d 475, 483 (5th Cir. 1984).

<sup>84</sup> *Id.* at 483.

<sup>85</sup> *Crisp v. Duckworth*, 743 F.2d 580, 588-89 (7th Cir. 1984).

<sup>86</sup> *King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir. 1984).

<sup>87</sup> *Id.* at 1465.

In a case from the Eighth Circuit, a guilty plea was set aside because of ineffective assistance.<sup>88</sup> The defense counsel's investigation consisted solely of reviewing the prosecutor's file. He failed to investigate the defendant's serious mental problems and felt the case seemed futile because of racial overtones (black defendant accused of raping a white woman.)<sup>89</sup> Using the *Strickland* test, the court held that there was a reasonable probability that but for the counsel's errors the plea proceedings would have been different.<sup>90</sup>

The defendant was able to meet both the performance and prejudice prongs of *Strickland* in *Martin v. Rose*, where the defense counsel refused to participate in a trial because he erroneously believed that he would waive his pretrial motions (speedy trial and continuance) or render them harmless error.<sup>91</sup> His trial tactic was based on a misperception as to the law and was not sound trial strategy but was professionally incompetent assistance.<sup>92</sup> The failure of the attorney to participate for this reason made the adversary process unreliable. The government's case was not subject to any meaningful adversarial testing.<sup>93</sup> The defendant was prejudiced by his counsel's omissions as there was a reasonable probability that the result of the trial would have been different. There was little direct evidence of the crime which the defendant's theory of defense would have tried to rebut.<sup>94</sup>

Effective assistance of counsel was at issue in the first degree murder case of *Rogers v. Israel* and centered on whether counsel failed to reasonably investigate the effect of a person's heart wounded by a bullet on that person's ability to maintain physical movement.<sup>95</sup> If the defense counsel had found an expert medical opinion concerning the effect of this wound on a victim, the defendant would have been able to present a solid self defense theory and rebut the government's expert. The defense attorney testified that he tried to find a physician to support the defense view, but he never talked to a pathologist. A forensic pathologist testified at a post conviction hearing that he and six other pathologists in the area (Racine, Wisconsin) agreed that the effects on the victim would be commensurate with the defense's theory.<sup>96</sup>

The Seventh Circuit Court used the *Strickland* tests and concluded:

- 1) The expert testimony was critical to the defense's presentation and there was a reasonable probability

that, if it had been presented, the jury would have reached a different conclusion (prejudice prong); and

- 2) The error of not interviewing pathologists on the issue was unreasonable and not based on trial strategy.<sup>97</sup>

The case was remanded to the district court, one purpose being to determine whether the physician consulted by the defense counsel could have been qualified as an expert. If so, then the defendant would not prevail on his writ as the attorney would have fulfilled his duty toward his client; if not, then the defendant's writ would be granted.<sup>98</sup>

The dissent disagreed with the majority's strange conclusion. The dissent wrote that the majority seemed to have lost sight of the basic inquiry in *Strickland* as to whether a true adversarial testing had taken place as envisioned by the sixth amendment. The inquiry was not to determine whether the representation could have been better, but whether it was reasonable under prevailing professional norms.<sup>99</sup> Determining how many physicians a defense counsel talked to and their expert qualifications was just such a detailed inquiry into a defense counsel's investigations that *Strickland* was trying to avoid.

The *Strickland* test is not used under a few limited circumstances where a counsel's performance is so impeded that it is unlikely that any attorney could have provided effective assistance. When such circumstances arise, prejudice to the defendant is presumed. An example would be where a defendant shows that his attorney had an actual conflict of interest which may have precluded his zealous representation of his client's interests. Thus, where the defendant's attorney provided a stipulation of fact that contained information adverse to the defendant and the attorney could have faced potential liability for the same crime, prejudice was presumed.<sup>100</sup>

The performance/prejudice test of *Strickland* also has not been applied where an issue arose concerning which attorney a defendant desired. When an accused seeks a substitution of counsel, different constitutional and societal interests are at stake than those under the *Strickland* focus.<sup>101</sup> Likewise, *Strickland* is not appropriate when reviewing cases where an attorney is absent during a "critical" stage of the trial<sup>102</sup> or the defendant has been denied

<sup>88</sup> *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984).

<sup>89</sup> *Id.* at 308.

<sup>90</sup> *Id.* at 307.

<sup>91</sup> 744 F.2d 1245, 1248 (8th Cir. 1984).

<sup>92</sup> *Id.* at 1249.

<sup>93</sup> *Id.* at 1250.

<sup>94</sup> *Id.* at 1251.

<sup>95</sup> 746 F.2d 1288, 1290 (7th Cir. 1984).

<sup>96</sup> *Id.* at 1293.

<sup>97</sup> *Id.* at 1294.

<sup>98</sup> *Id.* at 1295.

<sup>99</sup> *Id.* at 1296 (Kellam, Sr. D.J., dissenting).

<sup>100</sup> *Government of the Virgin Islands v. Zepp*, 748 F.2d 125 (3rd Cir. 1984).

<sup>101</sup> *Wilson v. Mintzes*, 761 F.2d 622 (6th Cir. 1985).

<sup>102</sup> *Silverson v. O'Leary*, 764 F.2d 1208 (7th Cir. 1985).

access to his attorney during a trial.<sup>103</sup> These are constitutional errors where prejudice is presumed and the issue becomes one of whether the error was harmless or not.

### Military Standards and the Use of *STRICKLAND* in Military Cases

The military accused's right to representation by counsel entails the right to the *effective* assistance of counsel.<sup>104</sup>

Rule for Courts-Martial 502(d)(6) outlines the duties of defense counsel in the military.<sup>105</sup> The discussion to the rule specifies what duties should be performed before, during, and after trial. What happens when counsel fails to perform in the manner prescribed by R.C.M. 502(d)(6)? On appeal, errors are reviewed under the following standard: "A finding or sentence of a court-martial may not be held incorrect on the ground of error of law unless the error materially prejudices the substantial rights of the accused."<sup>106</sup>

The question is whether the standard in Article 59(a) should be read as encompassing the standard for ineffective assistance of counsel enunciated in *Strickland*, or whether the military courts should treat *Strickland* as being "minimum" protection for the soldier and hold our defense counsel to a higher standard? On its face, it would appear that Article 59(a) would require that prejudice be shown before reversal due to a defense counsel's errors.

The standard in the military was set primarily in the 1977 case of *United States v. Rivas*.<sup>107</sup> There the court stated that, in the military, the accused is entitled to counsel who exercises "the skill and knowledge which normally prevails within the range of competence demanded of attorneys in criminal cases,"<sup>108</sup> and "his right is to one who exercises that competence without omission throughout the trial."<sup>109</sup> No specific requirement for prejudice resulting from the errors was necessary under this standard.

Along with *Rivas*, the case most often cited by military courts when dealing with ineffectiveness claims is the 1982 decision of *United States v. Jefferson*.<sup>110</sup> In *Jefferson*, the Court of Military Appeals cited with approval the standards enunciated in the leading federal case at the time, *United States v. DeCoster*.<sup>111</sup> That court held that before an accused could prevail on the issue of ineffectiveness of counsel, he had to demonstrate "serious incompetency" by

the counsel and that such inadequacy affected the trial result.<sup>112</sup>

This standard appears to be somewhat similar to the *Strickland* test handed down by the Supreme Court two years later. The second part concerning the inadequacy merely affecting the result appears to be a lower threshold than the *Strickland* standard of prejudice where the defendant is deprived of a fair trial as a result of the errors.

#### *How have the military courts dealt with Strickland?*

In *United States v. Huxhold*,<sup>113</sup> the Navy-Marine Corps Court of Military Review applied *Strickland* to an ineffectiveness issue. The ineffectiveness claim was not successful because of the lack of sufficient prejudice—the second prong of *Strickland*. Although this was the basis of the decision and the court recognized that they would not be required to make findings concerning the alleged deficiency of the defense counsel's performance, the panel discussed the alleged errors in detail and found them not to amount to ineffective assistance.<sup>114</sup>

In *United States v. Scott*,<sup>115</sup> a different panel from the Navy-Marine Corps court returned a record for finding of fact relating to the factual activities of the defense counsel when preparing for the trial after an accused raised an ineffectiveness claim of inadequate investigation of potential alibi witnesses. The majority would not determine whether *Strickland* was the controlling law prior to determining whether there had been defense counsel deficiencies, particularly in light of conflicting affidavits.<sup>116</sup> Seven extensive areas were mandated to be addressed upon return of the record for findings of fact.<sup>117</sup> The concurring judge would not postpone the decision as to the controlling law but would use the military standard which is different and provides at least the same protection to the accused as *Strickland* and probably more. This standard of review (from *Jefferson*) would be to:

- 1) first examine the record and see if the performance of counsel was deficient to the extent that it was below the performance ordinarily expected of lawyers;  
and then
- 2) if that standard has not been met, testing for prejudice under Article 59(a).<sup>118</sup>

<sup>103</sup> *Crutchfield v. Wainwright*, 772 F.2d 839 (11th Cir. 1985).

<sup>104</sup> Uniform Code of Military Justice art. 27(a), 10 U.S.C. § 827(a) (1982) [hereinafter cited as UCMJ].

<sup>105</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 502(d)(6) [hereinafter cited as M.C.M., 1984, and R.C.M., respectively].

<sup>106</sup> U.C.M.J. art. 59(a).

<sup>107</sup> 3 M.J. 282 (C.M.A. 1977).

<sup>108</sup> *Id.* at 288.

<sup>109</sup> *Id.* at 289.

<sup>110</sup> 13 M.J. 1 (C.M.A. 1982).

<sup>111</sup> 624 F.2d 196 (D.C. Cir. 1979) (en banc). See *United States v. Kelley*, 19 M.J. 946, 947 (A.C.M.R. 1985), and *United States v. Mons*, 14 M.J. 575, 578 (N.M.C.M.R. 1982) for discussions of the pre-*Strickland* standard that *Jefferson* marked out for the military.

<sup>112</sup> *Jefferson*, 13 M.J. at 5.

<sup>113</sup> 20 M.J. 990 (N.M.C.M.R. 1985).

<sup>114</sup> *Id.* at 994.

<sup>115</sup> 18 M.J. 629 (N.M.C.M.R. 1984).

<sup>116</sup> *Id.* at 630 n.1.

<sup>117</sup> *Id.* at 632.

<sup>118</sup> *Id.* (Cassel, J., concurring).

It is the opinion of this writer that the extensive inquiry of defense counsel's trial preparation in *Scott* is just the sort of appellate investigation that *Strickland* was trying to get away from. If there had been the adversarial testing as envisioned by the sixth amendment and the accused could not affirmatively show prejudice, then the accused should not have received a second bite at the apple. As noted in *Scott*, it was a hard-fought case which would have required an affirmation of guilty findings under *Strickland*, at least according to the concurring judge.<sup>119</sup>

In *United States v. Garcia*, the Air Force Court of Military Review examined errors which included the lack of objection to a clinical psychologist testifying concerning the general recidivism rate for persons who commit sexual offenses on children and trial counsel's improper argument concerning the high percentage of recidivism for those who commit these offenses on children who are not incarcerated and treated.<sup>120</sup> Staff Sergeant Garcia was found guilty of two offenses of committing lewd and lascivious acts with the same female under the age of sixteen years. His approved sentence was a dishonorable discharge, six years confinement, and reduction to airman basic.<sup>121</sup>

The court cited *Rivas* and *Jefferson* and the older military standard and then discussed the then-recently decided *Strickland* decision.<sup>122</sup> The defense counsel admitted that the errors resulted from his inexperience and uncomfortable feeling caused by his inexperience.<sup>123</sup> Analyzing the errors within the totality of the case, the court held that the first prong of *Strickland* was not met in that the errors were not so serious as to deprive the accused of a fair trial nor fair sentencing. The court went on to state that had the errors not been made, it was not reasonably likely that the result would have been different.<sup>124</sup>

Two other Air Force cases examining the tactics of defense counsel used the *Strickland* test and found no merit in the ineffectiveness claim.<sup>125</sup> These cases point out the reluctance of courts to second guess tactical decisions as they found no serious errors and also no prejudice to the accused if there were errors.

Prior to the *Strickland* decision, the Army Court of Military Review was also using *Rivas* and *Jefferson* as the guiding light for ineffectiveness cases.<sup>126</sup>

*United States v. Jackson*<sup>127</sup> was a post-*Strickland* case where the Army court discussed two allegations of ineffective assistance. The first was the failure to object to a defective specification. The court gave short shrift to this allegation as there were tactical reasons for not objecting. The accused would have received no benefit as the government could amend it, have it resworn and re-referred, and then the issue would not be preserved for appeal.<sup>128</sup> The second allegation was that the defense counsel failed to argue that the statute of limitations barred the accused's conviction for fraudulent enlistment, one of the offenses of which he was convicted. The court used the *Strickland* test and held that there was ineffective assistance in that instance. There was no strategic or tactical advantage to plead guilty to an offense barred by the statute of limitations and the failure to recognize this fundamental defense fell below minimum acceptable standards (even though the government and military judge also apparently did not notice the defense.)<sup>129</sup> The second prong of *Strickland* was then discussed and the court obviously found that the failure to raise the defense prejudiced the accused,<sup>130</sup> particularly in light of the fact that a significant amount of aggravation concerning this offense was admitted during sentencing and would have been excluded. The confinement portion of the sentence was reduced from five to four years.<sup>131</sup>

In 1985, a different Army Court of Military Review panel used the *Jefferson* standard in deciding that it was not ineffective assistance of counsel to fail to interview a witness whose testimony the counsel had no reason to believe useful or helpful, because it was a reasonable exercise of professional judgment.<sup>132</sup>

In *United States v. Davis*, an Army court of review panel determined that the *Jefferson* principles which virtually adopted those of *DeCoster* were "congruent with the *Strickland* requirements of a breach of professional competence coupled with a showing of a 'reasonable probability' of outcome-determinative prejudice."<sup>133</sup> In *Davis*, the military

<sup>119</sup> *Id.* (Cassel, J., concurring).

<sup>120</sup> 18 M.J. 716, 718 (A.F.C.M.R. 1984).

<sup>121</sup> *Id.* at 716-17.

<sup>122</sup> *Id.* at 718.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 720.

<sup>125</sup> *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985); *United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984). A Coast Guard appellate decision in 1985 failed to even mention *Strickland* in analyzing an ineffectiveness issue and relied on *Jefferson*. *United States v. King*, 20 M.J. 857 (C.G.C.M.R. 1985).

<sup>126</sup> See, e.g., *United States v. Jones*, 18 M.J. 713, 715 (A.C.M.R. 1984), where a defense counsel did virtually nothing on his client's behalf except argue vigorously during sentencing. The court would not second guess the defense strategy which was to plead not guilty and place the burden of proof on the government, hoping that an inexperienced trial counsel would fail to meet its burden. The strategy used was reasonable and the defense argued during sentencing that the accused was contrite and had in effect pled guilty.

<sup>127</sup> 18 M.J. 753 (A.C.M.R. 1984).

<sup>128</sup> *Id.* at 755.

<sup>129</sup> *Id.* at 756.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *United States v. Kelley*, 19 M.J. 946, 947 (A.C.M.R. 1985).

<sup>133</sup> 20 M.J. 1015, 1016 (A.C.M.R. 1985). Another Army panel has also held the standards congruent and cited favorably many of the *Strickland* principles. *United States v. Haston*, 21 M.J. 559 (A.C.M.R. 1985).

judge announced during sentencing that he "strongly" recommended that the convening authority suspend the bad-conduct discharge. The staff judge advocate failed to advise the convening authority of this recommendation. The defense counsel submitted nothing for the convening authority's consideration under R.C.M. 1105, nor did she mention the staff judge advocate's omission in her R.C.M. 1106(f) response. Action was taken by the convening authority without knowing of the trial judge's recommendation.<sup>134</sup>

The court noted that bringing the judge's recommendation to the convening authority's attention prior to action was a critical point where action was compelled because it was the accused's best chance for suspension of the adjudged discharge.<sup>135</sup> The omission was an unprofessional error demonstrating serious incompetency and in light of the substantial extenuation and mitigation matters and clean prior record, the error was sufficient to undermine confidence in the outcome.<sup>136</sup>

### Conclusion

Until recently the Court of Military Appeals had not decided whether the *Strickland* standard would be used in the military.<sup>137</sup> What standard should be adopted? Should the military continue with the more protective *Jefferson* standard in an abundant show of concern for fairness, particularly where the government supplies the judge, trial counsel, defense counsel, and panel? Or, should the accused not receive any additional patronizing and the trial defense counsel's effectiveness be measured by the lower *Strickland* standard? In *United States v. DiCupe* the Court of Military Appeals seems to apply the *Strickland* standard, although the Court did not break out the two-pronged *Strickland* test as clearly as it perhaps could have done.<sup>138</sup>

The approach of the *Strickland* Court was pragmatic and realistic. The guilt of the defendant is what is at issue, not a concern with measuring an attorney's performance against a checklist to determine if a certain standard is met regardless of guilt. With the application of the *Strickland* test, the number of successful ineffective assistance of counsel appeals should diminish. This should benefit society without hindering defendants' rights. The windfall to the accused will be curtailed without diminishing the basic constitutional guarantee of the right to counsel. If the trial evidence has

been subjected to adversarial testing, then the purpose of the effective assistance of counsel right will have been accomplished.

Obviously, trial defense counsel do not want to be the subject of an ineffectiveness claim. Counsel would be well advised to document tactical decisions in a memorandum signed by counsel and the accused as the counsel did in *United States v. Jones*, where virtually no defense case was presented.<sup>139</sup> The independent Trial Defense Service is well established,<sup>140</sup> functioning in an exemplary manner, and valid ineffectiveness claims should be few and far between.

In most instances, whether the *Jefferson* or *Strickland* standard is used, the result will be the same; however, it is this author's opinion that the *Strickland* two prong test and the principles discussed in that case make it more difficult for the accused to prevail than under the *Jefferson* test and in certain cases it certainly will make a difference.

In any event, the courts have a supervisory responsibility for the administration of justice in the court-martial system and should be able to set aside a conviction in an appropriate case even though there may be no prejudice to the accused.<sup>141</sup> In *Cronic*, the Supreme Court noted that courts may exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified.<sup>142</sup>

The development of the military justice system has transformed the courts-martial from an excessively paternalistic system into a truly adversarial one. Defense counsel are being held responsible for their actions on behalf of their clients. For example, the waiver doctrine is being used frequently against the accused where the counsel fails to raise motions and objections in a timely and accurate manner.<sup>143</sup>

The apparent decision of the Court of Military Appeals to adopt the principles announced in *Strickland* marks a trend to accomplish justice without hindering the search for truth at the expense of the accused's rights.

<sup>134</sup> *Davis*, 20 M.J. at 1016.

<sup>135</sup> *Id.* at 1018.

<sup>136</sup> *Id.* at 1019.

<sup>137</sup> The court did decide an ineffective assistance of counsel case recently. In *United States v. Wattenburger*, 21 M.J. 41 (C.M.A. 1985), the court held that the accused was improperly denied counsel prior to trial during "critical stages"; however, it was harmless error as he suffered no disadvantage in preparing his case and received effective assistance at trial. The court disagreed with the accused's argument that there was a presumption of prejudice because of the government's interference. See *United States v. Cronic*, 466 U.S. 648 (1984).

<sup>138</sup> 21 M.J. 440, 442 (C.M.A. 1986).

<sup>139</sup> 14 M.J. 700, 701 (N.M.C.M.R. 1982).

<sup>140</sup> See generally Dept. of Army, Reg. No. 27-10, Legal Services—Military Justice, chap. 6 (1 Aug. 1984).

<sup>141</sup> *United States v. Logan*, 14 M.J. 637, 640 (A.C.M.R. 1982).

<sup>142</sup> *Cronic*, 466 U.S. at 2050 n.38.

<sup>143</sup> Among the provisions of the M.C.M., 1984, that provide for the application of waiver are: Rules for Courts-Martial—  
801(g) – Failure to raise defenses or motions;  
905(c) – Failure to raise motions in general;  
907(b)(2) – Failure to raise speedy trial motion;  
916(c) – Failure to object to argument; and  
Military Rule of Evidence 130, that discusses that an untimely objection or motion may result in waiver.



# Use of the Soldiers' and Sailors' Civil Relief Act To Ensure Court Participation—Where's the Relief?

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## Introduction

Consider the following hypotheticals:

1. Sergeant First Class (SFC) Connally is serving a tour with the Middle East peacekeeping force. His feet have been on foreign soil for only a few days when he receives legal documents in the mail. His wife has just filed for divorce in Texas. SFC Connally does not want a divorce.

2. Second Lieutenant (2LT) Hawkins has been back with her unit in Germany for several months following three weeks leave in the States. While on leave and traveling in her car through a state which she was a non-resident, she collided with another vehicle traveling in the opposite direction. The driver of the other vehicle has sued her. 2LT Hawkins just received notice of the civil action against her.

3. Captain Bowery is stationed at Fort Jackson, South Carolina. He has just received service of process on a civil suit brought against him in the state of Arizona. It is a paternity action filed by a young mother in Tucson.

After complaining to their buddies, all three soldiers mentioned in the hypotheticals learn that there is a law that covers their problems. Each takes his or her beef up to the legal assistance office to check on the relief. Is the local legal assistance officer going to help them get it or make matters worse by responding in ignorance?

The courts in each of the hypotheticals will exercise discretion in deciding issues under the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA).<sup>1</sup> They may not dispense relief in a uniform manner. With the proper information, the legal assistance officer (LAO) can avoid making a mistake that will cause more heartburn for the soldier—and the LAO might even help! To do so, the LAO should have a good understanding of sections 520 and 521 in the SSCRA: default judgments and stay of proceedings.

## Historical Perspective and Purpose

Proper use of the SSCRA stems from understanding its historical development.<sup>2</sup> During the Civil War, many states

enacted "stay laws" that were tantamount to an absolute moratorium on civil actions brought against soldiers.<sup>3</sup> These laws were more than was needed. When drafting the SSCRA of 1918,<sup>4</sup> Congress specifically rejected the arbitrary and inflexible stay laws of the Civil War period. The words of Congressman Webb, Chairman of the House Judiciary Committee, make the point:

The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. . . . In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit. . . . There are many men now in the Army who can and should pay their obligations in full.<sup>5</sup>

The Act of 1918 proved to be successful. It is important to note that this act and the earlier "stay laws" only remained in effect until shortly after the end of the wars for which they were passed. The SSCRA of 1940<sup>6</sup> was essentially a reenactment of the World War I act. The Act of 1940 was to terminate on 15 May 1945 or six months after a treaty of peace was proclaimed by the President, whichever occurred later.<sup>7</sup> In 1948, however, Congress continued it in force "until repealed or otherwise terminated by a subsequent Act of Congress."<sup>8</sup> It is still in effect today.

Every member of the armed forces should understand initially that the SSCRA is not a cure-all. While the Supreme Court of the United States has declared that it must be read with "an eye friendly to those who dropped their affairs to answer their country's call,"<sup>9</sup> the Act's purpose was never to relieve a soldier of his or her civil obligations or to provide immunity against civil lawsuits. It was to provide for

\*This article was based upon a paper submitted in partial satisfaction of the 34th Judge Advocate Officer Graduate Course.

<sup>1</sup> 50 U.S.C. app. §§ 501-548, 560-591 (1982) (originally enacted as Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178). For an overview of the Act, see generally Dep't of Army, Pamphlet No. 27-166, *Soldiers' and Sailors' Civil Relief Act* (August 1981) [hereinafter cited as DA Pam 27-166]; Bagley, *The Soldiers' and Sailors' Civil Relief Act—A Survey*, 45 Mil. L. Rev. 1 (1969) [hereinafter cited as Bagley].

<sup>2</sup> See generally Chandler, *The Impact of a Request for a Stay of Proceedings under the Soldiers' and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 169, 170, 174-75 (1983) [hereinafter cited as Chandler]; Folk, *Tolling of Statutes of Limitations Under Section 205 of the Soldiers' and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 157, 159-162 (1983).

<sup>3</sup> H.R. Rep. No. 181, 65th Cong., 1st Sess. 18-32 (1917) [hereinafter cited as H.R. Rep. No. 181].

<sup>4</sup> Act of March 8, 1918, ch. 20, 40 Stat. 440. Major John H. Wigmore, well known as the author of the authoritative work on evidence, supervised the drafting of the legislation. He worked in the Office of The Judge Advocate General at the time.

<sup>5</sup> H.R. Rep. No. 181, *supra* note 3, at 2-3; See also Chandler, *supra* note 2, at 175.

<sup>6</sup> Act of Oct 17, 1940, ch. 888, 54 Stat. 1178.

<sup>7</sup> 50 U.S.C. app. § 584 (1982).

<sup>8</sup> 62 Stat. 623 (1948).

<sup>9</sup> *LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948).

the "temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons"<sup>10</sup> in the service. This temporary suspension is only to be provided when, in a court's opinion, a soldier's "opportunity and capacity to perform his obligations are impaired by reason of his being in the military service."<sup>11</sup>

Legislators from the start have been sensitive to potential abuses of this purpose. A congressional report from 1917 stated that a soldier "may be some ne'er-do-well who only seeks to hide under the brown of his khaki. . . . In such cases the court would grant no stay of any kind."<sup>12</sup> A soldier's obligations truly must be impaired by reason of military service. In availing himself or herself of the relief provisions in the Act, the soldier must act diligently and in good faith at all times. This is not only in keeping with congressional intent, but the courts that decide the issues will also expect it.

### Section 521—Stay of Proceedings

Of the two forms of general relief under consideration, section 521<sup>13</sup> of the Act will be discussed first because it is the most frequently invoked<sup>14</sup> and is usually the most appropriate under the circumstances. It provides for a stay at any stage of any civil proceeding involving a person in military service. The soldier can be either the plaintiff (infrequently seen) or defendant, and the involvement in the civil proceeding must be during the period of his or her active military service or within sixty days thereafter. Under these circumstances, a court *may* grant a stay on its own motion in its discretion or *must* grant a stay upon application to it, unless the court finds that the ability of the soldier to prosecute or defend is "not materially affected by reason of his military service."<sup>15</sup>

The application for a stay may be made by the soldier or by someone else on his or her behalf. Section 521 applies to both pre-service and in-service obligations that end up in a civil proceeding. Using this standard of material effect, courts focus on the ability of the soldier to participate in the proceedings rather than on the nature of the obligation.<sup>16</sup>

Who has the burden of proof in demonstrating material effect? The Act itself does not provide an answer. *Boone v.*

*Lightner*<sup>17</sup> is the only decision by the United States Supreme Court interpreting this section of the Act and is cited frequently by state courts as authority on the issue. The Supreme Court said:

The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come.<sup>18</sup>

Some courts have required the soldier to make an affirmative showing that his or her military service materially affects his or her ability to conduct or defend an action.<sup>19</sup> Others have clearly placed the burden of demonstrating no prejudice upon the party opposing a postponement of trial.<sup>20</sup> The legal assistance officer obviously should be more concerned when a jurisdiction places the burden of proof on the soldier. The safest policy is to assume that every court will do exactly that.

What factors do courts consider in deciding a request for stay of proceedings? Due to the discretion placed in individual courts, the factors vary from one jurisdiction to another. In those jurisdictions that place the burden of proof on the party opposing postponement, many times little more than a bare assertion from a soldier that he or she is in the service and unavailable will suffice. Unless the legal assistance officer knows for certain that the client is dealing with such a court, the attorney and the client must be prepared to demonstrate material effect in the most convincing way possible. Military service must be the reason for a person not being able to assert or protect his or her rights at trial. Military service is not sufficient in itself to acquire a stay of proceedings.<sup>21</sup>

A soldier's unsuccessful effort to obtain leave helps in demonstrating the necessary material effect.<sup>22</sup> In *Boone v. Lightner*, the defendant was summoned into a North Carolina court for an action initiated to remove him as trustee of a fund for his minor daughter. Boone was an Army captain

<sup>10</sup> 50 U.S.C. app § 510 (1982) (emphasis added).

<sup>11</sup> S. Rep. No. 2109, 76th Cong., 3d Sess. 3 (1940); H.R. Rep. No. 3001, 76th Cong., 3d Sess. 3 (1940).

<sup>12</sup> H.R. Rep. No. 181, *supra* note 3, at 2.

<sup>13</sup> 50 U.S.C. app. § 521 (1982).

<sup>14</sup> 54 Am. Jur. 2d *Military and Civil Defense* § 308 (1971).

<sup>15</sup> 50 U.S.C. app. § 521.

<sup>16</sup> Bagley, *supra* note 1, at 12; DA Pam 27-166, para. 3-6a. See also 56 Cong. Rec. 3,023 (1918).

<sup>17</sup> 319 U.S. 561 (1943).

<sup>18</sup> *Id.* at 569.

<sup>19</sup> Plesniak v. Wiegand, 31 Ill. App. 3d 923, 335 N.E.2d 131 (1975) (In a suit for damages sustained in an automobile collision, the defendant soldier had to demonstrate that his military status was the proximate cause of his unavailability.); Palo v. Palo, 299 N.W.2d 577 (S.D. 1980) (Soldier did not demonstrate actual unavailability or that his rights would be adversely affected by his absence at a divorce trial. Denial of stay was affirmed.)

<sup>20</sup> Bowsman v. Peterson, 45 F. Supp. 741 (D. Neb. 1942) (In an action to recover judgment for personal injuries and property damage resulting from an automobile collision, burden was placed upon the plaintiff resisting the application for stay.); Coburn v. Coburn, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982) (burden was placed upon the party opposing postponement in a dissolution of marriage and child custody action); Boothe v. Henrietta Egleston Hospital for Children Inc., 168 Ga. App. 352, 308 S.E.2d 844 (1983) (Soldier was plaintiff in a case involving wrongful death of son); Roark v. Roark, 201 S.W. 2d 862 (Tex. Civ. App. 1947) (burden was upon the party opposing a stay in a divorce suit).

<sup>21</sup> Boone v. Lightner, 319 U.S. 561, 567 n.2 (1943).

<sup>22</sup> *Id.* at 572; Graves v. Bednar, 167 Neb. 847, 95 N.W.2d 123, 126 (1959); Palo v. Palo, 299 N.W.2d 577, 579 (S.D. 1980).

stationed in Washington, D.C. at the time. When the day of the trial arrived, he invoked the Act and requested that the trial be continued until after he completed his service or until such time as he could properly conduct his defense. In an affidavit to the court, Boone stated that "no leaves whatever have been granted, except in cases of serious emergency."<sup>23</sup> The affidavit, however, clearly implied that Boone had not even applied for leave. The Supreme Court considered that fact in concluding that Boone was not taking the lawsuit seriously.<sup>24</sup> It thus affirmed the denial of a stay.

Affidavits in support of one's unavailability are also helpful. The Supreme Court of Virginia reversed a trial court's denial of a stay in *Lackey v. Lackey*.<sup>25</sup> The defendant was serving in the Navy on board the U.S.S. *DECATUR*. It was not due to return to its home port until several months after a scheduled child custody action. Lackey sent a personal affidavit to the court along with an affidavit of an officer on the ship. The officer was someone other than the commander of the U.S.S. *DECATUR*. The officer's affidavit stated that "Lackey was serving on board the *DECATUR* and that his military duties precluded him from leaving the ship."<sup>26</sup> Virginia's Supreme Court concluded that the affidavits were sufficient to establish unavailability and material effect.

Decisions on an application for stay have inevitably turned upon the facts and circumstances of each case.<sup>27</sup> Although being stationed overseas might help a soldier satisfy a burden of proof, overseas assignment in itself will not convince some courts to grant a stay. Hardships of the opposing party may influence the "mercy of the court" just as well as the circumstances of the soldier.<sup>28</sup> Again, both the circumstances of each situation and the forum make a difference.

A soldier's diligence affects the court's decisions as to both the granting of a stay and its length. Where it appears a soldier has not been diligent, courts will conduct a more exacting scrutiny of his or her alleged disadvantage in conducting or defending a lawsuit. The next three cases illustrate this point. In *Plesniak v. Wiegand*<sup>29</sup> the soldier was sued in an action for damages arising out of a vehicular collision. Over a period of about four years, he was granted a stay of proceedings three different times. His fourth request was denied. At the time of the final request, the court required the defendant to demonstrate that his military status was the proximate cause of his inability to be present for trial.

The court considered four factors in ruling upon the request for stay: (1) whether the soldier had made some statement as to when he could be available for trial; (2) whether he had attempted to apply for leave from the military; (3) the length of time between the start of the lawsuit and the soldier's final motion for a stay; and (4) the length of time the soldier had notice of the upcoming trial date.<sup>30</sup> This case clearly demonstrates that courts usually will only tolerate a reasonable amount of delay.

The defendant in *Underhill v. Barnes*<sup>31</sup> was sued in an action arising out of an automobile-motorcycle collision. Underhill was a sailor who sought a stay for the entire period of his time in the Navy plus sixty days.<sup>32</sup> The court determined that he had neither exercised due diligence nor acted in good faith in attempting to make himself available for trial. Underhill told the court in an affidavit that he was "unable to leave his duty station in Hawaii."<sup>33</sup> The court, on the other hand, took judicial notice of his total time in service and the rate at which leave time accrued under federal law. Calculations showed that the defendant had accrued fifty days of annual leave. The court also noted that there was no evidence or showing by the sailor that such leave was not available to him. Needless to say, the request for stay was denied. This type of close scrutiny by a court is probably more likely to occur when a soldier requests a lengthy stay of proceedings.

A U.S. district court in *Keefe v. Spangenberg*<sup>34</sup> took a somewhat innovative approach to a request for an extended stay. The defendant Spangenberg was a Marine who was in training at Fort Gordon, Georgia. He requested a delay until his expected discharge date three years later. The court continued the trial for approximately one month, concluding that the defendant would have "ample time to arrange for a leave or furlough to attend the trial in person or to be deposed by video tape deposition or otherwise."<sup>35</sup> The district court reasoned that such an accommodation would not offend the spirit and purpose of the Soldiers' and Sailors' Civil Relief Act.

#### Section 520—Reopening a Default Judgment

The second form of general relief under consideration is the reopening of default judgments entered against soldiers.<sup>36</sup> Before a default judgment can be entered in any action in any court based upon a default of any *appearance* by the defendant, the plaintiff must first file an affidavit

<sup>23</sup> 319 U.S. at 572.

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

<sup>25</sup> 222 Va. 49, 278 S.E.2d 811 (1981).

<sup>26</sup> *Id.* at 51, 278 S.E.2d at 812.

<sup>27</sup> See 54 Am. Jur. 2d, *Military and Civil Defense* §§ 312-316 (1971).

<sup>28</sup> See, e.g., *Palo v. Palo*, 299 N.W.2d 577, 578-79 (S.D. 1980).

<sup>29</sup> 31 Ill. App. 3d 923, 335 N.E.2d 131 (1975).

<sup>30</sup> *Id.* at 930, 335 N.E.2d at 136-37.

<sup>31</sup> 161 Ga. App. 776, 288 S.E.2d 905 (1982).

<sup>32</sup> The duration of stays under the Act is covered in 50 U.S.C. app. § 524 (1982). "Except as otherwise provided," it mentions period of military service plus 90 days as the maximum permissible stay. That limitation would apply to § 521.

<sup>33</sup> 161 Ga. App. at 777, 288 S.E. 2d at 907.

<sup>34</sup> 533 F. Supp. 49 (W.D. Okla. 1981).

<sup>35</sup> *Id.* at 50.

<sup>36</sup> 50 U.S.C. app. § 520 (1982).

with the court showing (1) that the defendant is not in military service, (2) that the defendant is in military service, or (3) that the plaintiff is unable to determine whether or not the defendant is in military service.<sup>37</sup> If the affidavit indicates the second or third situations above, then the court will decide the propriety of a default. Prior to doing so, however, the court must appoint an attorney to represent the defendant who is known to be a soldier or is found by the court to be in the military. This attorney has no power to bind the soldier or to waive his or her rights.<sup>38</sup>

Failure to file an affidavit or to appoint an attorney for the absent soldier is not a jurisdictional defect. It results in a default judgment that is voidable as opposed to void.<sup>39</sup> The Act also provides a criminal penalty for making or using a false affidavit. The maximum punishment is imprisonment for a year or a \$1000 fine or both.<sup>40</sup>

The court may also require a bond from the plaintiff conditioned to indemnify the soldier against loss or damage should the default judgment later be set aside in whole or in part.<sup>41</sup> Any further order for the defendant's protection may be made as deemed necessary.<sup>42</sup>

When a soldier has failed to appear in a proceeding and a default judgment has resulted, what are the requirements for later having it reopened? First, the judgment must have been rendered during a period of active duty or within thirty days thereafter. Next, the soldier's application to reopen must be made during service or within ninety days thereafter. Finally, the soldier must show that he or she was prejudiced by reason of military service in making a defense and that he or she has a meritorious or legal defense to the action or some part thereof.<sup>43</sup> The burden of proof is on the soldier to demonstrate both of these final factors.<sup>44</sup> In determining whether the soldier has met this burden of proof, "the trial court has a wide measure of discretion."<sup>45</sup>

There is some authority for the view that the purpose of section 520 is to protect persons in the armed services from judgments entered against them without their knowledge.<sup>46</sup> The legal assistance officer should be aware that a court may take that position. Limiting protection to those without knowledge, however, is too restrictive.<sup>47</sup> The defendant

is not required to show lack of knowledge, but rather the necessary prejudice by reason of service and a meritorious defense. Circumstances may exist where a soldier knows of a lawsuit against him or her and yet may still be able to satisfy the burden of proof.

In *Saborit v. Welch*,<sup>48</sup> for example, the defendant was a Marine who received notice of a suit while stationed in Okinawa. The action was for damages growing out of an automobile collision in Georgia. After a default judgment was entered against him, the Marine was successful in having it set aside. The Georgia appellate court ruled that there was a prima facie showing of prejudice in the case, and it was not overcome simply because the Marine knew about the case through service of process.

Significantly, the provisions in section 520 are only applicable when the defendant fails to appear in the original action. If the soldier makes any appearance, there is no need for a plaintiff's affidavit or a court-appointed attorney, and the soldier has no right to reopen a subsequent judgment.<sup>49</sup> An appearance removes the case from the purview of section 520. Actions constituting an appearance will be discussed in the next section.

*In re Larson*<sup>50</sup> and *Becknell v. D'Angelo*<sup>51</sup> illustrate successful use of section 520. In the former case, a divorced mother obtained a court decree changing the name of her minor daughter while the father was serving in the armed forces. At the time of the decree he was incarcerated in a prisoner of war camp overseas. The court later granted his motion to set aside the order for change of name. It held that a decree changing the name of a minor child was a judgment within the scope of the Act and that the father was unquestionably prejudiced by reason of his military service.

*Becknell v. D'Angelo* involved a soldier who left the continental United States under military orders for Thailand. Only one day prior to his departure, he and his wife were divorced. After serving in Thailand for six months, he received a copy of an amended divorce decree giving his former wife a greater share of the community property. The

<sup>37</sup> *Id.* at § 520(1) (emphasis added).

<sup>38</sup> *Id.* at § 520(3).

<sup>39</sup> *Krumme v. Krumme*, 6 Kan. App. 2d 939, 636 P.2d 814, 817 (1981); DA Pam 27-166, para. 3-2a(4).

<sup>40</sup> 50 U.S.C. app. § 520(2).

<sup>41</sup> 50 U.S.C. app. § 520(1) (1982).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at § 520(4) (emphasis added).

<sup>44</sup> See generally Annot., 35 A.L.R. Fed. 716-17 (1977).

<sup>45</sup> *LaMar v. LaMar*, 505 P.2d 566, 568 (Ariz. Ct. App. 1973).

<sup>46</sup> *Title Guarantee and Trust Co. v. Duffy*, 267 App. Div. 444, 46 N.Y.S.2d 441 (N.Y. Sup. Ct. 1944); *Cloyd v. Cloyd*, 564 S.W.2d 337 (Mo. Ct. App. 1978); *Chandler*, *supra* note 2, at 175.

<sup>47</sup> H. Rep. No. 181, *supra* note 3, at 5. In explaining the purpose of the court-appointed attorney, Mr. Webb stated that "since . . . communication between attorney and client may be uncertain and *unsatisfactory*, the acts of the attorney appointed by the Court should not bind the defendant." (emphasis added). The implication is that the defendant can at least know of the action and yet still have the relief afforded by the Act.

<sup>48</sup> 108 Ga. App. 611, 133 S.E.2d 921 (1963); See also *Lopez v. Lopez*, 173 Cal. Rptr. 718, 115 Cal. App. 3d 776 (1981) (Defendant was a physician stationed in Germany with the U.S. Air Force. Though he had knowledge of proceeding for spousal and child support, court order was later set aside due to showing of necessary prejudice).

<sup>49</sup> *Reynolds v. Reynolds*, 21 Cal. 2d 580, 586 134 P.2d 251, 255 (1943); *Martin v. Indianapolis Morris Plan Corp.*, 400 N.E.2d 1173, 1176 (Ind. Ct. App. 1980).

<sup>50</sup> 81 Cal. App. 2d 258, 183 P.2d 688 (1947).

<sup>51</sup> 506 S.W.2d 688 (Tex. Civ. App. 1974).

court amended the decree about one month after his departure. In a motion to set aside the amendment, D'Angelo argued that his military service prevented him from knowing about the change and from appearing in court to present his defense. The court agreed and set it aside.

A key factor in determining prejudice for purposes of equitable relief under section 520 is "the diligence with which a serviceman takes advantage of the opportunities to preserve the rights afforded him"<sup>52</sup> while the original court action is still pending. Two cases that demonstrate this lack of diligence are *LaMar v. LaMar*<sup>53</sup> and *Reeh v. Reeh*.<sup>54</sup> *LaMar* involved a motion by a soldier to set aside a divorce judgment rendered against him while stationed in Germany. The evidence showed that he had corresponded with others concerning the divorce while the action was in court but had made no effort to request a stay of proceedings. The court refused to reopen the default judgment, concluding that LaMar knew his rights under the Act but had taken no steps to assert them.<sup>55</sup>

In *Reeh v. Reeh*, the soldier was unsuccessful in reopening a default judgment for divorce and child custody. A California appellate court wrote that "it could have been concluded . . . that defendant was seeking only delay, and not a bona fide effort to defend the action."<sup>56</sup> Reeh had instructed his court-appointed attorney not to appear in his behalf and had made no effort to obtain leave in order to prepare for the divorce action. An affidavit introduced by his former wife also indicated that the soldier was visiting his home on weekends while the divorce action was pending. That his home was in the same geographic area as the divorce court emphasized his lack of diligence and made prejudice by reason of service unlikely.

### Is It Default of the Legal Assistance Officer?

#### *Waiving Goodbye to Relief*

To render a valid personal judgment against a soldier, a court must have jurisdiction over him or her. Personal jurisdiction is acquired in only two ways: by service of

process on the defendant, whereby he or she is brought in to the lawsuit against his or her will; or by the defendant's voluntary appearance in the action.<sup>57</sup> If the process or service of process is substantially defective, then the defendant must voluntarily appear in order for a valid personal judgment to be rendered against him or her.<sup>58</sup> Without previous objection, this appearance operates as a waiver of the defective service.<sup>59</sup>

Acts by a legal assistance officer on behalf of a client carry great significance. Recognizing that soldiers are not exempt from service of civil process,<sup>60</sup> the LAO must first determine whether the client has been served properly. If there are substantial defects in process or service of process, the attorney must avoid entering a voluntary appearance for the soldier, thereby waiving the defects. In such case the LAO has given the court personal jurisdiction over the soldier, something that probably did not exist prior to the LAO's involvement. Just as significant, the LAO has now removed the client from the purview of section 520. Because there has been an appearance, that section is no longer applicable.

Section 520 specifies that there must be a "default of any appearance by the defendant."<sup>61</sup> in the initial court action in order for the soldier to later use the procedure for reopening default judgments. The SSCRA of 1918 contained the words "an appearance," but these two words were broadened to read "any appearance" in the SSCRA of 1940.<sup>62</sup> Therefore, "the benefits of Section 520 are made to depend on an absence of any appearance, which includes a special as well as a general appearance."<sup>63</sup> The label that an attorney places on an appearance will not make any difference to some courts.<sup>64</sup>

Examples of initial efforts by a soldier or an attorney that have been dubbed appearances by the courts include: filing an answer through counsel;<sup>65</sup> filing an answer in one's own behalf and requesting that costs be assessed against the other party;<sup>66</sup> requesting through an attorney that the complaint and service be quashed or that the cause be continued;<sup>67</sup> contesting the jurisdiction of court through

<sup>52</sup> *Swartz v. Swartz*, 412 So. 2d 461, 462 (Fla. Dist. Ct. App. 1982).

<sup>53</sup> 19 Ariz. App. 128, 505 P.2d 566 (1973).

<sup>54</sup> 69 Cal. App. 2d 200, 158 P.2d 751 (1945).

<sup>55</sup> One of the letters that LaMar had written was to opposing counsel. The letter acknowledged receipt of the summons and the complaint. It also stated "I am protected against a default judgment by . . . the Soldiers' and Sailors' Civil Relief Act. Further I am entitled to a stay of this proceeding until I am able to return home and properly defend myself." Opposing counsel advised LaMar in a return letter that "claimed entitlements" under the Act were not his concern until "such time as they are properly put in issue." 19 Ariz. App. at 129, 505 P.2d at 567-68.

<sup>56</sup> 69 Cal. App. at 206, 158 P.2d at 754.

<sup>57</sup> 5 Am. Jur. 2d *Appearance* § 9 (1962).

<sup>58</sup> 5 Am. Jur. 2d *Appearance* §§ 9, 11 (1962); 49 C.J.S. *Judgments* § 192 (1947).

<sup>59</sup> See, e.g., *Vara v. Vara*, 14 Ohio St 2d 261, 171 N.E. 2d 384 (1961) (Soldier filed a motion for stay of action under section 521 of SSCRA. Because the soldier had entered a general appearance, the Court refused to quash the summons on the ground it did not comply with the statute respecting service by publication).

<sup>60</sup> H.R. Rep. No. 181, *supra* note 3, at 2 (Mr. Webb stated, "Not the slightest hindrance is placed upon the service of summons or other process."); 54 Am. Jur. 2d *Military, and Civil Defense* § 347 (1971).

<sup>61</sup> 50 U.S.C. App. § 520 (1982) (emphasis added); DA Pam 27-166, para. 3-2a(1).

<sup>62</sup> *In re Cool's Estate*, 19 N.J. Misc. 236, 18 A.2d 714, 716 (N.J. Orphans' Ct. of Warren County 1941).

<sup>63</sup> *Blankenship v. Blankenship*, 82 So. 2d 335, 340 (Ala. 1955).

<sup>64</sup> See *Chandler*, *supra* note 2, at 172; 5 Am. Jur. 2d *Appearance* §§ 1-2(1962); 6 C.J.S. *Appearances* § 4 (1975).

<sup>65</sup> *Cloyd v. Cloyd*, 564 S.W. 2d 337, 344 (Mo. Ct. App. 1978).

<sup>66</sup> *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441, 443 (Ill. App. Ct. 1980).

<sup>67</sup> *Blankenship*, 82 So. 2d at 340.

counsel;<sup>68</sup> requesting through private counsel a postponement of proceedings;<sup>69</sup> and requesting a stay through a legal assistance officer's letter.<sup>70</sup> This list is certainly not exhaustive. Judicial determinations, moreover, will vary significantly from one jurisdiction to another.

*So You've Got a Court Summons, Sergeant Smith. . . Is It From Arizona?*

The following two cases illustrate the significance that a request for stay may have on a later attempt by the soldier to reopen a default judgment. The soldier in *Skates v. Stockton*<sup>71</sup> was a Marine stationed in London. A mother residing in Tucson, Arizona, brought a paternity action against him, alleging that the child was conceived in Africa and born in Germany. Stockton was served with process in London under Arizona's long arm statute, but there was nothing in the complaint to indicate that he caused any event to occur in Arizona. Jurisdiction was questionable. When Sergeant Stockton received the notice of action, he went to see a legal assistance officer.

The legal assistance officer sent a letter<sup>72</sup> to the clerk of court, requesting that the action be stayed until the Marine could return to the United States. A copy also went to opposing counsel. The Marine's projected reassignment date was listed as January, 1982, about six months away. The letter was filed with the court but no order was ever issued either granting or denying the request for a stay. Stockton returned to the states about 24 November 1981. On 5 January 1982, the plaintiff's counsel mailed to Stockton at a Wyoming address a notice of intent to take default judgment. Default judgment was entered on 15 January 1982. Stockton was declared to be the father and ordered to pay support and attorney's fees.

When no support payments arrived, the court ordered a show cause hearing. Stockton, through Tucson counsel, filed a motion to dismiss for lack of personal jurisdiction. The trial court denied the motion, leaving the judgment undisturbed. The Arizona court of appeals affirmed. It determined that the LAO's letter constituted a general appearance and that, therefore, Stockton had submitted to personal jurisdiction. The request for a stay was construed

as a request for affirmative relief. Because Stockton had made an appearance, the appellate court determined he was not entitled to the benefits of section 520.

Only one day after the final decision in *Stockton*, a Texas appellate court reached an opposite conclusion in *Kramer v. Kramer*.<sup>73</sup> Kramer was a member of the U.S. Navy stationed in Guantanamo Bay, Cuba. His wife brought an action in Texas for divorce and child custody. There was no evidence that the couple had ever lived together in Texas or that the soldier had ever been in the state. Kramer received notice of the suit while at a stopover in Virginia. He was on his way back to Guantanamo Bay. About 10 days later, Kramer wrote a letter from Cuba to the Texas clerk of court stating that he was unable to appear and answer because of his military status.

The court appointed an attorney for the soldier a few minutes before trial was to begin. Having had no opportunity to communicate with Kramer, the attorney objected to the proceeding. The court, however, entered judgment for divorce and child custody. The Texas Court of Appeals reversed and remanded. Because Kramer had no contacts with the state, the appellate court concluded that there was no personal jurisdiction over him. It also held that Kramer's letter to the clerk was not an appearance but simply an application to stay the proceedings under the SSCRA.

*Recommendations*

Opposite opinions like these rendered in *Stockton* and *Kramer* make it difficult to recommend a standard response to a court summons. The legal assistance officer needs to know pertinent law on process and service of process. Usually this will be local state law. The LAO also needs to know what constitutes an appearance in the court hearing his or her client's case. If adequate research tools are not available, the LAO can contact the local judge or clerk of court in his or her individual capacity for information<sup>74</sup> or get assistance from a Reserve or National Guard judge advocate in the state.<sup>75</sup> In many jurisdictions special legal assistance officers and judge advocates serving on legal assistance advisory committees are available.

<sup>68</sup> Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943).

<sup>69</sup> Vara v. Vara, 14 Ohio St. 2d 261, 171 N.E.2d 384, 392 (1961).

<sup>70</sup> Skates v. Stockton, 140 Ariz. 505, 683 P.2d 304 (Ariz. Ct. App. 1984).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 506, 683 P.2d at 305. The letter read as follows:

Dear Sir:

As a legal assistance officer for this office, I have recently been consulted by Sergeant Joseph D. Stockton, Jr., USMC, the defendant in the above referenced action.

Please be advised that Sergeant Stockton is presently on active military service with the United States Marine Corps. I have advised him of the protection afforded him by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. app. 501-590), and he wishes to avail himself of those protections. Sergeant Stockton's presence on military duty in London, England, "materially affects his ability to conduct his defense," to this action, in the words of Section 521 of the Act. Accordingly, Sergeant Stockton respectfully requests this action be stayed until his return to the United States when he can take leave to see that his interests are protected. It is anticipated this will not be prior to January, 1982, which is his normal projected rotation date for reassignment.

This letter is in no way intended to be an appearance or answer in the action or to be a waiver of his protections under the Act. Thank you for your attention to this matter.

Yours truly  
(signature)  
Legal Assistance Officer

<sup>73</sup> 668 S.W.2d 457 (Tex. Civ. App. 1984).

<sup>74</sup> The Judge Advocate General's School, USAF, Soldiers' and Sailors' Civil Relief Act, at 7 (1975).

<sup>75</sup> For information on a local Reserve Component judge advocate, contact The Judge Advocate General's School, ATTN: JAGS-GRA, Charlottesville, VA 22903-1781. Telephone: (804) 293-6121/FTS 938-1301.

If a standard letter requesting a stay constitutes an appearance in the local court, the LAO must devise an alternative to it. One possibility is the method used in *Rutherford v. Bentz*.<sup>76</sup> In that case, the defendant soldier sent a telegram to the judge stating that he was in military service and requesting that his rights under the SSCRA be protected. Because the communication was to the judge as an individual and not to the court, it did not constitute an appearance. Alternatives to the standard letter need be devised only when the situation proves it necessary, however.

### Conclusion

To receive the relief provided in sections 520 and 521 of the SSCRA, a soldier should act responsibly. After receiving proper notice of lawsuit, a soldier should routinely seek a stay of proceedings under section 521 if military service materially affects his or her ability to assert individual rights or make a defense. The soldier should support the request with adequate documentation such as affidavits or evidence of denied leave. The soldier must give the court some indication how long a stay he or she wants. The postponement should be "only until such time as a defendant is unhampered by his military service to defend the action."<sup>77</sup>

A notice of lawsuit should not be ignored in anticipation of using section 520 at some later time. Any soldier who seeks to reopen a default judgment bears the burden of proof. Both prejudice by reason of military service and a meritorious defense must be shown. Courts may also deny an application to reopen a default when the soldier has not been diligent.

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<sup>76</sup> 345 Ill. App. 532, 104 N.E.2d 343 (1952); See also *LeClair v. Powers*, 632 P.2d 370 (Okla. 1981) (letter from a civilian to the judge in case did not constitute an appearance).

<sup>77</sup> *Royster v. Lederle*, 128 F.2d 197 (6th Cir. 1942); *Register v. Bourquin*, 14 So. 2d 673 (La. 1943).

## Congratulations to Fort Leonard Wood

On 27 March, Secretary of Defense Caspar Weinberger announced that Fort Leonard Wood was selected to receive the Commander-in-Chief's Award for Installation Excellence. A DOD panel selected Fort Leonard Wood as the installation which made the best use of its resources in support of its programs and people. The judges looked for innovative management programs which increased productivity and improved the overall quality of life on a given installation. The President is expected to present the award at a White House ceremony in May.

Legal activities played an integral part in Fort Leonard Wood's achievement. Among the legal programs noted were those concerning the processing of personnel for mobilization, tax assistance, federal court prosecutions, participation in local government activities, and the aggressive medical care recovery program.

The legal assistance office developed a computerized system of processing soldiers for overseas movement. The system allows for the preparation of wills and powers of attorney for soldiers identified for deployment. It has reduced preparation time of these documents from several weeks to 4.2 minutes per soldier. Similarly, the use of commercially available tax preparation software enabled the office to quickly and efficiently prepare federal and state income tax returns for clients.

Special arrangements with the United States Attorney enabled office attorneys to play a more active role in prosecuting persons charged with either on-post crimes or off-post crimes against the Army. Cultivating relations with the local communities played an important part in the office's success. SJA personnel attended local city commission meetings. They also sponsored Law Day activities which included a golf tournament and dinner for local lawyers, law enforcement personnel, and political leaders.

Aggressive involvement in the pre-review of construction contracts resulted in early identification, resolution, and in many cases prevention of contracting problems. This proactive approach to contracting is saving valuable taxpayer dollars. Similarly, vigorous efforts to recover government funds expended to provide medical care to soldiers injured by third parties has resulted in an increase of ninety-two percent in the amounts recovered in the last two years.

Soldiers and civilians in the Fort Leonard Wood SJA office can be very proud of this award. On behalf of the Judge Advocate General's Corps, Major General Overholt extends his commendation for their innovative skills and courage to try new approaches to old problems.

## LAAWS Software Development

On 13 May 1986, the first module of Legal Automation Army-Wide System (LAAWS) application software was mailed to forty-seven active duty staff judge advocate offices. The module contained four legal assistance programs developed by CPT Bill Charters and SFC Glen Megargee, both assigned to OTJAG.

The legal assistance software programs provide the following capabilities: (a.) preparation of simple wills; (b.) preparation of twelve different special powers of attorney; (c.) preparation of wills and powers of attorney for use in deployment or EDRE situations; and (d.) management of legal assistance records and preparation of legal assistance reports. Many of these applications have been successfully tried by the staff judge advocate offices located at Fort Belvoir, Fort Leonard Wood, Presidio of San Francisco, and elsewhere.

LAAWS software is written in compiled BASIC and compiled dBASE III. It is designed to run on IBM or compatible personal computers having 256Kb or more random access memory (RAM) and configured with one 5¼" floppy disk drive and one 10Mb or larger hard disk drive. Subsequent modules of LAAWS software will address other functional areas such as claims, criminal law and administrative law.

The LAAWS Master Menu shown below will permit the user to access off-the-shelf software such as word processing, database management, spreadsheet and graphics, as well as automated legal research services, such as WESTLAW. As JAGC-specific software modules are developed, distributed and installed, they too will be accessed from the Master Menu.

### LAAWS MASTER MENU

- |                          |                        |
|--------------------------|------------------------|
| 1. Database Management   | 8. Legal Assistance    |
| 2. Word Processing       | 9. Military Justice    |
| 3. Spreadsheet           | 10. Claims             |
| 4. Communications        | 11. Administrative Law |
| 5. Graphics              | 12. International Law  |
| 6. Change to BASIC       | 13. Contract Law       |
| 7. Subscription Services | 14. Office Automation  |

Offices receiving the initial distribution of legal assistance software completed and returned an automation status questionnaire indicating they presently have the capability to run the LAAWS software. Offices acquiring computers capable of running LAAWS software should promptly inform the Information Management Office, OTJAG, in order to be added to the distribution list.

The initial distribution of LAAWS software should be considered a test program. Care must be taken to assure the quality of legal products generated with the aid of this software. Any glitches in the system should be brought to the attention of the OTJAG IMO, telephone AV 227-8655 (commercial (202) 697-8655), immediately.



# USALSA Report

*U.S. Army Legal Services Agency*

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This month's Trial Counsel Forum features Part II of Major Thwing's two-part article on "service connection." Part I discussed the United States Supreme Court opinion of *O'Callahan v. Parker*, the Court's original intent in restricting court-martial jurisdiction over off-post offenses, and traced the development of the concept of "service connection" by the Supreme Court and the military appellate courts until the 1980 Court of Military Appeals decision in *United States v. Trottier*. Part II of the article addresses the effect that the Court of Military Appeals' decisions construing "service connection" have had upon the military community and the military justice system, especially during the period 1975-1980; the changed application of "service connection" by the Court in *United States v. Trottier* and, within the context of this changed application, as seen through an analysis of the subsequent cases of *United States v. Lockwood*, and *United States v. Solorio*, suggests a methodology trial counsel may pursue in successfully proving the "service connection" of off-post offenses.

## **Service Connection: A Bridge Over Troubled Waters**

*Major James B. Thwing  
Trial Counsel Assistance Program*

### **Part II**

"The doctrine of *stare decisis* should never be applied to perpetuate a view which no longer has a sound basis."<sup>1</sup>

#### **Application of *O'Callahan* (1975-1979): The Effects**

In a perceptive analysis of the decisions handed down by the Court of Military Appeals during the years 1975 through 1977, then-Captain John S. Cooke observed that the court's work could be characterized by three basic trends: expansion of the role of the military judge; total supervision of the military justice system by the court; and the broad interpretation of the individual rights of soldiers.<sup>2</sup> In hindsight, this analysis has proven to be correct and, in fact, these trends were carried beyond 1977 into 1980. The court's view of court-martial jurisdiction during this period was certainly a product of this process—one which virtually extracted the vital concept of "military necessity" from the fabric of military law. It is at least arguable that the court's efforts during this period amounted to an effort to reconstruct the military justice system in a manner responsive to the allegations made against it by Justice Douglas in *O'Callahan v. Parker*.<sup>3</sup> By appearing to elevate the personal criticisms of Justice Douglas from mere opinion to fact, however, the Court of Military Appeals forced upon those responsible for the administration of military justice a sense that the system really was inferior, necessitating drastic changes.

It is significant that during the same period when the Court of Military Appeals was actively engaged in "reforming" the military justice system, the armed forces were experiencing serious problems in adjusting to the concept of the "all-volunteer" force. In February 1981, almost ten years after the inception of this concept, General David C. Jones, then-Chairman of the Joint Chiefs of Staff, observed while testifying before Congress that:

[T]he All-Volunteer force was implemented with an explicit linkage to marketplace values. The inevitable consequence was erosion of the professional and institutional values, traditions, and prerogatives that define the profession of arms as a 'calling to service' rather than as a 'job.' By de-emphasizing discipline, esprit, and service to nation above self in favor of a marketplace appeal to self-interest the architects of the current system created enormous pressures on the officers and enlisted professionals. . . .<sup>4</sup>

Unquestionably, the concept and effectuation of the "all-volunteer" force brought with it a serious challenge to the traditional values, morals, and ideals of military service. The soldier's lifestyle was markedly changed and pay was increased to encourage voluntary service. These changes directly affected a past tradition of "duty to country" which in turn affected the basic notions of discipline and sacrifice characteristic of military service. Much of the American civilian moral ambivalence towards such concerns as obedience to established authority, duty, subordination, and criminal activity involving the use and possession of illicit drugs which grew out of the Vietnam War era followed the volunteer into military service causing severe disciplinary problems. In his concurring opinion in *Parker v. Levy*,<sup>5</sup> Justice Blackmun determined that the problem of moral ambivalence was the central issue in *Levy* as evidenced by the claim that Article 134 of the Uniform Code of Military Justice was unconstitutionally vague largely because of a "change of social values" since its adoption into the Code. In directly confronting this issue, Justice Blackmun stated that

In actuality, what is at issue here are concepts of "right" and "wrong" and whether the civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a broader variety of relationships than one finds in civilian life. In my judgment, times have not changed in the

<sup>1</sup> *United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986), petition for cert. filed, 54 U.S.L.W. 3664 (U.S. Mar. 26, 1986) (No. 85-1581).

<sup>2</sup> Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43, 53 (1977).

<sup>3</sup> 395 U.S. 258 (1969).

<sup>4</sup> *Army Times*, 23 Feb. 1981, at 19.

<sup>5</sup> 417 U.S. 733 (1974).

area of moral precepts. Fundamental concepts of right and wrong are the same now as they were under the Articles of the Earl of Essex (1642), or the British Articles of War of 1765, or the American Articles of War of 1775, or during the long line of precedents of this and other courts upholding the general articles. And, however unfortunate it may be, *it is still necessary to maintain a disciplined and obedient fighting force.*<sup>6</sup>

What was clearly required during this turbulent era was a time for adjustment to these changing circumstances both within the military itself and within the military justice system. Unfortunately, because of the needs to sustain personnel levels and maintain a highly responsive defensive posture during a time of accelerated technical advancements and requirements, the armed forces could not respond to the challenges of the "all-volunteer" force gradually. Such was not the case with regard to military law, however. Indeed, because the Military Justice Act of 1968 had resulted in many fundamental changes in the administration of military justice, the Court of Military Appeals in the 1970s was in a position to meld these reforms to the rapidly changing pace of military life in a stabilizing manner which could have added resolution to the serious disciplinary problems created by the implementation of "all-volunteer" force. Yet, the court's own actions which accelerated broad based changes within the military justice system virtually ignored, and in many instances de-emphasized, "the overriding demands of discipline and duty" which, before and after *O'Callahan* had been recognized by the Supreme Court as vital distinguishing factors in military law.<sup>7</sup> Consequently, the thrust of the court's efforts, especially with regard to court-martial jurisdiction, exacerbated the problems created by the "all-volunteer" force.

The court's adaptation of a stricter-than-*O'Callahan* standard discussed in Part I of this article, especially from 1975 onward, avoided such critical issues as the effect of widespread off-post drug abuse upon the combat readiness, health, welfare, and morale of soldiers. The court's failure to analyze and discuss the impact and military significance of officer and noncommissioned officer misconduct, especially in such cases as *United States v. Conn*,<sup>8</sup> *United States v. Sievers*,<sup>9</sup> and *United States v. Williams*<sup>10</sup> and its "borderline" analysis of serious misconduct set forth in *United States v. Klink*,<sup>11</sup> served to compromise the ideals of loyalty and fidelity historically embraced in the meaning of commissioned and noncommissioned service and the concept of "soldier" established by the Supreme Court in *In re Grimley*.<sup>12</sup>

The reader should understand that these effects were *real* and not hypothetical. A theater for situational ethics was

created wherein notions such as "what a soldier does off post, off duty, is his own business"; "Don't smoke dope in the barracks"; and "*Mere* 'recreational' use of marijuana does not threaten a soldier's duty performance" became acceptable rational viewpoints among many officers, noncommissioned officers, and soldiers in the armed forces. Perhaps the court should not be given total credit for these devastating misperceptions, but it should have been clearly foreseeable to the court that these attitudes would develop, especially when the court failed in such cases as *Conn* to understand and discuss the obvious palpable effects of an officer smoking marijuana in the presence of his subordinates off duty within the context of his military status and duties which required him to set an example as an officer and leader on duty and to enforce military law which held this form of criminal activity to be totally inimical to "good order and discipline."

#### *United States v. Trottier*: Restoration of "Military Necessity"

It was at the confluence of these conflicting developments that the case of *United States v. Trottier*<sup>13</sup> was decided and, because it altered the errant course the court had charted with regard to concept of "service connection" and court-martial jurisdiction, it will probably always have important historical significance as a positive force for change within the military and its system of justice.

The facts of *Trottier* were ordinary. The accused was charged with unlawfully selling illicit drugs on three separate occasions during a one-month period of time. Although one sale of marijuana was completed by the accused to an airman on the military base to which he was assigned, the other two illicit sales, one involving marijuana and the other lysergic acid diethylamide (LSD), were completed in the accused's apartment located several miles away from the military installation. The facts also demonstrated that on each occasion the drugs were sold to Special Agent Reirdan of the Air Force Office of Special Investigations who, posing as an airman, was acting in an undercover capacity. Although during the two off-base sales of drugs neither the accused nor Reirdan were in uniform, Reirdan had indicated that he intended to purchase the drugs for resale at McGuire Air Force Base, New Jersey, where he maintained he was stationed.

At the outset of the *Trottier* decision, the Court of Military Appeals noted that these actions by Agent Reirdan were dispositive of "service connection" by observing that, "In view of Reirdan's professed purpose of introducing drugs into McGuire Air Force Base, a military installation,

<sup>6</sup> *Id.* at 763 (emphasis added).

<sup>7</sup> In *Burns v. Wilson*, 346 U.S. 137, 140 (1953), the Supreme Court held, among other things, that, "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment . . . the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." This belief by the Supreme Court was, of course, reaffirmed in its decision in *Parker v. Levy* in 1974.

<sup>8</sup> 6 M.J. 351 (C.M.A. 1979).

<sup>9</sup> 8 M.J. 63 (C.M.A. 1979).

<sup>10</sup> 2 M.J. 81 (C.M.A. 1976).

<sup>11</sup> 5 M.J. 404 (C.M.A. 1978).

<sup>12</sup> 137 U.S. 636 (1890). The Supreme Court held, "By enlistment the citizen becomes a soldier. His relations to the State and public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged" (Emphasis added).

<sup>13</sup> 9 M.J. 337 (C.M.A. 1980).

we believe that our existing precedents support jurisdiction."<sup>14</sup>

In fact, the issue of court-martial jurisdiction in the context of this factual setting was not entirely resolved by the court's "existing precedents." In only one case had the court, less than a unanimously, determined that court-martial jurisdiction existed over an off-post illicit drug transaction where the accused knew the transferee of illicit drugs was a military member and of the latter's intent to return to the military installation and resell the drugs.<sup>15</sup> Indeed, during this same period of time the court had rejected a theory that court-martial jurisdiction was present where off-post drugs sales were part of a "chain of illicit drug events" which began on post.<sup>16</sup> Thus, the *Trottier* case was significant not only because it presented a clear departure from past precedent in terms of its specific holding, but because the court, pursuant to the government's urgings, embarked on the much broader analysis concerning "whether jurisdiction would exist even in absence of an accused's knowledge or belief that drugs which he is selling [would] be taken onto a military post."<sup>17</sup> In fact, the government had asked the court to expressly overrule its decisions in *United States v. McCarthy*,<sup>18</sup> *United States v. Williams*,<sup>19</sup> *United States v. Alef*,<sup>20</sup> and their progeny, and to "[d]eclare once again that 'use of marijuana and narcotics by military persons on or off a military base has special military significance' as it did in *United States v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969)."<sup>21</sup>

Recognizing, as the Supreme Court had done in *Funk v. United States*,<sup>22</sup> that the law must respond to changing conditions of society, Chief Judge Everett, writing for the majority of the Court of Military Appeals in *Trottier*, found that, "While the jurisdictional test of service connection may remain firm, its application must vary to take account of changing conditions in military society."<sup>23</sup> This view was central to the court's piercing of the *O'Callahan* veil enabling it to avoid both the narrow twelve criterion analysis of *O'Callahan* and the limitations inherent in the *ad hoc* approach outlined in *Relford v. Commandant*.<sup>24</sup> It also allowed the court to analyze the broad issue of court-martial jurisdiction over all off-post illicit drug activity using almost identically the test for "service connection" outlined by the Supreme Court in *Schlesinger v. Councilman*: [1] "gauging the impact of an offense on military discipline and

effectiveness"; [2] "determining whether the offense is distinct from and greater than that of civilian society"; and, [3] "whether the distinct military interest can be vindicated adequately in civilian courts."<sup>25</sup>

### Impact of the Offense

In *Trottier*, Chief Judge Everett found, consistent with *Reid v. Covert*,<sup>26</sup> that the analysis of the impact of illicit drug activity, whether occurring on or off post required a "realistic view of the role of [the] military in the modern world." This view, according to Judge Everett had to be examined from the perspective used by the Supreme Court in *Brown v. Glines*<sup>27</sup> that "[m]ilitary personnel must be ready to perform their duty whenever the occasion arises." Thus, the impact of illicit drug activity had to be gauged by its effect on combat readiness of the personnel needed to man and maintain the equipment necessary for the national defense at all times, whether during peace or during hostilities, because "there is a fine line . . . between time of peace and time of hostilities."<sup>28</sup>

Within this framework, Chief Judge Everett determined that the type of illicit drugs sold in *Trottier* had a direct palpable impact on the safety of the operators of the growing number of complicated weapons within the military as well as on others involved in the operation of such equipment. Furthermore, he found that in order to maintain a credible armed force, "[t]he need is overwhelming to be prepared to field at a moment's notice a fighting force of finely tuned, physically and mentally fit men and women."<sup>29</sup> In this regard, he found that these characteristics of a combat ready force were "incompatible with indiscriminate use of debilitating drugs."<sup>30</sup> Accordingly, Chief Judge Everett found that whether illicit drug offenses took place on or off a military installation, their impact upon the combat readiness of the military organization and its equipment and personnel was the same. In specifically discussing how off-post illicit drug activity would affect a military installation, Chief Judge Everett observed:

Usually, when drugs are possessed off post by servicepersons or are sold by one serviceperson to another, it is reasonably foreseeable that at least some of the drugs will be brought onto a military installation. Indeed, in many instances the drugs will enter the

<sup>14</sup> *Id.* at 339.

<sup>15</sup> *United States v. Chambers*, 7 M.J. 24 (C.M.A. 1979).

<sup>16</sup> *United States v. Strangstalien*, 7 M.J. 225, 227 (C.M.A. 1979).

<sup>17</sup> *Trottier*, 9 M.J. at 339.

<sup>18</sup> *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976).

<sup>19</sup> *United States v. Williams*, 2 M.J. 81 (C.M.A. 1976).

<sup>20</sup> *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).

<sup>21</sup> *Trottier*, 9 M.J. at 344.

<sup>22</sup> 290 U.S. 371 (1933).

<sup>23</sup> *Trottier*, 9 M.J. at 344 (emphasis added).

<sup>24</sup> 401 U.S. 355 (1971).

<sup>25</sup> 420 U.S. 738, 758 (1975).

<sup>26</sup> 354 U.S. 1, 34-35 (1957).

<sup>27</sup> 444 U.S. 348, 353 (1980).

<sup>28</sup> *Trottier*, 9 M.J. at 346.

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

<sup>30</sup> *Id.* at 349.

military installation in their *most lethal* form—namely, when they are coursing through the body of a user. Also on some occasions a serviceperson who observes his peers using drugs away from a military installation will be *induced to emulate* their conduct—but without their care to do so off post.<sup>31</sup>

### *The Distinct Military v. Civilian Interests*

Without specifically discussing the differences between civilian and military interests in offpost illicit drug activity involving members of the military, Chief Judge Everett made clear in *Trottier* that both the scope of this problem and the need for vigorous prosecution of offenses involving off-post illicit drug activity were paramount military interests. He observed that although this may appear to be a “local” problem, it was in reality a problem of much larger dimension

The drugs entering American military installations usually have their original source at some distant spot—typically in a foreign country. Then, through complicated channels of distribution, the drugs are funneled to consumers—many of whom are servicepersons. However, most of the major suppliers and vendors of drugs are civilians and so are clearly beyond the scope of military jurisdiction. Indeed, they are often located in foreign countries where they are immune from jurisdiction by our Government.<sup>32</sup>

In relating this observation to the question of deterrence, he urged that

[D]rug suppliers are not completely invulnerable to attack. Their profits—which provide the inducement to enter or continue in the drug trade—depend on having a market for their wares. The vigorous prosecution of servicepersons who use or possess drugs will tend to deter acquisition of the drugs by *other* members of the military community. . . . [I]n considering the scope of military jurisdiction, the prospect cannot be ignored that prosecution of those service persons who possess, use, and distribute drugs off post will tend to dry up sources of drugs for who others who would use them on or near a military installation to the detriment of the military installation.<sup>33</sup>

Chief Judge Everett found that these interests were properly subject to Congress’ war powers, arguing that because the Supreme Court had found that Congress, under the commerce clause,<sup>34</sup> could appropriately act against interstate commerce which threatened interstate commerce, then, similarly, the power invested in Congress through its

war powers permitted it “to block the ‘commerce’ in drugs affecting service persons and military installations.”<sup>35</sup> According to Chief Judge Everett, the proper expression of Congress’ war powers in this regard was the invocation of court-martial jurisdiction.

### *Adequate Vindication in Civilian Courts*

Having conclusively demonstrated the palpable impact of off-post illicit drug activity by soldiers upon the military and the paramount interests of the military therein, Chief Judge Everett only briefly discussed the seemingly obvious fact that these military interests could not be adequately vindicated in civilian courts. However, in demonstrating this reality he returned to the eighth factor of the *O’Callahan* criteria—“presence and availability of a civilian court in which the case can be prosecuted.”<sup>36</sup> In this regard, he succinctly recognized

That prosecution of a particular case is declined by civilian authorities does not, of course, mean that a civilian court is not present and available. However, because many servicepersons are transients, local civilian law enforcement and prosecutorial authorities often have negligible interest in their activities, so long as those activities do not have direct impact on the local civilian community. Where civilian prosecutorial refusal to exercise jurisdiction is extensive and affects a whole class of offenses, this factor of “availability” may be important.<sup>37</sup>

This was a clear and obvious departure from past precedent established by the court in *United States v. McCarthy*,<sup>38</sup> which had set forth the obverse proposition that “[w]hile it may be very well 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.”<sup>39</sup>

This final assessment by Chief Judge Everett almost totally eclipsed the court’s past precedents regarding court-martial jurisdiction over off-post illicit drug activity by soldiers. Also, in further contrast to past precedent was his consideration of the accused’s constitutional rights of grand jury indictment and trial by jury which were the cornerstone of the *O’Callahan* case. Here he reasoned that as the Supreme Court had not considered the right to grand jury indictment “so basic a guarantee as to merit incorporation in the Fourteenth Amendment due process,”<sup>40</sup> nor trial by jury “so essential as to merit retroactive application,”<sup>41</sup> nor

<sup>31</sup> *Id.* at 350 (emphasis added).

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

<sup>33</sup> *Id.*

<sup>34</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>35</sup> *Trottier*, 9 M.J. at 349.

<sup>36</sup> *Id.* at 352. It is interesting to note that Chief Judge Everett referred to this *O’Callahan* factor as a *Relford* factor thus seemingly continuing the confusing effect caused by blurring the distinction between the *O’Callahan* criterion and the *Relford* criterion for “service connection.”

<sup>37</sup> *Id.* at 352.

<sup>38</sup> 2 M.J. 26 (C.M.A. 1976).

<sup>39</sup> *Id.* at 29.

<sup>40</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>41</sup> *DeStafano v. Woods*, 392 U.S. 631 (1969).

either "so incompatible with reliable fact-finding as to require retroactive application of *O'Callahan*,"<sup>42</sup> they could not operate in the face of the compelling military interests to foreclose many offpost drug offense to trial by court-martial.

Consequently, although Chief Judge Everett's analysis of "service connection" in *Trottier* represented a considerable departure from *O'Callahan* and *Relford v. Commandant*, he did pay homage to their respective criterion for "service connection" in determining that "very few drug involvements of a service person will not be 'service connected.'" This principle not only established a special general exception to these cases but also established that central to any issue involving "service connection" was the concept of military necessity. This attribute of the *Trottier* case is its hallmark and perhaps its most monumental quality. And, because of the analytical framework used to develop the application of military necessity to the facts in *Trottier*, the issue joined was whether there were other offenses or classes of offenses which bore similar categorical "service connection."

### The *Lockwood* Connection

In 1983, the *Trottier* analysis of "service connection" was used in *United States v. Lockwood*,<sup>43</sup> a case involving, among other things, an off-post larceny. On 5 July 1980, Lockwood stole a wallet and its contents from his roommate and six days later took the wallet and the identification documents off-base to a nearby town and fraudulently obtained a loan by forging his roommate's name on the loan application. In *United States v. Sims*,<sup>44</sup> with facts nearly identical to those in *Lockwood*, the court held that the presence of all twelve *O'Callahan* factors in *Sims*' off-post larcenies and forgeries (which stemmed from the accused's use of his military identification card) compelled a determination of "non-service connection." In a footnote discussing the apparent paradox in its finding that the use of the military identification card to aid in the commission of the forgery offenses did not amount to "flouting of military authority," the court in *Sims* held that, "The mere display of appellant's military identification card did not flout military authority and did not confer court-martial jurisdiction."<sup>45</sup>

This view was amplified in *United States v. Hopkins*,<sup>46</sup> where the Court of Military Appeals, viewing factual circumstances similar to *Sims*, held that

What must be carefully distinguished is an instance in which a serviceperson fraudulently uses a military

identification card to obtain a privilege available only to a serviceperson . . . and one . . . in which the card simply was an incidental means of identifying a person as the person represented . . . on a par with any of several other means.<sup>47</sup>

The court in *Lockwood* virtually ignored *Lockwood* and *Sims* and, after a sweeping review of the concept of "service connection" developed by the Supreme Court following *O'Callahan*, observed that, "In determining whether an offense is service connected, a military tribunal now must take into account the requirements for achieving military victory in a period of history when wars may be won or lost in days, if not hours or minutes."<sup>48</sup> This is consistent with the court's analysis in *Trottier*.

With this premise as a starting point, the court then concluded that "the conduct of servicemembers which takes place outside a military enclave is service connected and subject to trial by court-martial if it has a significant effect within that enclave."<sup>49</sup> Such reasoning, according to the court, was consistent with the manner in which states had sought to handle the adverse effects of conduct occurring outside their borders, e.g., the Uniform Reciprocal Enforcement of Support Act,<sup>50</sup> and by which the United States had sought to prohibit the extraterritorial effect of restraints of trade on American commerce by the Sherman Act.<sup>51</sup>

### Impact of the Offense

Like *Trottier*, the Court of Military Appeals in *Lockwood* gauged the impact of Lockwood's offenses in terms of its effects upon the combat readiness of the military installation and its personnel:

In a time of increasingly complex and sophisticated weapon systems, intangibles like "reputation" and "morale" are sometimes given little emphasis. However, just as the Supreme Court recognized in *Relford*, they do have impact upon "military operation and military mission". . . . [M]aintaining the "reputation" and "morale" of the Armed services is essential. This circumstance cannot be ignored in determining the service connection of off-post offenses.<sup>52</sup>

Because Lockwood pled guilty to the charges alleging the off-post offenses of larceny and forgery, the court presumed<sup>53</sup> that his offenses had a palpable effect upon the military installation and its personnel because of their tendency to impair both the reputation of the installation and the morale of its population, observing that

<sup>42</sup> *Gosa v. Mayden*, 413 U.S. 665 (1973).

<sup>43</sup> 15 M.J. 1 (C.M.A. 1983).

<sup>44</sup> *United States v. Sims*, 2 M.J. 109 (C.M.A. 1977).

<sup>45</sup> *Id.* at 112, n.11.

<sup>46</sup> 4 M.J. 260 (C.M.A. 1978).

<sup>47</sup> *Id.* at 261 (citations omitted).

<sup>48</sup> *United States v. Lockwood*, 15 M.J. 1, 5 (C.M.A. 1983).

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 5 n.4.

<sup>52</sup> *Id.* at 5 n.5.

<sup>53</sup> *Id.* at 10.

Few military enclaves are self-sufficient and usually the servicemembers assigned to the post and their dependents must rely on persons in the surrounding community for various types of support—such as *housing, credit, and recreation*. An offense committed by a servicemember near a military installation tends to injure the relationships between the military community and the civilian community and thereby makes it more difficult for servicemembers to receive local support.<sup>54</sup>

#### *Distinct Military v. Civilian Interests*

As it had done in *Trottier*, the court refrained from discussing or assessing the different interests existing in the military and civilian jurisdictions under the *Lockwood* setting. Even so, as it had done in *Trottier*, the court noted that there were paramount military interests and found that these interests were manifested through the facts and consequences of the accused's criminal course of conduct which originated on the military installation and which culminated in the adjacent civilian community.

In *Lockwood*, the government argued that court-martial jurisdiction over the accused's off-post offenses could be based on the concept of "pendant jurisdiction" because just as a federal court was empowered to adjudicate claims based on state law which were related to claims predicated on federal law, a court-martial could adjudicate offenses which, while not clearly "service connected," nevertheless stemmed from offenses which were clearly "service connected." The Court of Military Appeals was reluctant to embrace this thesis primarily because the concept of pendant jurisdiction was "a theory . . . predicated chiefly on considerations of judicial economy developed for civil rather than criminal trials."<sup>55</sup>

Even so, the court noted that the consequences from a soldier's exposure to trial by both civilian and military authorities stemming from but one course of conduct affecting both jurisdictions, not only affected the best interests of the accused, but also impeded two military interests central to the military justice system. According to the court, the accused's best interests would be interfered with because the prosecution of the offenses, divided between two jurisdictions, would expose the accused potentially to two convictions, making rehabilitation of the accused more difficult and exposing the accused to an uncertain fate until the completion of the second trial. Additionally, the accused would be exposed to a rehabilitation process, also divided between two jurisdictions, with potentially conflicting methodologies and goals.

In turn, this process would directly affect two distinct military interests. First, the "military interest in having all the offenses tried by court-martial so that they can be disposed of together without delay."<sup>56</sup> Second, the military

interest in "assuring that a servicemember receives an appropriate punishment for his crimes and that, if feasible, he is rehabilitated."<sup>57</sup>

Additionally, the court, unlike its previous holdings in *Sims* and *Hopkins*, expressed the serious concern of armed forces regarding the military identification card (which the accused in *Lockwood* used to effectuate his off post crimes) by observing that

[T]he Armed Services must protect reliance on the military identification card by those who deal with persons purporting to be members of the Armed Services. This card is a means of entry to many facilities and events, and it frequently enables the bearer to obtain services and credit. When a military identification card is debased by its use to perpetuate a crime, the Armed Forces have an *additional* reason for concern.<sup>58</sup>

#### *Vindication in Civilian Courts*

The military interests determined by the court to be present in the *Lockwood* case underscore that, almost always, they could never be adequately vindicated by a civilian court. In addition to the potential cross-purposes existing between military and civilian jurisdictions, the court discussed the practical realities of a civilian adjudication of *Lockwood's* off-post offenses

Two trials would take longer and would require the presence of the witnesses—some of them military—in two different courts and on two different occasions. Until the criminal proceedings were completed, the military personnel who were witnesses might be unavailable for reassignment. Furthermore, if the accused is punished only by the military authorities, they may keep him available to perform military duties; but if he is sentenced by a civilian court to confinement in a civilian jail, he will be unavailable for such duties.<sup>59</sup>

Furthermore, the court found that any program for rehabilitating the accused would be delayed and made more difficult until the certainty of the punishment for the accused for both trials became clear. This would always depend on the eventual results of the second trial.

Interestingly, the court did not balance the accused's rights to grand jury indictment and trial by jury within the context of the military interests it had outlined in *Lockwood* nor did it agree with the government's contention that the accused had waived these rights by failing to contest the issue of "service connection" at trial. Instead, the court seemed to determine that once it had found that "service connection" existed, the issue of the accused's constitutional rights outlined by *O'Callahan* was disposed of "since *O'Callahan* purport[ed] to be an interpretation of congressional power under Article 1, § 8, Clause 14 of the Constitution, rather than a construction of Fifth and Sixth

<sup>54</sup> *Id.* at 7. Trial counsel should note the court's holding in this regard. The court stated that, "[A]t the very least, appellant's express refusal to contest service connection justifies drawing any reasonable inferences against him with respect to factual matters not fully developed in the record of trial."

<sup>55</sup> *Id.* at 9.

<sup>56</sup> *Id.* at 7 (emphasis added).

<sup>57</sup> *Id.* at 8.

<sup>58</sup> 15 M.J. at 9.

<sup>59</sup> *Id.* at 8.

Amendment safeguards.”<sup>60</sup> This different approach was in contrast to the court’s position in *Trottier* (which was probably relied upon by the government in *Lockwood*) which sought to minimize the fundamental importance of the rights to grand jury indictment and trial by jury.

Also important was the court’s determination to satisfy its analysis of *Lockwood* within the context of several of the nine *Relford* factors. This adherence to the ad hoc approach of *Relford* was also in contrast to its approach in *Trottier* and, although the court admitted that its holding in *Lockwood* “conform[ed] more to the Supreme Court opinions subsequent to *O’Callahan*,”<sup>61</sup> it was not the creation of a class or category of cases to which “service connection” was automatically attached.

#### The Solorio Rationale

In *United States v. Solorio*,<sup>62</sup> the Court of Military Appeals was confronted with the pure issue of whether off-post offenses unrelated to a course of conduct originating on post were “service connected.” The case was a government appeal of the trial judge’s dismissal of the charges for lack of court-martial jurisdiction.

In *Solorio*, the accused, a Coast Guardsman, was charged with various offenses against two young girls, including attempted rape, indecent assault, and indecent liberties which had allegedly taken place between March 1982 and November 1984. The alleged victims were between the ages of ten and twelve during the period when the offenses supposedly occurred. The fathers of these girls were also active duty members of the Coast Guard. The offenses purportedly took place in Juneau, Alaska, where both the accused and the victims resided in civilian housing; one family lived next door to the accused and his family and the other a half-mile away. The families lived in civilian quarters because government housing was unavailable. Information concerning the alleged offenses was not provided by the girls until both they and the accused had been transferred to different Coast Guard duty stations outside Alaska; the accused had been transferred to Governors Island, New York, where he was charged with the Alaska offenses, as well as similar offenses involving two other minor daughters of Coast Guardsmen which allegedly had occurred in government quarters at Governors Island from November 1984 to January 5, 1985.

While the State of Alaska had not specifically declined to prosecute the charges which stemmed from the Juneau allegations, its attorney general’s office had notified the Coast Guard that it would “defer” the prosecution of the accused to the “legal prosecutorial arm of the Coast Guard,” citing the expense and difficulty involved in investigating and prosecuting a case where the alleged victims have been transferred from Alaska as one of the reasons.<sup>63</sup>

At trial, the military judge carefully made findings consistent with both *O’Callahan* and *Relford* and concluded that there was no “service connection” with regard to the Alaska offenses. After a studied analysis of the trial judge’s findings, the Coast Guard Court of Military Review firmly disagreed holding, *inter alia*, that

The similarity of the alleged on-base Governors Island offenses and the alleged off-base Juneau offenses, when viewed together, presents a pattern of behavior which poses a real threat to families now living in close proximity to the offender on-base at Governors Island. That threat and the impact it has upon morale, good order and discipline on the base challenges the responsibility and authority of the military commander for maintenance of order in his command.<sup>64</sup>

The Court of Military Appeals generally accepted this view. As it had done in *Trottier* and *Lockwood*, the court noted at the outset of its opinion that “opinions on service-connection should be reexamined in light of more recent conditions and experience.”<sup>65</sup> According to the Court, this was so because “*O’Callahan* permitted [the court] to consider later developments in the military community and in the society at large and to take into account any new information that might bear on service-connection.”<sup>66</sup> It then noted that the increased concern for victims of crimes was an important recent development in society and that Congress and state legislatures had sought to protect the rights of victims and to make their participation in criminal proceedings less onerous. With this perspective of the off-post offenses, the court then analyzed the challenging and difficult question of whether the crimes had an impact on the Coast Guard and its mission.

#### Impact of the Offenses

In discerning the impact of the Alaska offenses upon the Coast Guard and its mission, the court was confronted with the difficulty of their geographical and chronological displacement from the Governors Island trial. In other words, the court had to determine whether the question of their impact was to be resolved from the vantage point of their occurrence or from their discovery. It resolved this by holding that *O’Callahan* did not require that “service connection” be resolved in the limited context of “events as they existed at the time of an alleged offense.”<sup>67</sup> This view, coupled with the court’s finding that sexual offenses against children have continuing psychological and financial effects, provided the court with the basis for determining that, “Sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 10.

<sup>62</sup> 21 M.J. 251 (C.M.A. 1986), *petition for cert. filed*, 54 U.S.L.W. 3664 (U.S. Mar. 26, 1986) (No. 85-1581).

<sup>63</sup> *United States v. Solorio*, 21 M.J. 514 (C.G.C.M.R. 1985).

<sup>64</sup> *Id.* at 521.

<sup>65</sup> *Solorio*, 21 M.J. at 254.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 257.



family member is assigned. This continuing effect tends to establish service connection."<sup>68</sup>

In discussing the practical ramifications of these offenses upon the Coast Guard, even though at the time of trial the victims and their families were no longer in geographical proximity to the accused, the court observed that

[I]t is unlikely that [the accused] and the two father could ever again be satisfactorily assigned together in one of the small units which is typical of the Coast Guard organization. Furthermore, because of the widespread hostility towards the offender that usually results from this type of sex offense, it would appear that [the accused's] future assignments would be greatly limited due to the tensions that his presence would create in an organization.<sup>69</sup>

#### *Distinct Military v. Civilian Interests*

The court determined that the distinct and paramount military interest in a single trial and a uniform program of rehabilitation which had been present in *Lockwood* were also present in *Solorio*. This was so despite the fact that the off-post offenses in *Solorio* did not stem directly from a course of criminal conduct which originated on post. The court's reasoning in this regard was that the off-post Alaska offenses were related to the on-post Governor's Island offenses because they stemmed from the "same underlying motive or predisposition."<sup>70</sup> Accordingly, the court observed that

[T]he similarity is such that, even if not before the court-martial for trial, the offenses in Alaska might be admissible under Mil. R. Evid. 404(b); and apparently, if the military judge's ruling is upheld, the Government will seek to use evidence of these offenses pursuant to that rule.<sup>71</sup>

Another important military interest found by the court was eliminating the possibility that the victims and their parents would have to undergo the process of attending two trials and having to render public testimony about a humiliating and degrading experience.

#### *Vindication in Civilian Courts*

Unlike the Coast Guard Court of Military Review which gave considerable weight to the determination by Alaska authorities to "defer" prosecution of the accused's offenses to the Coast Guard, the Court of Military Appeals agreed with the trial judge's determination not to attach great significance to this decision by the Alaska authorities. The court reasoned that to do otherwise might give "military authorities anxious to try a servicemember by court-martial . . . [a motive to] persuade civilian prosecutors to drop cases that they normally would prosecute, in an effort to create court-martial jurisdiction."<sup>72</sup> Even so, the court recognized that

[W]here the prospective defendant and the victims have left the State and move to distant locations . . . State officials are less likely to be interested in prosecuting. Moreover, if for some reason, the victims decide that they do not wish to [return for a civilian trial] and undergo the trauma of testifying, it will be difficult to compel their attendance.<sup>73</sup>

Beyond this observation, the court did not discuss whether a civilian jurisdiction could adequately vindicate the distinct military interests outlined in *Solorio* nor did the court address the effect of its decision upon the accused's presumed rights to grand jury indictment or trial by jury. Furthermore, it made no attempt to conform its analysis either to the *O'Callahan* criterion or the *Relford* factors for "service connection." It made clear, however, that it was neither creating a class nor a category of cases upon which "service connection" was to be inferred commenting that "not every off-base offense against a servicemember's dependent is service-connected."<sup>74</sup>

#### **"Service Connection": A Methodology for Proof**

Since the beginning of this decade, the concept of "service connection," as seen through the Court of Military Appeals' decisions in *Trottier*, *Lockwood*, *Solorio*, and their progeny, has changed from one of restricting court-martial jurisdiction to one of permitting court-martial jurisdiction over off-post misconduct. The original intent of *O'Callahan* discussed in Part I of this article clearly has been overshadowed by these later developments and although these opinions represent a clear departure from that original intent, they were made manifest by the Supreme Court's own actions subsequent to *O'Callahan*. It should be understood that long before the Court of Military Appeals restored the concept of military necessity to its consideration of "service connection," the Supreme Court, aside from *O'Callahan*, had continuously recognized that the needs of military service were vital to any discussion surrounding a soldier's Constitutional rights. This result has created the paradox wherein *O'Callahan*, the exception, has produced "service connection"—the rule. The difference for trial counsel currently confronted with determining whether an off-post offense is "service connected" is that the current cases permit proof of court-martial jurisdiction within the context of "changed circumstances and experience." The framework for addressing this broad field is suggested by the Court's analysis in *Trottier*, *Lockwood*, and *Solorio* although trial counsel will note that the discussion of these cases herein is not entirely reflected by their actual reported format. Even so, the analysis in each of these cases does proximate the basic framework for determining "service connection" outlined in *Schlesinger v. Councilman*, and discussed above, and provides clear direction for trial counsel to follow in establishing proof of "service connection."

<sup>68</sup> *Id.* at 256.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 257.

<sup>71</sup> *Id.* at 258.

<sup>72</sup> *Id.* at 257.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 258.

### Understand the Parameters of O'Callahan

An approach towards establishing proof of "service connection" should never be taken without first considering its original basis, intent, and application. For example, a trial counsel could quickly dispatch any issue regarding court-martial jurisdiction over an off-post offense at once if it could be shown that the accused would not be entitled to a grand jury indictment or jury trial within the civilian jurisdiction in which the offenses were committed. Thus, in *United States v. Sharkey*,<sup>75</sup> the Court of Military Appeals held that the offense of drunk and disorderly in uniform in an off-post public place was appropriate for trial by court-martial. The Air Force Court of Military Review extended this "petty offense" exception to include offenses considered petty under civilian law.<sup>76</sup> Furthermore, it is instructive for trial counsel to understand how a trial judge may view proof of "service connection" given the *O'Callahan* criterion. The trial judge's findings set out in the Coast Guard Court of Military Review decision in *United States v. Solorio*<sup>77</sup> provide an excellent example of careful and comprehensive findings consistent with *O'Callahan*.

#### Determine and Allege the Underlying Factors of the Off-Post Offense

The recent decisions by the Court of Military Appeals and the Supreme Court since *O'Callahan* have pointed out many factors in off-post offenses which show distinct military significance. These include the geographical location of the offense (*i.e.*, whether adjacent to the military community; off post but within a nearly total military community);<sup>78</sup> the status of the victim (*i.e.*, whether the victim is a soldier, dependent, or civilian employee of the armed forces);<sup>79</sup> the status of the accused (*i.e.*, whether the accused has a special status such as officer, noncommissioned officer, roommate of the victim, in victim's chain-of-command, special duty status such as military police);<sup>80</sup> the costs of the offense as born by secondary victims such as parents, relatives, and friends (*i.e.*, the financial, medical, or psychological costs);<sup>81</sup> and whether the off-post offense is part of a course of conduct originating on post or is misconduct which stems from or is subsequent to related or similar uncharged misconduct.<sup>82</sup>

In analyzing an off-post offense, trial counsel should determine the underlying factors surrounding the offense and allege them as part of the specification. Illustrative of this approach is the recent case of *United States v. Scott*<sup>83</sup> where the accused was charged with various on-post and off-post acts of indecent liberties with two minor females. Here, the factors determined and alleged by the government toward establishing jurisdiction were that the on-post and off-post offenses were parts of the same course of conduct; that the victims were daughters of a retired noncommissioned officer; that the location of the off-post offenses was contiguous to the military base to which the accused was assigned; that the accused committed the off-post offense while only briefly away from his place of duty; and the accused was an officer. The Court of Military Appeals held that the existence or these circumstances was "persuasive as to the presence of service-connection."<sup>84</sup>

#### Prove the Distinct Military Interests in the Offense

The Court of Military Appeals makes clear in *Trotter*, *Lockwood*, and *Solorio* that the distinctness of the military interests in an off-post offense is shown by the effects that the off-post offense has upon the combat readiness, efficiency, discipline, or morale of a military installation and its personnel. It is clear, however, that these effects are not matters for supposition but rather are matters for proof. By determining and alleging the underlying factors of an off-post offense, trial counsel can prove the effects of these factors upon the combat readiness, efficiency, discipline or morale of a military installation and its personnel. For example, if a soldier has been charged with either physically or sexually abusing his own child off post, trial counsel should be prepared to prove the interests of the military in the military family, the effects that a civilian prosecution of the accused would have upon these interests and the integrity and efficiency of the military organization if the accused is found guilty and sentenced either to civilian confinement or exposed to a civilian rehabilitation program which may prohibit the accused from being reassigned, who would bear the financial burden of any medical or psychological treatment of the victim, the effects of a civilian conviction upon the disciplinary framework of the accused's unit, the effects upon the reputation of the military installation, and the direct interests of the military in the

<sup>75</sup> 41 C.M.R. 26 (C.M.A. 1969).

<sup>76</sup> *United States v. Wentzel*, 50 C.M.R. 690 (A.F.C.M.R. 1975).

<sup>77</sup> 21 M.J. 514 (C.G.C.M.R. 1985).

<sup>78</sup> *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *United States v. Abell*, Misc. Doc. No. 1986/1 (A.C.M.R. 11 March 1986) (off-post child abuse adjacent to military installation); *United States v. Lowery*, 21 M.J. 998, (A.C.M.R. 1986) (off-post adultery—"private fornication"—in motel nearby to military installation).

<sup>79</sup> *United States v. Solorio* (dependant victim); *United States v. Stover*, SPCM 21611 (A.C.M.R. 26 February 1986) (soldier victim of aggravated assault); *United States v. Roa*, 20 M.J. 867 (A.F.C.M.R. 1985) (officer victim of burglary); *United States v. Williamson*, 19 M.J. 617 (A.C.M.R. 1984) (dependant victim).

<sup>80</sup> *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986); *United States v. Williamson*, 19 M.J. 617 (A.C.M.R. 1984) (officer committing indecent acts on non-commissioned officer's daughter)

<sup>81</sup> *United States v. Solorio* (financial costs of psychological counselling); *United States v. Stover*, SPCM 21611 (A.C.M.R. 26 February 1986) (injuries inflicted by accused required victim to be kept in military hospital for two days and absent from duty for one and one-half days).

<sup>82</sup> *United States v. Solorio* (similar related misconduct admissible under Mil. R. Evid. 404(b)); *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *United States v. Stover*, SPCM 21611 (A.C.M.R. 26 February 1986) (accused charged with other on-post misconduct committed at near same time as off-post misconduct); *United States v. Eeckhoudt*, CM 447096 (A.C.M.R. 28 February 1986) (accused charged with off-post involuntary manslaughter, where offenses stemmed from on-post misconduct).

<sup>83</sup> 21 M.J. 345 (C.M.A. 1986).

<sup>84</sup> *Id.* at 347.

accused's status if he was either an officer or noncommissioned officer.

### *Demonstrate Lack of Adequate Vindication of Military Interests by Civilian Court*

In many cases proof of the impact of an off-post offense upon the combat readiness, discipline, morale, or integrity of a military installation and its personnel will sufficiently demonstrate that a civilian court cannot adequately vindicate the distinct military interests underlying the offense. This is especially so in cases involving a course of criminal conduct which is directly related to on-post crime as shown in *Lockwood*, and where the off-post crime is discovered after either the accused or the victim has been transferred away from the civilian jurisdiction in which the crime was committed as shown in *Solorio*. In the absence of either these two situations, trial counsel should demonstrate the level of civilian interest in the off-post offense and, in any event, whether the distinct military interests are so clearly superior to the civilian interests that a civilian prosecution would be inimical to the best interests of the law.

In demonstrating the level of civilian interest in an off-post offense, trial counsel should carefully note that the Court of Military Appeals in *Solorio* cast a jaundiced eye on attempts by military authorities to "endeavor to persuade civilian prosecutors to drop cases that they would normally prosecute."<sup>85</sup> Even so, trial counsel should not hesitate to determine the extent of civilian interest in an off-post offense to help prove the superiority of military interests.

Demonstrating that a military prosecution is in the best interests of the law is a two-fold process: proving the superiority of military interests and balancing those interests with the accused's right to grand jury indictment and trial by petit jury.

Although demonstrating the superiority of military interests is similar to proving the impact of the off-post offense upon the military, the important difference is in showing that the effects are distinctly military. For example, an off-post aggravated assault against another soldier impacts upon the military installation in terms of its discipline and security of its personnel and at the same time is by nature distinctly military because, even though committed off-post, it involves an offense between two soldiers. Likewise, off-post larcenies committed against civilian vendors who primarily provide services to military personnel directly tend to disrupt commerce between the vendor and military personnel and hence impact upon the morale of the military installation and at the same time, although of interest to civilian authorities, is of greater interest to military authorities who seek to deter other soldiers from such conduct. A recent example illustrating this difference is *United States v. Abell*.<sup>86</sup> In *Abell*, the accused was charged with

the off-post sexual assault of two minor dependent daughters of military personnel. As part of his proof in demonstrating the superiority of military interests, the trial counsel showed that the accused and the victims resided in a trailer park which was on the off-post housing referral list maintained on the military installation and that the trailer park, although located off-post, was composed of nearly eighty per cent military families. Such proof amply demonstrated the superiority of the military interests in the case.

The Court of Military Appeals did not clearly explain in its analysis of "service connection" in *Trottier*, *Lockwood*, and *Solorio* to what extent the government must demonstrate that the individual rights of the accused to grand jury indictment and trial by jury must give way to the interests of the military. In *Trottier* and *Solorio*, the court seemed to say that these rights had not been construed by the Supreme Court in *Hurtado v. California*<sup>87</sup> and *Gosa v. Mayden*<sup>88</sup> to be so significant as to require the government to specifically prove the absence of each of the *O'Callahan* criterion to establish "service connection." Conversely, in *Lockwood*, the court seemed to say that the establishment of "service connection" by the government disposed of the issue of the accused's rights to grand jury indictment and trial by jury. Once trial counsel has shown the "service connection" of an off-post offense, a more compelling approach to this issue, would be to prove whether the underlying difference between a grand jury indictment and investigation pursuant to Article 32 of the Code<sup>89</sup> and between trial by civilian jury and trial before court-martial members are of such significance that a trial by court-martial would really represent a diminution of the accused's constitutional rights. Although frequently left to argument and supposition, these differences have never been analyzed or discussed by either the Supreme Court or the Court of Military Appeals. Without question these differences should be part of trial counsel's proof in establishing "service connection."

### Conclusion

Although the concept of "service connection" has spanned seventeen years and still retains its vitality as an important concept in military law, its original intent established in the *O'Callahan* decision has been remarkably transformed by both the Supreme Court and the Court of Military Appeals to favor, rather than inhibit, its sound development. Even so, trial counsel should take note that the concept of "service connection" remains to be a bridge over troubled waters. Recently, the Air Force Court of Military Review determined that an accused's off-post offense of sexual assault against a fifteen-year-old girl was not "service connected." The accused was a master sergeant and the fifteen-year-old girl sexually assaulted was his stepdaughter.<sup>90</sup>

<sup>85</sup> 21 M.J. at 256-57.

<sup>86</sup> Misc. Doc. No. 1986/1 (A.C.M.R. 11 March 1986).

<sup>87</sup> 110 U.S. 516 (1884).

<sup>88</sup> 413 U.S. 665 (1973).

<sup>89</sup> Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) and the requirements set forth in Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 405.

<sup>90</sup> *United States v. Bolser*, ACM 25031 (A.F.C.M.R. 18 April 1986) [Note: Contact between TCAP and Air Force Government Appellate revealed that *en banc* reconsideration of this case has been requested.].

Among other things, the Air Force court, maintaining that its holding was consistent with *Solorio*, determined that the evidence failed to establish that the crimes had an impact on the discipline and effectiveness of the military organization and failed to establish a distinct and overriding military interest in deterring the offenses. Indeed, the *Solorio* opinion did not confer "service connection" over all off-post offenses of child abuse by service members. However, the result of finding "service connection" in a situation where a soldier commits a sexual assault against a military dependent but denying "service connection" where a soldier commits a sexual assault against his own child is anomalous. The principal danger of "service connection" applied in this way is that it portends an endless series of relativized findings and the possible creation of the type of situational ethics which grew out of the era of "non-service connected" drug cases.

Under such circumstances, trial counsel and the courts should consider that basing "service connection" on the impact that an off-post offense has on military discipline requires embracing *all* the interstices of military discipline. In the military, discipline means a desire to be loyal, a willingness to be obedient even when doing so is unpleasant, and unfailing adherence to law, and wanting to uphold the integrity of being a soldier. Although these attributes seem

"intangible,"<sup>91</sup> they are the distinguishing substance of military service and military law. They cannot be confined conveniently to "bright lines" or borderlines.

This reality was most recently recognized by Judge Cox in his concurring opinion in *United States v. Scott*.<sup>92</sup> There, in agreeing with the government's contention that proof of misconduct alleged as "conduct unbecoming an officer and a gentleman" satisfied the requirement of "service connection," and in supporting this view with a recitation of General Douglas MacArthur's address to the Corps of Cadets at West Point on May 12, 1962 on the ideals of "duty, honor, country," Judge Cox made this observation

In essence, Article 133 is, in every sense, an offense which is unique to the military community and is of special significance therein. It focuses on the fact that an accused is "an officer" and that his conduct has brought discredit upon all officers and, thus, upon the honor, integrity, and good character inherent in this important, unique status. There is no question in my mind that we must zealously preserve and protect the status of an officer.<sup>93</sup>

Is there any less need to protect the status of "a soldier?"<sup>94</sup>

## Government Brief

### Army Court Refines Its Interpretation of Residual Hearsay

In the July 1985 issue of *The Army Lawyer*, TCAP provided a detailed analysis of the military cases interpreting the residual hearsay exceptions, (Mil. R. Evid. 803(24) and 804(b)(5)).<sup>95</sup> That article highlighted *United States v. Whalen*,<sup>96</sup> the first Army opinion on residual hearsay, and *United States v. Hines*,<sup>97</sup> a more recent Air Force opinion. *Whalen* set forth a simple and effective way to determine if a hearsay statement is sufficiently trustworthy to be admissible. *Hines* used a similar but more detailed analysis to sanction admission of three sworn statements alleging child sexual abuse, even though the three declarants were unavailable for cross-examination. In the process, the *Hines* court made several far-reaching observations about the residual hearsay exceptions:

1) The trustworthiness necessary to justify admission of residual hearsay is simply equal to or greater

than the least trustworthy exceptions listed under 803 and 804;

2) If a statement is sufficiently trustworthy to gain admission under the residual hearsay exceptions, it should also meet the "reliability" standard set forth by the Supreme Court in *Ohio v. Roberts*<sup>98</sup> to comply with the confrontation clause of the sixth amendment;

3) Statements alleging child abuse are similar to statements against interest in that both involve societal stigma and presumably would not be made unless true because they could subject the declarant to criminal or financial liability;<sup>99</sup> and

4) Admissions or confessions by the accused can be offered as corroborating evidence to establish the necessary trustworthiness of the residual hearsay statement.

In contrast to *Whalen* and *Hines*, other panels of the Army and Air Force Courts of Military Review have taken a more restrictive view. For example, a panel of the Army

<sup>91</sup> *Lockwood*, 15 M.J. 1 at 10: "In a time of increasingly complex and sophisticated weapon systems, intangibles like 'reputation' and 'morale' are sometimes given little emphasis." (emphasis added).

<sup>92</sup> 21 M.J. 345 (C.M.A. 1986)

<sup>93</sup> *Id.* at 351.

<sup>94</sup> The current Commander-in-Chief, President Ronald Reagan, has observed: "Who else but an idealist would choose to become a member of the armed forces?" See Westmoreland, *It Takes More Than Strength*, Parade Magazine, April 13, 1986.

<sup>95</sup> See Child, *Effective Use of Residual Hearsay*, *The Army Lawyer*, July 1985, at 24.

<sup>96</sup> 15 M.J. 872 (A.C.M.R. 1983).

<sup>97</sup> 18 M.J. 729 (A.F.C.M.R. 1984).

<sup>98</sup> 448 U.S. 56, 66 (1980).

<sup>99</sup> In child abuse cases, the declarant can suffer societal stigma "nothing less than personally devastating," and risk the financial stability of the family should the breadwinner be sentenced to jail. *Hines*, 18 M.J. at 742.

court held that the proponent must demonstrate the unavailability of the declarant under either exception or the proponent must demonstrate "peculiar circumstances"<sup>100</sup> which guarantee trustworthiness. Of course, Mil. R. Evid. 803(24) explicitly removes the unavailability requirement.

A panel of the Air Force court concluded that when determining a residual hearsay statement's similarity to other statutory exceptions, comparison may be made *only* to exceptions within the same class.<sup>101</sup> That is, the court in *Harris* held that a statement offered under Mil. R. Evid. 803(24) could be compared *only* with exceptions 803(1) through (23) and not with any exceptions under Mil. R. Evid. 804.<sup>102</sup>

*United States v. Rousseau*,<sup>103</sup> a recent and well-written opinion from the Army court follows the lead taken in *Whalen* and *Hines*. In the process, Senior Judge Yawn, writing for the court, differed with the restrictive views of these other panels of the Army and Air Force courts.

In contrast to the previous residual hearsay opinions involving child abuse, *Rousseau* concerned physical rather than sexual abuse. In *Rousseau*, the appellant's wife took their child to the dispensary for treatment of certain injuries. Suspecting child abuse, hospital personnel alertly contacted the local CID office whose agents questioned the appellant's wife at the hospital and took pictures of the injuries. The agents obtained a sworn written statement from her naming appellant as the cause of her son's injuries and of injuries to herself.

As so often happens in abuse cases, the wife became reluctant to testify against her husband. At an initial Article 39(a) session held three weeks before trial, the wife "clearly expressed her intention not to testify on the merits."<sup>104</sup> At trial, she did the same, although not from the stand.<sup>105</sup>

On appeal, appellant argued that his wife's in-court testimony would have been more probative than the sworn statement, a requirement that must be met before admission under Mil. R. Evid. 803(24).<sup>106</sup> In effect, appellant argued that the government had to demonstrate his wife's unavailability before introducing her sworn statement. In answering

this argument, Judge Yawn considered and rejected the restrictive view expressed in *Arnold* that the proponent must always show the unavailability of the declarant even though offering a statement under Mil. R. Evid. 803(24). To do so would "run afoul of the clear language of the rule that availability is immaterial and, in fact, make [ ] Rules 803 and 804 redundant."<sup>107</sup> Nevertheless, the court in *Rousseau* observed that it did not need to rule on just how strictly Mil. R. Evid. 803(24) (B) should be applied because the government did make reasonable efforts to get appellant's wife to testify. Appellant's wife was therefore unavailable and her statement was "more probative than any other evidence available."<sup>108</sup>

Judge Yawn then addressed the restrictive interpretation of the panel of the Air Force court in *Harris*, *i.e.*, that a statement offered under Mil. R. Evid. 803(24), may be compared *only* with other exceptions under Mil. R. Evid. 803(1) through (23) and not with exceptions under 804. Judge Yawn concluded that the court should "not take such a narrow view of this issue and . . . that approximation to *any* recognized exception is some indication of trustworthiness."<sup>109</sup> Instead, "admissibility should be resolved by 'assessing relevancy, need and reliability instead of insisting on compliance with a particular class exception.'" <sup>110</sup>

In addition to making clear where the current Army court differs with earlier, more restrictive views, the court made clear its acceptance of the *Whalen* and *Hines* analyses. First, the court applied the four *Whalen* criteria to determine if the statement was sufficiently trustworthy to admit.<sup>111</sup> Before doing so, Judge Yawn observed that other criteria could be used as well, *e.g.*, whether the declarant has a good or bad reputation for truthfulness. Obviously the first criterion, availability for cross-examination, was found against the government.<sup>112</sup>

Addressing the second criterion, Judge Yawn found, as did the court in *Hines*, that the wife's statement was similar to a statement against interest (Mil. R. Evid. 804(b)(3)) because the court found her failure to report other instances of spouse and child abuse was probably due to fear and to

<sup>100</sup> *United States v. Arnold*, 18 M.J. 559, 561 (A.C.M.R. 1984).

<sup>101</sup> *United States v. Harris*, 18 M.J. 809, 813 (A.F.C.M.R. 1984).

<sup>102</sup> In *Whalen*, the court reached the opposite conclusion, but without providing any analysis. The court in *Whalen* compared the statement offered under Mil. R. Evid. 803(24) with a declaration against interest, Mil. R. Evid. 804(b)(3).

<sup>103</sup> CM 446032 (A.C.M.R. 28 Feb. 1986).

<sup>104</sup> *Id.* slip op. at 2.

<sup>105</sup> *Id.* at 2-3. The wife expressed her reluctance to the trial counsel and defense counsel outside of court. Defense counsel did not contest her "unavailability" under Mil. R. Evid. 804(a), but rather attacked admission on the basis of insufficient indicia of reliability. Appellant's wife later testified during presentencing.

<sup>106</sup> Rule 803. Hearsay exceptions; unavailability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(B) the statement is *more probative* on the point for which it is offered than *any other* evidence which the proponent can *procure through reasonable efforts*. . . ." [emphasis added]

<sup>107</sup> *Id.* at 3-4.

<sup>108</sup> *Id.* at 5.

<sup>109</sup> *Id.* at 6 [emphasis in original].

<sup>110</sup> *Id.* (quoting from 4 Weinstein's Evidence § 803(24)).

<sup>111</sup> *Whalen* set forth four criteria as a useful measure of trustworthiness: 1) availability of the declarant for cross-examination; 2) similarity of the declaration to a defined hearsay exception; 3) circumstances surrounding the making of the declaration; and 4) independent corroborating facts which support the substance of the statement.

<sup>112</sup> *Rousseau*, slip op. at 8.

the "social stigma which would attach to her husband, and possibly herself, for not reporting the abuse earlier."<sup>113</sup> When combined with the fact that her statement was "made contrary to her pecuniary interests"<sup>114</sup> because it could affect her husband's ability to support the family, the court was convinced the statement had the same kind of trustworthiness we presume to accompany a statement against interest. In addition, the court found that her statement, made in conjunction with securing medical treatment for her son and herself, was similar to the medical treatment exception in Mil. R. Evid. 803(4).

The court found the third criterion (circumstances surrounding the making of the declaration) because the statement was made under oath, and executed close in time to the offense and there was "absolutely no indication that her actions were vindictive, or that she had a motive to lie."<sup>115</sup>

Finally, the court found independent facts to support the statement, the fourth criterion, because photos were introduced of the son's injuries and expert testimony established that the son's hand injuries were caused by someone holding his hand under hot water. In addition, like *Hines*, the court considered appellant's admission to abusing his son as corroboration.<sup>116</sup>

Judge Yawn turned to the sixth amendment confrontation clause issue after finding sufficient trustworthiness to meet the standards for admission under Mil. R. Evid. 803(24). Because appellant's wife did not subject herself to in-court testimony and cross-examination, a constitutional analysis under *Ohio v. Roberts* was also required to determine if a violation of the confrontation clause had occurred. For the same reasons the court found the statement admissible under Mil. R. Evid. 803(24), it found the statement "contained [the] particularized guarantees of reliability sufficient to satisfy Sixth Amendment concerns."<sup>117</sup>

*Rousseau* is important because it is the most recent Army opinion to follow the majority trend<sup>118</sup> of the military courts of review to interpret the residual exceptions broadly: as "specifically included in the rules of evidence to provide for growth in evidentiary law."<sup>119</sup>

The residual exceptions have been particularly useful in trying child abuse cases. Judge Yawn reiterated this fact by concluding that "the residual exceptions are particularly well-suited to the type of hearsay problems which arise when one family member falls victim to the aggressions of another family member."<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 7.

<sup>115</sup> *Id.*

<sup>116</sup> Earlier Army and Air Force courts have been reluctant to consider admissions as independent corroborating facts. See Child, *Effective Use of Residual Hearsay*, The Army Lawyer, July 1985, at 33.

<sup>117</sup> *Rousseau*, slip op. at 8.

<sup>118</sup> The Navy-Marine Court of Military Review came on board with *United States v. Yeagher*, 20 M.J. 797 (N.M.C.M.R. 1985), which specifically adopted the *Whalen* analysis.

<sup>119</sup> *Rousseau*, slip op. at 7.

<sup>120</sup> *Id.* at 8.

**Effective Assistance of Counsel: Conflicts of Interests and Pretrial Duty to Investigate**

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This article explores two areas that often form the basis of allegations of ineffective assistance of counsel: conflicts of interests and pretrial duty to investigate. The article explores the general principles and policies in each of these areas and their application in recent military cases. Each topic is explored separately, beginning with an examination of the statutory authority, followed by an analysis of the applicable caselaw, and ending with suggestions to assist defense counsel in avoiding problem areas. It is important to distinguish the three categories of situations, because the legal standards applied are dependent thereon. If actual or constructive denial of counsel, there is a legal presumption of prejudice to the accused. If counsel is burdened by an actual conflict of interest, prejudice is presumed if the accused shows that counsel actively represented conflicting interests and his performance was adversely affected thereby. Lastly, if there is a claim of other ineffectiveness, the accused must affirmatively prove prejudice.<sup>1</sup>

**Conflicts of Interests**

The sixth amendment to the Constitution of the United States provides that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."<sup>2</sup> The same right to counsel is afforded a military accused in all general or special courts-martial.<sup>3</sup> While there is no specific mention of the quality of this representation or any other criteria, this right has been interpreted to encompass conflict-free representation.<sup>4</sup> This interpretation is amply represented in rules governing the professional conduct of attorneys in general and defense counsel in particular.<sup>5</sup> The defense counsel owes his or her undivided loyalty to the interests of the client. Where there is a conflict of interest, counsel should seriously consider withdrawal from the case as a solution.

In recent conflict of interest cases, the most recurring problem involved multiple representation. The Court of

Military Appeals, foreseeing potential problems, established that the responsibility for recognizing those problems initially rests upon those who appoint defense counsel, and that the responsibility for resolving conflicts that do arise is upon the individual defense counsel.<sup>6</sup> While multiple representation is not per se improper, it is the exception rather than the rule that one attorney can properly represent multiple accused at a joint or common criminal trial.<sup>7</sup>

The Court of Military Appeals reaffirmed in *United States v. Breese*<sup>8</sup> that multiple representation is not per se violative of the sixth amendment. Citing with approval *Cuyler v. Sullivan*,<sup>9</sup> the court held that, in order to establish the sixth amendment predicate for a claim of ineffective assistance, there must be some evidence of an active representation of conflicting interests.<sup>10</sup> The client must make a demonstration of actual conflict adversely affecting the lawyer's performance.<sup>11</sup> The *Breese* court reiterated that the trial defense counsel must make the determination whether a conflict of interest exists. An examination of the record of trial in *Breese* led the court to conclude that no conflict had occurred. The court also established a rebuttable presumption of conflict of interest "in any case of multiple representation wherein the military judge has not conducted a suitable inquiry into a possible conflict."<sup>12</sup> This rebuttable presumption, however, does not relieve the individual defense counsel of the responsibility to recognize and resolve such conflicts. Further, failure by the military judge to conduct such a "suitable" inquiry does not conclusively establish an active conflict of interest warranting relief.<sup>13</sup> The government may still prove either that no actual conflict existed, or that, if an actual conflict did exist, the parties "knowingly and voluntarily chose to be represented by the same counsel."<sup>14</sup>

<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>2</sup> U.S. Const. amend. VI.

<sup>3</sup> Uniform Code of Military Justice art. 38(b) 10 U.S.C. § 838(b) (1982).

<sup>4</sup> *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978); *Glaser v. United States*, 315 U.S. 60 (1942).

<sup>5</sup> See Model Code of Professional Responsibility, Canon 5, DR 5-105(19)(1979); see also American Bar Association Standards For Criminal Justice, the Defense Function § 3.5(b)(1986 Supp).

<sup>6</sup> *United States v. Evans*, 1 M.J. 206, 209 (C.M.A. 1975); see also *United States v. Blakely*, 1 M.J. 247, 249 (C.M.A. 1976) (Everett, C.J., concurring.)

<sup>7</sup> *United States v. Blakely*, 1 M.J. at 248; see also *Holloway v. Arkansas*, 435 U.S. 475 (1978).

<sup>8</sup> 11 M.J. 17 (C.M.A. 1981).

<sup>9</sup> 446 U.S. 335 (1980).

<sup>10</sup> 11 M.J. at 19, 20.

<sup>11</sup> *Cuyler v. Sullivan*, 446 U.S. at 348.

<sup>12</sup> 11 M.J. at 23.

<sup>13</sup> *United States v. Devitt*, 20 M.J. 240 (C.M.A. 1985).

<sup>14</sup> *Id.* at 243.

In *United States v. Devitt*,<sup>15</sup> husband and wife were prosecuted in separate trials on related charges and represented by the same detailed and civilian defense counsel. In reversing the Air force court's interpretation of *Breese* as establishing a per se rule where no inquiry was conducted at trial, Chief Judge Everett reiterated that the presumption established in *Breese* was a *rebuttable* one.<sup>16</sup> *Devitt* is also noteworthy for articulating two other points. First, the issue of conflict of interest based on multiple representation may be decided by appellate courts based on the record of the trial.<sup>17</sup> Where insufficient facts are available, however, the alternative may be a limited *DuBay*<sup>18</sup> hearing. Second, and of even more importance to trial defense counsel, where improper multiple representation is alleged as ineffective assistance, the attorney-client privilege is waived.<sup>19</sup>

Disabling conflicts of interest are not limited to cases of multiple representation. A conflict of interest is currently defined as "an 'actual conflict of interest' in which a lawyer 'actively represent[s] competing interests.'"<sup>20</sup> The sole requirement is a showing that the conflict of interest adversely affects the lawyer's performance.<sup>21</sup> In *United States v. Kidwell*, the accused agreed through counsel to act as an informant for the government in exchange for the chief justice's recommendation for approval of a request for an administrative discharge in lieu of courts-martial. Although the accused performed his part of the bargain, his counsel deliberately failed to submit the request so that the accused could continue to work as an informant. In explaining his actions, counsel stated that he felt the information the accused potentially could provide was of such value to society as to render the accused's interests insignificant in comparison. The Army court had very little difficulty finding an actual conflict of interest, triggering a conclusive presumption of prejudice that warranted relief.<sup>22</sup>

In conclusion, any potential conflict of interest situation should obviously be approached by trial defense counsel with extreme caution. Particularly where multiple representation is involved, the client should be fully informed of the ramifications of this type of representation. Defense counsel should ensure that all consultations in this regard are documented. More importantly, defense counsel should insure that an adequate inquiry is conducted on the record at trial where multiple clients are represented by the same counsel.

The key factor in conflicts, other than those of multiple representation, is detriment to the client. Whenever defense counsel makes a tactical decision, contrary to the wishes of the client, which is beneficial to someone other than the client, that decision is subject to close scrutiny. Where the results are clearly detrimental to the client, a valid claim of ineffective assistance may exist.

### Pretrial Duty to Investigate

It is axiomatic that an attorney's performance at trial is a reflection of the amount and quality of pretrial preparation. In addition to the obvious benefits to the client and his or her cause, thorough and complete pretrial investigation and preparation is absolutely essential to ensure that the defense counsel has satisfied his or her professional responsibility to represent a client competently.<sup>23</sup> It should be noted at the outset that the duty to conduct an adequate pretrial investigation is, however, but one aspect of competent representation. The Model Code obligates an attorney to adequately prepare, and give appropriate attention to his legal work,<sup>24</sup> and it prohibits him from handling a legal matter without preparation adequate in the circumstances.<sup>25</sup> Flexibility is inherent in this guidance and rightly so. Some cases will require more pretrial investigation than others. Quite often, time constraints and the type of case will determine the form and amount of pretrial investigation conducted in a particular case. The American Bar Association Standards for Criminal Justice specifically address the duty of a defense counsel to investigate, and mandate that such investigations be prompt and thorough, both in regard to the merits of the case and sentencing.<sup>26</sup> This investigation need go no further than developing the relevant facts, however. The issue then becomes what is "adequate" and what is "relevant."

The right of a military accused to effective assistance of counsel described by the Court of Military Appeals in *United States v. Rivas*<sup>27</sup> was interpreted by the Navy Marine Court of Military Review to apply both to the trial and pretrial proceedings from the time defense counsel is officially

<sup>15</sup> *Id.* at 241, 242.

<sup>16</sup> *Id.* at 244.

<sup>17</sup> *Id.*

<sup>18</sup> *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

<sup>19</sup> 20 M.J. at 244. Even though the error on appeal is based on failure of the military judge to conduct an adequate inquiry, counsel's competence is questioned as in any other claim of ineffective assistance. Consequently, the attorney-client privilege does not apply.

<sup>20</sup> *United States v. Kidwell*, 20 M.J. 1020, 1024 (A.C.M.R. 1985).

<sup>21</sup> *Id.*

<sup>22</sup> See *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982); *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977); *United States v. Kelley*, 19 M.J. 946 (A.C.M.R. 1985).

<sup>23</sup> Model Code of Professional Responsibility Canon 6(19)(1979).

<sup>24</sup> Model Code of Professional Responsibility EC 6-4(19)(1979).

<sup>25</sup> Model Code of Professional Responsibility DR 6-101(A)(2)(19)(1979).

<sup>26</sup> American Bar Association Standards for Criminal Justice, the Defense Function, 4-4.1—Duty to investigate. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

<sup>27</sup> 3 M.J. 282 (C.M.A. 1977).



detailed.<sup>28</sup> In *United States v. Owens*, the defense counsel permitted the accused to confess to the Naval Investigative Service. In deciding the ineffective assistance allegation, the Navy court thoroughly examined the pre-confession advice provided by the defense counsel.<sup>29</sup> The court applied the actual prejudice test and determined that, under the circumstances, Owens was afforded effective assistance. There was some concern for defense counsel's failure to vigorously oppose Owens' decision to confess, however, and counsel's failure to convince Owens that the decision should be delayed until the government's case could be investigated.<sup>30</sup> The decision in *United States v. Owens* clearly shows that in some cases it is not enough to provide legal advice. Counsel is obligated to actively influence a client's decision and present the client with alternative courses of action.

In *United States v. Mann*,<sup>31</sup> the Army Court of Military Review addressed several allegations of ineffective assistance involving pretrial preparation. Mann alleged that his defense counsel had refused to allow him to assist in the defense of his case, pressured him into a pretrial agreement without explaining the consequences, failed to adequately investigate the facts of the case and interview witnesses, and failed to call certain witnesses during the sentencing portion of the trial.<sup>32</sup> While an accused's right to participate in the defense of his case was well established, the court had little difficulty approving the defense counsel's course of action where appellant's idea of assisting in his defense consisted of exerting improper influence on witnesses against him.<sup>33</sup> Appellant's claim that the consequences and effect of his guilty plea and pretrial agreement were not adequately explained to him was likewise dismissed based on the affidavits of both defense counsel and a review of the plea inquiry conducted at trial.<sup>34</sup> Of particular interest was Mann's claim that his defense counsel refused to investigate the circumstances under which the statements of two witnesses against him were obtained. Judge Foreman, writing for the court, recognized that in some federal jurisdictions there was a different standard governing counsel's duty to

investigate in guilty plea cases. In those jurisdictions, defense counsel need only simply ensure that the plea is provident.<sup>35</sup> Because Mann had informed defense counsel that the statements were true and there was no question about their admissibility, the court determined that representation in this regard was adequate.<sup>36</sup> The necessity for interviewing witnesses depended on the information available to the defense counsel from whatever source.<sup>37</sup> Resolution of this issue against Mann reflected deference to counsel's assessment of the relative importance of a particular course of action. Finally, Mann's allegation that witnesses he desired in extenuation and mitigation were not called was dismissed by the court primarily due to the failure of Mann to show the existence of such witnesses.<sup>38</sup>

Counsel's responsibility to interview witnesses and to make strategic and tactical decisions was again at issue in *United States v. Bowie*.<sup>39</sup> The Army court reiterated that counsel is responsible for investigating and preparing the case and for interviewing essential witnesses prior to trial when it is clear that the testimony of the witnesses is relevant and beneficial to an accused.<sup>40</sup> Further, the Court deferred to counsel's judgment in not calling certain witnesses, and refused to equate lack of success to ineffective assistance.<sup>41</sup> What is not clear from the court's analysis is whether the mere failure to call certain witnesses, assuming counsel has some articulable reason for doing so, will render counsel's assistance ineffective. *Bowie* clearly shows the Army court's reluctance to second-guess trial defense counsel's pretrial strategy where information was not available to the defense counsel through no fault of his own.

Deference to defense counsel's strategic decision was reflected again in *United States v. Dupas*.<sup>42</sup> The Army court in *Dupas* emphasized that it was imperative that counsel, prior to trial, investigate and prepare the case, by interviewing essential witnesses and arranging for their appearance.<sup>43</sup> This obligation did not require that counsel

<sup>28</sup> *United States v. Owens*, 12 M.J. 817, 818 (N.M.C.M.R. 1981).

<sup>29</sup> *Id.* at 818, 819. Prior to confessing, "[Owens] was advised four times that he didn't have to confess or say a thing to the Naval Investigative Service, five times that counsel would defend him whether or not he confessed; twice that if [Owens] confessed he could reasonably be looking at twenty years in prison; twice that the Government might not be able to prove a thing; that confessing would deal the prosecution its strongest card; and that [he] would go to jail that day if he confessed."

<sup>30</sup> *Id.* at 819. The court intimated that, in conjunction with other facts, these lapses may constitute ineffective assistance.

<sup>31</sup> 16 M.J. 571 (A.C.M.R. 1983).

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

<sup>33</sup> *Id.* at 573.

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

<sup>35</sup> *Id.* In *Jones v. Henderson*, 549 F.2d 995, cert. denied, 434 U.S. 840 (1977), the court specifically held that where an accused wishes to plead guilty or is advised to plead guilty, there is no requirement to investigate all facts of the case and explore all avenues of defense as in the contested case. It should be noted that this appears to be contrary to the guidance of the Standards for Criminal Justice.

<sup>36</sup> The question remains whether the distinction between guilty pleas and contested cases will be applied in the military.

<sup>37</sup> 16 M.J. at 574. Mann had also informed defense counsel what the witnesses were going to say, and had confirmed that their pretrial statements were true.

<sup>38</sup> *Id.* The court also closely examined the defense case on sentencing and determined that counsel's performance was more than adequate under the circumstances.

<sup>39</sup> 17 M.J. 821 (A.C.M.R. 1984).

<sup>40</sup> *Id.* at 824. Bowie's claim was determined to be without merit due to his failure to show which witnesses were not interviewed nor how their testimony would be relevant and beneficial. Defense counsel had interviewed all witnesses named by Bowie and determined that their testimony was favorable to the government.

<sup>41</sup> *Id.*

<sup>42</sup> 17 M.J. 689 (A.C.M.R. 1983).

<sup>43</sup> *Id.* at 690.

search for unknown witnesses or attempt to develop an unrealistic defense strategy, however.<sup>44</sup> Thus, the appropriateness of a particular course of action necessarily depends on the peculiar facts of the case. The same analytical framework was employed by the Army Court in *United States v. Kelley*.<sup>45</sup>

In a recent case involving counsel's pretrial duty to investigate and prepare, *United States v. Scott*,<sup>46</sup> the accused urged his civilian defense counsel to pursue an alibi defense. The Navy court held that the proposed defense was not adequately prepared prior to trial but, applying the two-prong test of *Strickland v. Washington*,<sup>47</sup> the court concluded there was no need to determine the question of adequacy of representation because there was no prejudice to Scott.<sup>48</sup> The court did, however, express dissatisfaction with counsel's failure to interview any alibi witnesses for several reasons. First, even though it is permissible to delegate certain aspects of case preparation, counsel is not thereby relieved from ultimate responsibility.<sup>49</sup> Second, counsel had in fact chosen to pursue alibi as a defense but failed to interview any witnesses prior to trial.<sup>50</sup> Finally, the potential witnesses were known to the defense counsel and were readily available.<sup>51</sup> The court's dissatisfaction with defense counsel's conduct in this case was vividly shown by Judge Kercheval's dissent.<sup>52</sup>

An often cited opinion in the area of pretrial responsibility and the duty to investigate is *United States v. DeCoster*.<sup>53</sup> The analysis in *DeCoster* is important to the practitioner for several reasons. First, it recognized that the client is the primary source of information for the defense counsel. Thus, the failure of the client to divulge the names of potential witnesses or to provide other information may later preclude a successful allegation of ineffective assistance as such claims are reviewed based on the information available to counsel. Counsel should not summarily discount their client's information without adequate investigation, however, in spite of the reluctance among some federal jurisdictions to intrude into this area.<sup>54</sup> Second, there are several areas where the failure to investigate amounts to inadequacy of counsel presumably without any showing of prejudice.<sup>55</sup> Third, claims based on a duty to investigate are appraised in light of the government's case.<sup>56</sup> There is no constitutional requirement that an exhaustive investigation be

conducted when the government's evidence is overwhelming. Finally, the duty to investigate is but one part of the overall function of a defense counsel.<sup>57</sup> The ethical obligation to represent a client competently necessarily requires that pretrial investigation and preparation be adequately conducted.

Clearly, the courts are reluctant to second-guess pretrial strategies employed by a defense counsel. The importance of the pretrial phase remains intact, however. The accused dictates the course of pretrial investigation and information provided by the accused cannot be summarily discounted. Trial defense counsel is not required ethically or by law to investigate every possible lead where the information to be obtained would not be relevant or beneficial to the case, however. The circumstances of each case will necessarily dictate the extent of pretrial investigation. Thus it clearly behooves the prudent defense counsel to expend the necessary effort to investigate a case before trial rather than relying on his or her in-court advocacy skills to pull the client's coals from the fire.

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<sup>44</sup> *Id.* at 691.

<sup>45</sup> 19 M.J. 946 (A.C.M.R. 1985). Great weight was given to the professional judgment of trial defense counsel in determining which witnesses should be interviewed and called to testify, as well as other aspects of the pretrial investigation process.

<sup>46</sup> 21 M.J. 889 (N.M.C.M.R. 1986).

<sup>47</sup> 466 U.S. 668 (1984). There must be a showing of serious incompetency on the part of the attorney, and that such inadequacy affected the trial result.

<sup>48</sup> 21 M.J. at 891-93. The facts of this case are worthy of close examination.

<sup>49</sup> *Id.* at 893.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 899-903. Judge Kercheval had no problem with finding that counsel's representation was inadequate and that the outcome of the trial was undermined.

<sup>53</sup> 624 F.2d 196 (D.C. Cir. 1976).

<sup>54</sup> *Id.* at 209.

<sup>55</sup> For example, a policy adhered to despite requests by the defendant that certain persons be interviewed. *Id.* It is not certain whether the military courts would adhere to this proposition in light of *United States v. Scott* and *United States v. Kelley*.

<sup>56</sup> 624 F.2d at 210.

<sup>57</sup> *Id.* at 209.

### Good Faith?

For the first time since it recognized the good faith exception to the Jencks Act<sup>1</sup> in *United States v. Jarrie*,<sup>2</sup> the Court of Military Appeals has expounded upon the definition of the term "good faith."<sup>3</sup> In *Jarrie*, the only guidance from the court was that an "optional practice of discretionary destruction" of prior statements was outside the definition of good faith, but that the destruction of those statements in accordance with "routine administrative procedures" was within that definition.<sup>4</sup> The Court in *United States v. Marsh* has now expanded "good faith" to include "some negligence" not amounting to "gross negligence."<sup>5</sup> This recent expansion, while purportedly clarifying the meaning of the term "good faith," may in reality result in speculation as to the boundaries of "some negligence." The defense should note that the government, in *Marsh*, provided "substantial evidence" of a "good faith effort" to preserve the materials, in compliance with "office policy."<sup>6</sup> Thus, defense counsel in the field should continue to litigate the issue of good faith in order to force the prosecution to provide substantial evidence of good faith and to determine the confines of "some negligence." Captain David Hoffman.

### Defense Opposition To Judicial Notice

What happens when trial counsel requests the military judge to take judicial notice of facts detrimental to the accused's case? A judicially noticed fact must be one not subject to reasonable dispute because it is either (1) known universally, locally, or in the area pertinent to the event, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.<sup>7</sup> The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of witness testimony. If particular facts are outside the area of reasonable controversy, however, this process may be dispensed with as unnecessary. In this regard, a high degree

of indisputability is the essential prerequisite, and traditional methods of proof should be dispensed with only in clear cases.<sup>8</sup>

There have been very few published military cases relating to judicial notice of adjudicative facts. In *United States v. Williams*,<sup>9</sup> the Court of Military Appeals was faced with the question of whether under Mil. R. Evid. 201 it could take judicial notice of the jurisdictional status of certain areas of Fort Hood, Texas. The court held that, similar to a military judge, it could take judicial notice of indisputable facts. The court then noted that although a fact-finding hearing held after trial had established which areas of Fort Hood were subject to federal jurisdiction, the court still could not say that these facts should be judicially noticed. Nothing in the record indicated that such facts were "generally known universally, locally, or in the area pertinent to the event."<sup>10</sup> Nor could the court perceive how the facts would be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."<sup>11</sup>

Judicial notice is inappropriate where the facts are within the personal knowledge of the military judge.<sup>12</sup> Another source which is not susceptible of judicial notice is evidence from other trials. In the first place, the appellant is denied his sixth amendment right to confront and cross-examine those witnesses.<sup>13</sup> Second, proceeding referral to facts presented in another proceeding does not meet the requirement of accurate and ready determination.<sup>14</sup> Finally, evidence introduced at another trial is not considered indisputable; it must be weighed and evaluated by the factfinder.<sup>15</sup>

Procedurally, the military judge may take judicial notice sua sponte, or trial counsel may request that the judge take judicial notice.<sup>16</sup> Where the facts are unfavorable to the accused and do not meet the requirements for judicial notice, it is incumbent upon defense counsel to make a timely objection.<sup>17</sup> If possible, defense counsel should present

<sup>1</sup> 18 U.S.C. § 3500 (1982). The Jencks Act requires the government to produce, upon defense motion, the relevant statements of a government witness who has testified on direct examination. Failure to produce results in striking the witness' testimony or a mistrial.

<sup>2</sup> 5 M.J. 193 (C.M.A. 1978).

<sup>3</sup> *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986).

<sup>4</sup> 5 M.J. at 195.

<sup>5</sup> 21 M.J. at 452.

<sup>6</sup> *Id.* at 451.

<sup>7</sup> Mil. R. Evid. 201 governs adjudicative facts, and Mil. R. Evid. 201A governs legislative facts. The drafters' analysis to Mil. R. Evid. defines adjudicative facts as simply the facts of a particular case, while legislative facts are those which have relevance to legal reasoning and the lawmaking process.

<sup>8</sup> Advisory Committee's Note to Fed. R. Evid. 201. Mil. R. Evid. 201(b) is taken generally from Fed. R. Evid. 201(b). Drafters' analysis to Mil. R. Evid. 201(b).

<sup>9</sup> 17 M.J. 207 (C.M.A. 1984).

<sup>10</sup> *Id.* at 214.

<sup>11</sup> *Id.*

<sup>12</sup> *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975).

<sup>13</sup> See *Barber v. Page*, 390 U.S. 719, (1968) (violation of sixth amendment to admit testimony from another hearing without good faith effort to produce witness).

<sup>14</sup> See *United States v. Williams*, 17 M.J. at 214-15.

<sup>15</sup> See Dept. of Army, Pam. No. 27-9, *Military Judges' Benchbook*, para. 2-29 (1 May 1982) (CI, 15 Feb. 1985).

<sup>16</sup> Mil. R. Evid. 201(c).

<sup>17</sup> Mil. R. Evid. 201(e).

## No Contest Stipulations?

witnesses or other evidence to show that the facts are not generally known and are subject to dispute.<sup>18</sup> Also, defense counsel should be prepared to challenge any supporting evidence offered by trial counsel. Finally, defense counsel should articulate why the particular facts are not susceptible of judicial notice and how they are prejudicial to his or her client.

Even where the government is able to present some proof that the facts are true, defense counsel may still challenge the propriety of taking judicial notice of those facts. In *Anton Shipping Co. v. Sidermar S.P.A.*,<sup>19</sup> the court held that where two alternative theories were both plausible, there was a reasonable dispute and judicial notice could not be taken.<sup>20</sup> Thus, alert defense counsel may mount a successful challenge to a request to take judicial notice of facts which may be detrimental to the client. Captain Peter D.P. Vint.

### Joint Possessor Exception Misapplied<sup>21</sup>

The Army Court of Military Review has reconsidered its decision in *United States v. Allen*,<sup>22</sup> where it recognized the "joint possessor" exception in drug distribution offenses and found improvident a plea of guilty to the offense of possession with intent to distribute. In its opinion on reconsideration,<sup>23</sup> the Army court determined that the facts in *Allen* were not appropriate for an application of the exception which was adopted in *United States v. Swiderski*.<sup>24</sup> This exception has been applied to preclude a conviction of a distribution charge where the transfer of the controlled substance occurred between two joint possessors. On reconsideration, the Army court found that Allen's "statements at trial paint him more as a receiving agent for the vendee . . . than as an actual co-purchaser whose rights to possess and consume the hashish were equivalent to those of [the vendee]" and thereby determined that the *Swiderski* exception did not apply.<sup>25</sup> "The *Swiderski* exception does not, by its terms, protect an agent who, by performing services for his principal, lengthens the chain of distribution of drugs."<sup>26</sup> The court did note, however, that a *Swiderski*-type exception may be appropriate in the military "in the right case."<sup>27</sup> Captain Lorraine Lee.

The Army Court of Military Review recently held in *United States v. Taylor*<sup>28</sup> that military judges should not involve themselves with the "negotiations" of a stipulation of fact by allowing an accused to raise objections to the admissibility of the contents of the stipulation of fact at trial unless there is plain error. The Army court advised military judges to handle a situation involving a contested stipulation as follows: first, recess the court to give the parties an opportunity to arrive at an agreed stipulation; next, if the parties cannot agree, the proposed stipulation should not be admitted into evidence and the accused should be advised that he has not complied with the terms of his pretrial agreement; and finally, the accused should be asked if he still desires to plead guilty, and the trial should proceed accordingly.<sup>29</sup>

The stipulation in *Taylor* was objected to at trial on the basis that it contained uncharged misconduct.<sup>30</sup> At trial, the military judge ruled that, while the stipulation was proper, portions of appellant's statement, which was incorporated into the stipulation by reference, were inadmissible and allowed only a redacted version of appellant's statement.<sup>31</sup> The Army court found that, when a military judge entertains objections to the stipulation of fact, he or she improperly inserts himself or herself into pretrial negotiations and has allowed his or her ruling to set the terms of the pretrial agreement.

The Army court's decision will allow trial counsel to strong-arm accused into stipulating to facts that are true, but otherwise inadmissible. The government is properly allowed to require an accused, pursuant to a pretrial agreement, to stipulate to the "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty," but the government should not be allowed to require an accused to stipulate to other incidents of misconduct that simply amount to "uncharged misconduct" in order for the accused to keep his bargain.<sup>32</sup> The *Taylor* decision has taken away from the military judge his or her ability to determine the admissibility of evidence which comes before the court for consideration and places it squarely in the hands of the trial counsel. The Court of Military Appeals has yet to address

<sup>18</sup> See Mil. R. Evid. 201(b).

<sup>19</sup> 417 F. Supp. 207 (S.D.N.Y. 1976).

<sup>20</sup> See also *United States v. Wilson*, 631 F.2d 118 (9th Cir. 1980).

<sup>21</sup> This is an update to DAD Notes, *Joint Possessor Exception*, The Army Lawyer, March 1986, at 46.

<sup>22</sup> CM 446768 (A.C.M.R. 17 Jan. 1986). This first *Allen* opinion was withdrawn by the court's opinion on reconsideration. *United States v. Allen*, 22 M.J. 512 (1986) [hereinafter cited as *Allen II*].

<sup>23</sup> *Allen II*.

<sup>24</sup> 548 F.2d 445 (2d Cir. 1977).

<sup>25</sup> *Allen II*, 22 M.J. at 514.

<sup>26</sup> *Id.* (citation omitted).

<sup>27</sup> *Id.*

<sup>28</sup> CM 448049 (A.C.M.R. 27 Mar. 1986).

<sup>29</sup> *Id.*, slip op. at 4.

<sup>30</sup> *Id.* at 1-2.

<sup>31</sup> *Id.* at 3. The *Taylor* decision is contrary to the decision of *United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R.), certificate for review filed, 18 M.J. 97 (C.M.A. 1984). The *Keith* court found plain error in the admission of a stipulation that incorporated by reference a confession to uncharged misconduct.

<sup>32</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) (emphasis added) [hereinafter cited as M.C.M., 1984, and R.C.M., respectively].

this issue. Until that happens, defense counsel are encouraged to be aggressive in drafting stipulations of fact and in negotiating what facts should be included therein. Defense counsel should continue to raise the issue of any inadmissible matters contained in stipulations of fact at trial for resolution by the military judge on the record. Although the military judge may refuse to address the issue in light of *United States v. Taylor*, the objection will be recorded and the issue will not be considered waived, thereby allowing appellate defense counsel to pursue the issue on appeal. Captain Donna L. Wilkins.

#### Multiplicity—*Baker* or *Blockburger*?

The Navy-Marine Corps Court of Military Review has held that the Rules for Courts-Martial<sup>33</sup> have adopted the multiplicity standard of *Blockburger v. United States*<sup>34</sup> that offenses are separate for findings if there is at least one element not common to both.<sup>35</sup> Similarly, the Air Force Court of Military Review has, in dicta, suggested that the MCM, 1984 adopts *Blockburger*.<sup>36</sup> This is less restrictive than the standard set forth in *United States v. Baker*.<sup>37</sup> that offenses are separate for findings if all elements of one offense are not embraced in the elements, or allegations and evidence, of the other. These holdings comport with the analysis by one commentator that the Rules for Courts-Martial follow the *Blockburger* test.<sup>38</sup>

Counsel should note, however, that such an interpretation of the MCM, 1984 is far from universal. In granting the petition in *Jones*, the Court of Military Appeals specified the issue "Can the Court of Military Review refuse to follow a precedent of this Court?" thereby implying that the standard in *Baker* is still the law.<sup>39</sup> In particular, the Army Court of Military Review has continued to apply the *Baker* analysis.<sup>40</sup> Moreover, in the recent unpublished case of *United States v. Bowen*,<sup>41</sup> the government contended in its brief that the adoption of *Blockburger* by MCM, 1984 permitted separate charging of simultaneous possessions of five different drugs. The court implicitly rejected this interpretation of the MCM 1984, and held the separate specifications multiplicitious for findings,<sup>42</sup> citing *United States v. Zupan*.<sup>43</sup>

Trial defense counsel should, therefore, not alter their multiplicity motion practice but instead, if the government argues *Blockburger*, respond with citation to the Army court's continued application of *Baker* and note for the military judge the tenor of the issue specified by the Court of Military Appeals in granting appellant's petition for review in *Jones*. Captain Martin B. Healy.

### Clerk of Court Notes

#### Clerk of Court Directory

When communicating with the Office of the Clerk of Court, U.S. Army Judiciary, talking to the correct office element can speed response time. Callers should copy and use the following directory of office symbols and AUTOVON numbers:

Special Actions Team (JALS-CCS): Witnesses for OCONUS cases; congressional correspondence; HQDA court-martial orders. 289-1193.

Operations Team (JALS-CCO): Remanded Article 66 cases and Article 62 appeals; FOIA and other requests for documents and records; Privacy Act matters; ACMR bar admissions. 289-1758.

Statistics Team (JALS-CCC): JAG-2 reports; JAG-72 (military judge) case reports; Chronology sheet (DD Form

490); Quarterly court-martial activity and processing time reports. 289-1790.

Records Control and Analysis Branch (JALS-CCR): Post-trial processing, including wording of actions and orders; Records of trial (creation, correction); Status of cases pending before ACMR or CMA. 289-1638.

(Note: Matters pertaining to cases not reviewed by ACMR should be directed to the Examination and New Trials Division (JALS-ED), 289-1701.)

Judicial Advisor/Clerk of Court (JALS-CCZ): Appellate procedure; Other information not listed above; Suggestions; Complaints. 289-1888.

Office hours are 0745 to 1615 EST or EDT daily except Saturdays, Sundays, and federal holidays. The message address is CUSAJUDICIARY FALLS CHURCH VA// [office symbol shown above] //. Room number for express

<sup>33</sup> R.C.M. 307(c)(4), 907(b)(3)(B) and 1003(c)(1)(C).

<sup>34</sup> 284 U.S. 299 (1932).

<sup>35</sup> *United States v. Jones*, 20 M.J. 602 (N.M.C.M.R. 1985), petition granted, 21 M.J. 305 (C.M.A. 1985) (forgery and larceny); *United States v. Meace*, 20 M.J. 972 (N.M.C.M.R. 1985) (false official statement and wrongful appropriation).

<sup>36</sup> *United States v. Jobs*, 20 M.J. 506, 512 (A.F.C.M.R. 1985).

<sup>37</sup> 14 M.J. 361, 367-68 (C.M.A. 1983), interpreting paragraph 74b(4), Manual for Courts-Martial, United States, 1969 (Rev. ed.).

<sup>38</sup> Uberman, *Multiplicity Under the New Manual for Courts-Martial*, *The Army Lawyer*, June 1985, at 34.

<sup>39</sup> 21 M.J. at 305.

<sup>40</sup> See, e.g., *United States v. Woods*, 21 M.J. 856, 876 (A.C.M.R. 1986); *United States v. Callaway*, 21 M.J. 770, 778-780 (A.C.M.R. 1986) (citing *Baker*); *United States v. Green*, 21 M.J. 633, 636 (A.C.M.R. 1985).

<sup>41</sup> SPCM 21969 (A.C.M.R. 15 April 1986).

<sup>42</sup> *Id.*

<sup>43</sup> 17 M.J. 1039 (A.C.M.R. 1984).

delivery is 204 Nassif Building, 5611 Columbia Pike, Falls Church, Va. ZIP code for mail is 22041-5013. The commercial alternative to the AUTOVON prefix is area code 202, 756-xxxx.

### Correction

Table 3-2 on page 49 of the March issue of *The Army Lawyer* indicates that 40 percent of the 138 non-BCD special courts-martial tried by court members in FY 1985 were tried by courts including enlisted members. The correct figure is 65 percent.

## COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES PER THOUSAND

First Quarter, Fiscal Year 1986  
October-December 1985

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	.49 (1.98)	.40 (1.59)	.63 (2.52)	.63 (2.52)	1.30 (5.20)
BCDSPCM	.40 (1.62)	.41 (1.62)	.40 (1.60)	.38 (1.53)	.58 (2.31)
SPCM	.10 (.42)	.11 (.44)	.10 (.42)	.08 (.31)	.07 (.29)
SCM	.42 (1.66)	.44 (1.75)	.39 (1.54)	.32 (1.30)	.43 (1.73)
NJP	34.29(137.16)	34.42(137.70)	34.36(137.45)	32.16(128.66)	36.33(145.30)

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

### *Trial Judiciary Note*

## US Army Trial Judiciary—A Special Assignment

*Lieutenant Colonel Donald Morgan*  
*Circuit Judge, Fifth Judicial Circuit, Nuernberg, FRG*

*Real people, real problems, tough duty!*  
*But exciting and challenging too.*  
*Our task has its own special beauty*  
*That's known to only a few.<sup>1</sup>*

As a relative newcomer to the bench, I do not pretend to speak with the wisdom of experience that many of the more senior trial judges I know could. And, having been certified as a GCM judge without any prior judicial experience, my perspective might be characterized as somewhat unique, if not singular. However, the decision to discontinue the SPCM military judge program will produce many more GCM judges who will make the transition from bar to bench as I did. It is to those lieutenant colonels, and to those contemplating an assignment to the Trial Judiciary, that this article is directed. These thoughts on what you could expect to face in what is truly a special assignment hopefully will help you make a more informed decision, or at least ease the transition for those whose decision has already been made.

### Your New Role

Perhaps the most dramatic and immediate adjustment which a new judge must make is in his attitude toward himself once he assumes the office and dons the robe. Although you have to be careful not to take yourself too seriously in the face of everyone addressing you as "Your Honor," you should also be sensitive to the symbolism of the position. It

is impossible to exaggerate the enormous prestige you acquire in the eyes of the non-JAGC community. Your family, civilian friends, and military associates all see you in a different light and cloak you with added stature. It is not at all unusual, for instance, to be addressed as "Sir" by court members and witnesses who are senior to you in rank.

Lawyers, as a group, may have acquired a reputation in our society of which we cannot always be proud. Judges, on the other hand, are perceived to have greater moral responsibilities than lawyers, and you should be prepared to justify this perception. You do so, quite simply, by subtly fostering it as a valid and deserved one, earned by meticulous attention to the propriety of your personal affairs and an unwavering commitment to the integrity of the rule of law.

This latter responsibility for impartiality is at the very heart of the judicial function. Your rulings on motions and evidence must be made without regard for the resulting impact upon either party's case. In a sense, your decisions can be made only within the "blindness" of admissible evidence and applicable law available on the matter at issue. Unlike the advocates, you are not expected to have any interest in the outcome of the trial. And this should give you some measure of comfort. Every ruling you make will necessarily include a rejection of either the government or defense position, and, to the extent you are correct, has the potential to generate unjust criticism or dissatisfaction. You soon find

<sup>1</sup> Stewart, "Passing The Gavel," a poem written upon his retirement and presented at the Tri-Service Military Judges' Conference, Maxwell Air Force Base, Montgomery, Alabama, March 1985 [hereinafter cited as Stewart].

that your truest and most supportive ally as a judge is the law.

### Your Goal

As a public servant, the trial judge's obligation to do "exact justice according to the law"<sup>2</sup> often can be elusive. Translating this ideal into action can be equally frustrating.

Being human in an imperfect world, how do you ensure for the community, as well as the individual accused, that justice is done? One view is that "[the] task is not that of achieving justice. The task is a much more subtle one: that of avoiding injustice."<sup>3</sup> And this seems, at least to me, to be the key to the dilemma. Injustice is a much easier concept to identify and act upon. It is, essentially, proscribed by the law—from regulations, executive order (including rules of evidence), and statute, to the Constitution itself.

Both parties to the trial are equally entitled to as correct a ruling on the law as you can possibly make under the circumstances of the case. By impartially enforcing these various proscriptions on both parties, you eliminate to the extent you can the objectively identifiable "injustices" either party might otherwise suffer. In the process of doing so, you come as close to achieving justice as can reasonably be expected. Sometimes you may need to articulate the public policy behind the law which requires a competing interest to fall in order to enhance the perception of fairness that is so vital to the integrity of the proceedings. But, ultimately, it is the law to which you inevitably return for your answer.

If this seems like an overly simplistic approach to the matter, perhaps it is. The duty to determine the law in any given case is not always as easy as we anticipate. It is constantly being refined by the appellate process, with widely-varying degrees of clarity and precision. And if you agree that "the law is not what the court said the last time, but what it says the next time," you realize that foresight is one of several virtues worth cultivating in an effort to become a good judge.

### Getting Started

You must learn to be a judge—nobody was born on the bench (although some judges seem to feel they were born TO BE on the bench). The Military Judge Course is a good step in getting your initial momentum, but in no other job is it more true that you learn by doing. It does not happen overnight either, but it happens.

Among the first tasks facing you is the requirement to prepare a script, "songbook," or trial guide with which you are comfortable. All scripts are substantially similar,<sup>4</sup> although I would hazard a guess that no two judge's are identical. To communicate with a jury most effectively, you must speak to them in your own words rather than read to them in someone else's. To do this, you tailor standard-form or boilerplate trial guides to reflect your own manner

of expressing the same points. The precise wording of a trial guide is not nearly as important as the matters that are required to be discussed and the order in which you discuss them. You should remember that counsel are also using a script which should conform substantially to yours. It eventually becomes useful primarily as a checklist to ensure that you have discussed those essential matters that have since been committed to memory.

In the beginning at least, you will probably want to stick fairly close to the content and format of the Military Judge's Benchbook. It is useful to put Chapter 2 in one looseleaf binder and the remaining chapters in another. The second binder supplements the first and can be augmented as necessary for each trial.

You will inherit a docketing system from your predecessor which was designed for the caseload historically experienced in your jurisdiction. Because these procedures vary, the only useful comment I can make is that your docket should be adhered to with a standard of what some have called "reasonable arbitrariness."<sup>5</sup> As a trial judge you are solely responsible for setting trial dates—and granting delays once the date for trial is set. If you forfeit this responsibility to counsel, the results are potentially disastrous.

Your local rules of court, published by each circuit, provide a wealth of information on pretrial, trial, and docketing procedures. A careful reading of these rules will provide answers to many of your initial questions, and this should be one of your first priorities. They were written and revised by experienced trial judges as an aid for all the parties. As their enforcement is another of your responsibilities, you cannot effectively do your job until you become familiar with them.

There are a number of Trial Judiciary standard forms and reports (not to mention the SOP) that will require a degree of your time and effort. The administrative tasks required of a judge are going to surprise you, but a good clerk will make them seem simple and routine.

Finally, you might give some thought to a filing system in which to store your case files after trial. Whether it is alphabetical or chronological, you need a system which permits quick retrieval in order to deposit promulgating orders, appellate pleadings, and final court options—some of which are received many months after the date of trial.

### What To Expect in the Courtroom

Justice Louis Brandeis has been quoted as saying "a judge can only be as good as the lawyers who practice in his court." It has also been said that in large part justice depends on how effectively lawyers perform.<sup>6</sup> Both these statements exaggerate the impact counsel have on the conduct and outcome of a trial. It is true that they play the principal roles in any contested case, but trials are won

<sup>2</sup> ABA Standards Relating to The Function of the Trial Judge (Tentative Draft), (June 1972), at 3 [hereinafter cited as ABA Standards].

<sup>3</sup> Morris, *The Judge's Declining Role in the Criminal Justice System Process*, The Robert Houghwout Jackson Lecture at the National Judicial College, Reno, Nevada, July 7, 1978, at 11.

<sup>4</sup> Compare chapter 2 of Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook (1 May 1982) (CI, 15 Feb. 1985), with Fifth Judicial Circuit Trial Guide (14 Sept. 1984).

<sup>5</sup> Will, *The Art of Judging, Trial*, Oct. 1985, at 79.

<sup>6</sup> *Id.*

more often by witnesses than by lawyers.<sup>7</sup> The inevitability of the evidence, the force of logic, and legal imperative in most cases compel the convictions and the acquittals.

Today's new counsel seem on the whole to be perceptibly more intelligent and better educated than their counterparts were a decade ago—although they do not have more common sense. The same mistakes we made as inexperienced counsel are often repeated by today's novices. Unfortunately, not all counsel carefully prepare every case for trial with economy of expression, nor do they limit their attention and effort exclusively to relevant issues. They sometimes test your patience by missing the obvious, attempting the impossible, or, in rare cases (usually involving civilian counsel), by deliberate provocation.

In this regard, you should always recall the admonition that "there are but three fundamental requisites for a good judge. First, he should have patience; second, he should have patience; and third, he should have patience."<sup>8</sup> Civility in deportment is an absolute necessity for a good trial judge—it is not a sign of weakness.<sup>9</sup> In fact, it sometimes reflects a tremendous reservoir of self-discipline.

You should be careful not to underestimate the danger of conveying unintended messages to the court members by your demeanor toward counsel. So to the extent that you do not abdicate your responsibility to "direct the course of the trial in such a manner as to give the jury fair opportunity . . . to reach an impartial result,"<sup>10</sup> let counsel try the case themselves. They should not be constantly worried about the judge—let them concentrate on the issues.

It may surprise you to learn that counsel on both sides of the courtroom will sometimes strenuously argue points they fully expect to lose. Defense counsel will feel the need to "make a record" on some obscure point that might have remote appellate significance, while trial counsel, for a variety of reasons,<sup>11</sup> want the judge to decide questions which could properly have been resolved in the pre-referral stage. Because the genuine or perceived expectations of either party are not admissible under Mil. R. Evid. 401, they can have no bearing on your decision-making process. In any event, the most appropriate result in each case, although certainly never a compromise, is seldom the all-or-nothing result for which counsel usually argue. In most cases there is some merit to both sides.

The temptation to help the floundering novice try the case can be almost irresistible. Although you are not expected to sit silently by as a spectator and casually observe an easily avoidable travesty, or even an unnecessary ambiguity in the evidence, you must realize that there are limits on your ability to "try the case" for either side. A good rule, again, is to let counsel do it themselves. Your duty to train and assist counsel in their professional development

can most effectively, and appropriately, be performed in chambers.

Because of your opportunities, especially in Europe, to travel to a number of different jurisdictions to preside at courts-martial, you have the chance to observe a wide range of effective, and not so effective, trial tactics employed by both the government and the defense. Thus you do not need a wealth of personal experience as a trial lawyer to give sound, helpful advice to counsel after a trial.

Post-trial discussions on trial tactics are not the only matters that can be handled effectively in chambers, either. Prior to trial, and even during the trial, opposing counsel can be brought together in an effort to avoid potentially embarrassing issues and unnecessary delays.<sup>12</sup> Anything of real significance can then be put on the record. As we all know, however, there are a considerable number of things that, for counsel's sake, can be more appropriately resolved "off the record." And it is interesting to see how much of a case is not really in dispute when opposing counsel have to talk to each other in your presence.

### Getting Reversed

One of the real joys of being a trial judge is the fact that you so often find yourself traveling through uncharted waters. An it is here that timidity is not always helpful in reaching the correct result. The easiest, safest, or least controversial ruling on an issue may in fact reveal a weakness in your approach to duty. Accordingly, the mere potential for a finding of error on appeal should never become an overriding factor in your rulings.

It might be a blow to your ego to read in the first appellate brief you receive on one of your cases (and you get copies of them all) that the "Assignment of Error" headline begins with what soon becomes very familiar language:

"THE MILITARY JUDGE ERRED BY . . ."

which is followed by a discussion that makes your blood boil, because it is patently frivolous, inconsequential, or simply wrong. Relax, because you will see this almost routinely in your contested cases, and reversal is rarely the final result. No more eloquent or succinct advice in this regard can be given than the words of Colonel (Ret.) Ronald B. Stewart:

*Enjoy each issue presented,  
While it is alive and real.  
And when you decide, be contented,  
You've given your judgment and zeal.  
You've called them just as you've seen them,  
You've done it exactly your way.  
Though scholars may differ between them,  
You've made your best guess today.*

<sup>7</sup> Steingass, *A Judge's 10 Tips on Courtroom Success*, ABA Journal, Oct. 1985 at 70 [hereinafter cited as Steingass].

<sup>8</sup> Devitt, *Ten Commandments for the New Judge*, ABA Journal, Dec. 1961, at 1175.

<sup>9</sup> Steingass, *supra* note 7, at 71.

<sup>10</sup> ABA Standards, *supra* note 2, at 3.

<sup>11</sup> For example, after suppressing a confession on a *Mcomber* issue, resulting in eventual dismissal of the affected charge, I was told that the result had been expected by the government. The case had required several pre-referral actions by the convening authority and, rather than turn to that officer *again*, it was decided to "let the judge do it." Multiplicity issues, and questions regarding which of several lesser included offenses is actually supported by the evidence, invariably become the trial judge's prerogative.

<sup>12</sup> See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 802 [hereinafter cited as R.C.M.].



*And that is all that's demanded.  
No more and no less will do.  
So what, if reversed and remanded?  
Appellate Courts surely guess too.*

*And their guess may even be better.  
Clearly three heads are better than one.  
And with time to check every letter  
Their job should be better done.*

*But they're doomed to deal only with paper  
Away from the blood, sweat and tears  
Not knowing the robber and raper  
His victims, his family, his fears.<sup>13</sup>*

Under R.C.M. 908, the government can, within limits, seek appellate review of your rulings as well, and this should, in a very real sense, give you additional comfort in your concept of duty as a judge. In the event that someday you are publicly identified as a human being, and therefore capable of error, the trick is simply to note the lesson and forge on.

### **Why Do It?**

Several of my line officer friends view an assignment to the Trial Judiciary as having command-list importance for JAGC officers. The validity of this perception may conflict with the reality in our Corps, but in some respects it should not.

There are JAGC officers who feel reluctant to go "on the record" with their legal opinions as quickly and as often as trial judges must. The nature of the job requires you to frequently be put on the spot, and your responses are always preserved for subsequent scrutiny. It is simply not for everyone.

But for those of you who genuinely miss the fun and excitement of the courtroom, I heartedly recommend you go for it! An assignment to the Trial Judiciary will provide you one of the greatest opportunities for personal growth and professional satisfaction the JAG Corps has to offer. You become a central figure occupying a crucial role in our criminal justice system. This system, recognized by so many as having the potential to be the very best at what it was designed to do, will only be as good as those of us who are charged with its administration make it.

And in the eyes of many, the trial judge IS the system. You become identified as THE LAW by those whose perceptions are formed by what they see in your courtroom.

The rewards are obvious.

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<sup>13</sup> Stewart, *supra* note 1.

## Practical Aspects of Trying Cases Involving Classified Information

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The hope of trying a "Big Case" is the fuel that fires the furnace of ambition inside every trial lawyer. To the civilian plaintiff and defense bars, Big cases are usually defined in terms of monetary damages, and usually come after years of laboring in the vineyards of lesser cases. For the military criminal lawyer, they are defined in terms of the offense. More often than not, even a judge advocate on his or her first tour has a high probability of trying one. Among the murders, rapes, and other mayhem that we traditionally associate with big cases is a category which is unsurpassed in importance, complexity, and potential for hazard to the advocate—those cases involving classified information.

This is so for a fairly obvious reason. The government's interest in prosecution outweighs its interest in limiting access to the classified material. This usually means that the underlying offense is one involving big money, big issues, or big people. In any event, the lawyer who girds himself or herself with shield and sword to champion the cause of his or her client, faces difficulties and challenges in classified trials that are not encountered in his normal practice.

The purpose of this article is to provide practical guidance to advocates to assist them in handling cases involving classified information. It should not be used as a substitute for the regulations and policies that govern the protection of classified information.

Classified trials present two unique sets of problems, how to physically handle classified documents (evidence as well as work product), and how to deal with the government's assertion of the evidentiary privilege of Mil. R. Evid. 505.

### Handling Classified Material

It is not documents per se that are classified but the information they contain. Whenever classified information is relevant to a criminal prosecution, a number of classified documents will likely be produced. For example, documents of evidentiary value which existed at the time of the offense, Criminal Investigation Reports which refer to classified information, sworn statements by knowledgeable witnesses, transcripts of testimony taken during the Article 32 investigation, the record of trial, and, of major concern to defense counsel, interview notes, and other work product in the case file. Counsel are faced with four distinct problems when it comes to handling all of this material: classification, storage, transportation and disposition.

### Classification

The Department of the Army Information Security Program is set out in detail in Army Regulation 380-5. It is the

Army's implementation of Executive Order 12356 and Department of Defense Directive 5200.1-R.<sup>1</sup> It details classification designations, the principles, criteria and considerations of classification, classification authority, and the administration of information security. Counsel in cases that involve classified information need to be familiar with the regulation in its entirety, with special emphasis on storage, transportation, and disposal of classified documents. When it comes to the issue of determining what should be classified and what level of classification to employ, however, there are two rules defense counsel should follow: make the government do it; and assume all working papers are classified.

Making the government responsible for establishing what information is classified serves the interests of the accused in a number of ways. The defense counsel is ill-equipped to evaluate and classify items of information. Often, neither the defense counsel nor the accused, will know the classification guidelines established by the classification authority. Occasionally, even the compilation of information that, standing alone, would be unclassified, will result in classification. Consequently, the potential for inadvertent compromise of classified information is reduced if it is clearly understood that the government is responsible for deciding what is classified and what is not. There is simply no reason for a defense counsel to attempt to substitute his or her judgment for that of the officials who are proponents of the classification.<sup>2</sup>

Naturally, a defense counsel will generate documents that contain classified information. These will normally be of two kinds: pleadings and other papers that will ultimately be served on the government; and working papers and other documents that are subject to the attorney-client privilege. There is no reason not to deliver the first type of documents to the government for classification and marking. The government is going to eventually be served with the document, so giving it to them to classify does not compromise the client's interests.

Working papers are a different matter altogether. Counsel must preserve the confidences of a client and must strongly resist any attempts by the government to examine client case files and work product on the pretext of national security. On the other hand, Trial Defense Service counsel are Army officers and as such have a duty to preserve the

<sup>1</sup> Exec. Order No. 12356, National Security Information (1982); Dep't of Defense Directive No. 5200.1, DOD Information Security Program (August 1982); Dep't of Army, Reg. No. 380-5, Department of the Army Information Security Program Regulation (1 Aug. 1983), [hereafter cited as AR 380-5].

<sup>2</sup> Chapter 1, section 5, AR 380-5, establishes security classification designations.

nation's secrets and guard against compromise.<sup>3</sup> The clearest way out of this apparent dilemma is for counsel to treat their working papers as if they are classified, and store them accordingly.

Defense counsel should maintain two sets of records in a classified case. The first contains all documents which the counsel knows to be unclassified. This file will make up a large and significant part of the total file; after all, the government has an interest in keeping the number of classified documents to a minimum in order to reduce its own administrative burden. In all likelihood, the charge sheet, forwarding endorsements, convening orders, and portions of the investigative file will be unclassified. Counsel knows a document is unclassified if it either bears a marking to that effect or, in the absence of a marking, if it was a document generated by the government, such as the investigative file.

The second file contains all documents that counsel knows are classified and those which counsel does not know are unclassified. To state the issue another way, unless counsel knows a document is unclassified, it should be treated as if it were classified. A document should remain in this second file until counsel confirms that the information it contains is unclassified.

#### Storage

Having decided how to categorize the various documents generated in a classified trial, counsel must next determine how to go about storing them. One guiding principle should be followed: make the government do it.

Trial Defense Service field offices depend upon installation SJAs for administrative support.<sup>4</sup> In classified trials, defense counsel should insist that properly rated storage containers be made available.<sup>5</sup> Ideally, the defense should be given a container to which only the defense counsel has access, although, if the only classified documents are those which the government already has, then no harm is done by storing all such documents together.

If the case arises at another installation, counsel should utilize the secure storage capabilities of the SJA office at his or her home station. Recognize, however, that in all probability the SJA office will only have the capability of storing up to SECRET material. Any material that is TOP SECRET, sensitive compartmented information, or otherwise subject to special handling could not be secured in the SJA's safe.<sup>6</sup> Therefore, the defense counsel must look elsewhere on the installation for a storage facility. Post communications centers and installation security offices are logical alternatives. Installation Special Security Offices

(SSO) will have the capability of storing even the most sensitive items of information. In addition, highly classified material can even be transported through SSO channels.

#### Transportation

Once counsel has decided how to classify and store his or her documents, it is time to determine how to transport classified material to where he or she needs to use it. Two rules should be followed: make the government do it; and if you have to do it, follow the regulation and ask for advice. Chapter VIII of AR 380-5 sets out in detail the only approved methods for the transmission or transportation of classified information. Some material can be sent by registered mail, if properly packaged,<sup>7</sup> while other material may only be handcarried.<sup>8</sup> Failure to follow the restrictions in the regulation will result in a possible compromise<sup>9</sup> and an investigation.<sup>10</sup> Neither the lawyer nor the client needs that.

Installation security offices and SSOs are the experts in these matters. When in doubt, counsel should get an answer before doing something that may be wrong.

#### Disposition

Disposing of classified documents may be more important than any other aspect of handling classified material. Once again, defense counsel should remember to make the government do it!

Only approved methods may be employed to destroy classified material, and recordkeeping requirements exist for the destruction of certain types of material within the Department of the Army.<sup>11</sup> Trial Defense Service counsel should rely upon trained security personnel for technical assistance and guidance when destroying classified documents in their files. Nevertheless, an attorney must guard against inadvertent disclosure of confidential client materials. One way to meet these two requirements would be to permit security officials to inspect all documents already known to the government, if they so desire, and to seal all other records in burn bags for bulk destruction.

If the trial results in an acquittal, counsel would be well advised to destroy all working papers, notes, and other potentially classified documents as soon as practicable. If the trial results in a conviction, trial defense counsel should make immediate coordination with the Defense Appellate Division for the physical transfer of the file to the appellate counsel. The last thing defense counsel needs is for government officials to insist on examining the attorney's file for "security" reasons.

<sup>3</sup> See AR 380-5, para. 1-402.

<sup>4</sup> Dep't of Army, Reg. No. 27-10 Legal Services—Military Justice, chap. 6 (10 Dec. 1985).

<sup>5</sup> "The GSA establishes and publishes minimum standards, specifications, and supply schedules for containers, vaults, alarm systems, and associated security devices suitable for the storage and protection of classified information." AR 380-5, para. 5-101. See also AR 380-5, para. 5-101 a, b, c, d, and appendix F, for detailed guidance on storage requirements for classified information.

<sup>6</sup> "Sensitive Compartmented Information" is information that requires special controls for restricted handling within compartmented intelligence systems. AR 380-5 para. 1-327. A "Special Access Program" is any program imposing need-to-know or access controls beyond those normally provided for access to Confidential, Secret, or Top Secret Information. AR 380-5, para. 1-328.

<sup>7</sup> AR 380-5, para. 8-102c.

<sup>8</sup> AR 380-5, para. 8-101.

<sup>9</sup> A "compromise" is the disclosure of classified information to persons who are not authorized access thereto. AR 380-5, para. 1-307.

<sup>10</sup> AR 380-5, Chapter VI.

<sup>11</sup> AR 380-5, Chapter IX.

The proper thing for an advocate to do is get rid of classified information in an approved manner just as soon as the need for that information no longer exists.

### Handling the Government's Privilege

Military jurisprudence has historically recognized the necessity of guarding military and state secrets from improper disclosure during courts-martial.<sup>12</sup> The current statement of the government's privilege is Mil. R. Evid. 505. Rule 505 contains not only a statement of the substance of the privilege, but also sets out an elaborate procedural mechanism for its assertion, justification, and implementation. Substantively, it applies to any evidence that has been properly classified Confidential, Secret, or Top Secret,<sup>13</sup> and to restricted data as defined by the Atomic Energy Act.<sup>14</sup> Procedurally, Rule 505 requires the government to justify the claim of privilege, requires the defense to provide notice of its intent to introduce classified evidence, provides for judicial review of both parties' claims, and establishes alternatives to full disclosure.<sup>15</sup>

#### Justification of the Privilege

The prosecution is not allowed to merely assert that certain information is classified and therefore privileged. Instead, the government must be prepared to demonstrate, by affidavit, to the satisfaction of the military judge, that the classification criteria of Executive Order 12,356, as implemented by DOD Directive 5200.1-R and AR 380-5, are applicable to the information sought to be protected.<sup>16</sup>

The rule is silent as to the form of the government's affidavit, but it does require that the affiant demonstrate that "disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation."<sup>17</sup> Rule 505(c) provides that the holder of the privilege is the "head of the executive or military department or government agency concerned."<sup>18</sup> The holder of the privilege may authorize a witness or trial counsel to assert the privilege and such authority is presumed in the absence of contrary evidence.<sup>19</sup>

Who then should act as the affiant to justify the assertion of the classified information privilege? Rule 505 does not

say, and no rule of evidence specifically addresses the admissibility of affidavits. The only other mention of affidavits in the Military Rules of Evidence is Rule 405(c), which permits the use of affidavits to prove the character of an accused if such evidence would "otherwise be admissible under these rules." Rule 602 requires that witnesses have personal knowledge of the matters about which they testify. Consequently, an affiant must have personal knowledge of the matters contained in the affidavit in order to be admissible under Rule 405. Clearly, no lesser standard would be applied to affidavits offered in support of a claim of privilege. Therefore, the affiant must be someone with personal knowledge that disclosure of the protected information reasonably could be expected to cause damage to the national security in the degree required to warrant classification.<sup>20</sup> So the proper affiant, then, would be the government official who acted as the original classification authority<sup>21</sup> over the information. Alternatively, when more than one classification authority is involved, a senior official in the agency could provide such evidence on behalf of the agency as a whole. Within the Department of the Army, the Vice Chief of Staff, the Assistant Chief of Staff for Intelligence, or the Secretary of the Army General Staff could certainly fulfill this function.

#### Notice by the Defense

Rule 505(h)(1) provides that "if the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention."<sup>22</sup> The defense is under a continuing duty to provide such notice as appropriate throughout the proceedings,<sup>23</sup> and may not disclose classified information until the government has been afforded an opportunity to assert its privilege and seek alternatives to full disclosure or other protective measures.<sup>24</sup> Failure to provide the required notice may result in such information being suppressed by the military judge who may also prohibit the examination of witnesses with respect to such information.<sup>25</sup>

There can be no doubt that the notice requirements of Rule 505 apply to the defense case-in-chief. What is less clear, however, is the applicability of the notice requirement to cross-examination of government witnesses. A close

<sup>12</sup> See Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 151b; *United States v. Gagnon*, 21 C.M.A. 158, 44 C.M.R. 212 (1972); *United States v. Reyes*, 30 C.M.R. 776 (A.F.C.M.R. 1960); *United States v. Dobs*, 21 C.M.R. 451 (A.C.M.R. 1956); *United States v. Craig*, 22 C.M.R. 466 (A.C.M.R. 1956). See also *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>13</sup> AR 380-5, paras. 1-501 to 1-503.

<sup>14</sup> Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 774, codified as amended at 42 U.S.C. §§ 2011-2296 (1982). A definition of restricted data is provided at 42 U.S.C. § 2014(y).

<sup>15</sup> For an analysis of all privileges contained in Section V of the Military Rules of Evidence, see Woodruff, *Privileges Under the Military Rules of Evidence*, 92 Mil. L. Rev. 5 (1981).

<sup>16</sup> Mil. R. Evid. 505(i)(3).

<sup>17</sup> *Id.*

<sup>18</sup> Mil. R. Evid. 505(c).

<sup>19</sup> *Id.*

<sup>20</sup> Mil. R. Evid. 505(i)(3).

<sup>21</sup> AR 380-5, para. 1-302.

<sup>22</sup> Mil. R. Evid. 505(h)(1).

<sup>23</sup> Mil. R. Evid. 505(h)(2).

<sup>24</sup> Mil. R. Evid. 505(h)(4).

<sup>25</sup> Mil. R. Evid. 505(h)(5).

reading of the military law of evidence and an examination of the policy underlying the notice requirement lead to the conclusion that the government is not entitled to disclosure of intended cross-examination under the rubric of Rule 505(h).

Rule 611(b) states, "Cross-examination should be limited to the subject matter of the direct examination and matters affecting credibility of the witness." Whenever a prosecutor passes a witness to the defense, he or she has set the agenda for the cross-examination. The proponent of any witness owes it to his or her client to anticipate the direction of cross-examination. Indeed, a party should be charged with constructive knowledge of everything its own witnesses know relevant to the matters adduced on direct examination.

The intent of the drafters of Rule 505(h) was to merely provide the government an opportunity to determine what position to take concerning the possible disclosure of specified information.<sup>26</sup> The government has ample opportunity to determine its position prior to putting its own witnesses on the stand. A prosecutor who has competently prepared his or her case can anticipate those areas of cross-examination where he or she must assert the privilege and either seek to preclude the testimony or implement measures to guard against unauthorized disclosure. Requiring the defense to disclose its cross-examination strategy under the guise of Rule 505(h) would in no way further the drafters' intent, or promote a fair and just adjudication.

It behooves all parties to the trial to establish the measures that will be employed during the course of the trial to prevent unauthorized disclosure; nevertheless, trial counsel can always object to a classified line of cross-examination and move for an *in camera* proceeding to determine the applicability of the privilege and fashion a remedy.<sup>27</sup> It does not promote the ends of justice to require the defense to tell the prosecutor what the government's own witnesses know.

If the defense departs from the scope of direct examination and adopts a government witness as its own, then the defense is required to proceed as if on direct examination.<sup>28</sup> Leading questions are prohibited,<sup>29</sup> and the notice requirement of Rule 505(h) applies.

The central figure in the resolution of issues involving the Rule 505 privilege is the military judge. The judge must determine whether the government has met its burden of demonstrating the national security nature of the disputed information.<sup>30</sup> He or she must determine whether the information is relevant and necessary to an element of the offense or a legally cognizable defense.<sup>31</sup> Further, the judge must fashion alternatives to full disclosure<sup>32</sup> or impose sanctions against the government for failing to make full disclosure<sup>33</sup> and implement measures designed to guard against unauthorized disclosure.<sup>34</sup>

Military practice prior to the adoption of the Military Rules of Evidence did not require the military judge to rule on the adequacy of the government's claim of privilege.<sup>35</sup> If information was classified by executive authority, the military judge was not free to look beyond that determination. Rule 505, however, expressly requires the military judge to determine whether information over which the prosecution asserts its privilege is properly classified.

Should the military judge determine that the information at issue was not properly classified, he or she cannot order the information to be declassified. The judge could, however, determine that full disclosure of the information was required. If the judge made such a determination and the government refused to disclose the information, the judge could order a variety of sanctions up to and including dismissal of the charges and specifications.<sup>36</sup>

Likewise, the military judge is required to evaluate the claims by the defense that discovery and disclosure of protected information is required. The standard applicable to such determinations is whether the information is relevant and necessary to an element of the offense or a legally cognizable defense.<sup>37</sup> The drafters intend for this standard to be liberally construed and to specifically include matters affecting the credibility of witnesses such as prior inconsistent statements by a witness.<sup>38</sup>

In summary, Rule 505 establishes judicial review of privilege claims and demands for disclosure. It gives the military judge the authority: to determine that the information is irrelevant to an element of the offense or a legally cognizable defense and exclude the evidence; to determine that the information is relevant but otherwise inadmissible; to conclude that the evidence is relevant, admissible, and

<sup>26</sup> The official analysis following Rule 505(h) states in relevant part: (h) Notice of the accused's intention to disclose classified information. . . . The intent of the provision is to prevent the disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information.

<sup>27</sup> Mil. R. Evid. 505(j)(4).

<sup>28</sup> Mil. R. Evid. 611(b).

<sup>29</sup> Mil. R. Evid. 611(c).

<sup>30</sup> 230. Mil. R. Evid. 505(i)(4)(A), (C).

<sup>31</sup> Mil. R. Evid. 505(i)(4)(B).

<sup>32</sup> Mil. R. Evid. 505(i)(4)(D).

<sup>33</sup> Mil. R. Evid. 505(i)(4)(E).

<sup>34</sup> See Mil. R. Evid. 505(g)(1) and (2) and 505(j)(2) and (5).

<sup>35</sup> *United States v. Gagnon*, 21 C.M.A. 158, 44 C.M.R. 212 (1972).

<sup>36</sup> Mil. R. Evid. 505(i)(4).

<sup>37</sup> Mil. R. Evid. 505(i)(4)(B).

<sup>38</sup> Mil. R. Evid. 505(g)(3) analysis.

properly classified (therefore privileged), and fashion alternatives to full disclosure, if necessary; or to determine that the evidence is not properly classified (therefore not entitled to the privilege) and order the government to produce or abate.

#### *Alternatives to Full Disclosure and Other Protective Measures*

Having determined that certain information is privileged but relevant and necessary to the defense, the court must issue orders to regulate disclosure to those persons authorized and prevent disclosure to unauthorized persons. Rule 505(g)(1) allows the military judge to issue a protective order to guard against possible compromise. Many of the suggested provisions of such protective orders are restatements of the requirements of AR 380-5. Consequently, a meaningful protective order would be one that required the government to provide the physical security measures necessary to accomplish the requirements of the regulation.

Rules 505(g)(2) and 505(i)(4)(D) permit the military judge to authorize: the excision of irrelevant classified information from documents made otherwise available to the defense; the substitution of information summaries in lieu of the full text of classified documents; and the admission of relevant facts in lieu of disclosure of classified information to prove the relevant facts. As previously discussed, the military judge may also impose sanctions against the prosecution if the government fails to make full disclosure if such disclosure is deemed appropriate.

Potentially the most controversial power given the military judge by Rule 505 is one which pits the government's interest in protecting classified information against the accused's and society's constitutional right to a public trial. Rule 505(i)(4) and (j)(5) permit the military judge to exclude the public during portions of the trial that disclose classified information.

Rule 505(i)(4) permits closed door sessions to resolve interlocutory issues involving classified information. Rule 505(j)(5) permits proceedings on the merits to be closed to the public. It is a long-recognized aspect of Anglo-American jurisprudence that the trials of criminal cases are presumptively open to the public.<sup>39</sup> The public's right to an open court may be overcome only when "the defendant's superior right to a fair trial or . . . some other overriding consideration requires closure."<sup>40</sup> Only when disclosure of classified information in a public trial would result in palpable and irreparable damage to national security can the prosecution justify excluding the public. Hence, it is vitally important for government officials to carefully weigh the efficacy of continued classification of information once it becomes relevant to a criminal proceeding. And it is incumbent upon military judges to require the prosecution to demonstrate with specificity that applicable classification criteria are met whenever ruling on justification of the privilege. Closed proceedings should be the exception rather than the rule, even in trials involving classified information.

#### **Conclusion**

Defense counsel assigned to cases that involve classified information must be particularly cautious so that their ability to zealously represent their clients is not impaired by the administrative requirements involved in protecting classified material or the procedural morass of the government's privilege. Counsel should make the government responsible for the physical security of classified documents and information, but diligently comply with the requirements of the information security regulation. Counsel should insist that the government justify its privilege through competent evidence that specifically identifies the national security interests involved. Counsel must scrupulously comply with the requirement to provide notice of the defense's intent to introduce classified information during its case-in-chief, but resist any attempt by the prosecution to require disclosure of cross-examination. Finally, counsel must be prepared to demonstrate the relevance and necessity of classified information so that the military judge can grant defense motions for discovery and deny government attempts to preclude the introduction of defense evidence.

It is an old saying that the quickest way to ruin a military career is to mishandle money or classified documents. Military defense counsel do well to remember that most old sayings are true.

<sup>39</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>40</sup> *Id.* at 564.

# Examining the "Good Faith" Exception to the Exclusionary Rule and Its Application to Commanders' Search Authorizations

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## Introduction

On February 19, 1986, the President signed Executive Order 12,550<sup>1</sup> which amended several provisions of the Manual for Courts-Martial, 1984.<sup>2</sup> Among the various amendments which took effect on March 1, 1986 was the long-expected creation of a military "good faith" exception to the exclusionary rule.<sup>3</sup> Over a year and a half had passed since the United States Supreme Court held in *United States v. Leon* that the fourth amendment's exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by police officers who were acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate but which was subsequently found to be invalid.<sup>4</sup> Subsequent to the Court's decision, the application of *Leon* to the military became the subject of scholarly concern, as well as appellate litigation.<sup>5</sup>

The incorporation of a "good faith" exception into Military Rule of Evidence 311 has neither settled the debate

that has ensnared the military justice system regarding the propriety of applying *United States v. Leon*, nor has it precluded defense counsel from litigating *Leon's* applicability at the trial level. First, the Court of Military Appeals has yet to address definitively the relationship between Section III of the Military Rules of Evidence<sup>6</sup> and the President's rule-making authority under Article 36(a) of the Uniform Code of Military Justice.<sup>7</sup> Article 36(a) empowers the President to prescribe rules of procedure for cases before courts-martial, and pursuant to that authority, the President has promulgated the current Manual for Courts-Martial.<sup>8</sup> Any procedural rules created pursuant to Article 36(a) must comply with the Constitution or other laws.<sup>9</sup> Therefore, any rules of substantive law contained in the Manual which are not more protective of an accused must rest upon a foundation independent of Article 36(a) since they would

<sup>1</sup> Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (1986) [hereinafter cited as Exec. Order No. 12,550].

<sup>2</sup> Manual for Courts-Martial, United States, 1984.

<sup>3</sup> Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 311(b)(3) (as amended by Exec. Order No. 12,550, *supra* note 1) [hereinafter cited as Mil. R. Evid. 311(b)(3)]:

(3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) The search or seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant issued by competent civilian authority;

(B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

<sup>4</sup> *United States v. Leon*, 104 S. Ct. 3405, 3419-20 (1984); U.S. Const. amend. IV.

<sup>5</sup> *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985) (contained dicta concluding that good faith exception is applicable to military jurisprudence); *United States v. Queen*, 20 M.J. 817, 820 (N.M.C.M.R. 1985) (held seized evidence was admissible by applying good faith exception to a commander's search authorization); Gilligan & Kaczynski, *Of Good Faith and Good Law: United States v. Leon and the Military Justice System*, *The Army Lawyer*, Nov. 1984, at 1, 3 (The purpose of which was to "examine the underpinnings of the debate underlying the 'good faith' exception to the exclusionary rule, discuss the recent Supreme Court decision, and analyze its potential impact upon the applicability to the military justice system.") [hereinafter cited as Gilligan & Kaczynski]; Memorandum, JALS-TCA, 1 Sept. 1985, subject: Memorandum for Chiefs of Military Justice and Trial Counsel, at 1-2 (discussing *Applying 'Good Faith' to the Military*).

<sup>6</sup> Mil. R. Evid. sec. III.

<sup>7</sup> Uniform Code of Military Justice, art. 36(a), 10 U.S.C. sec. 836(a) (1982) [hereinafter cited as UCMJ]. The Navy-Marine Court of Military Review has provided some guidance with regard to section III of the Military Rules of Evidence, sometimes referred to as the "constitutional rules," in *United States v. Postle*:

[The] "constitutional rules" of the Military Rules of Evidence [Mil. R. Evid. 301 and 304-321] were intended to keep pace with, and apply the burgeoning body of interpretative constitutional law—including what it does, or does not, require—not to cast in legal or evidentiary concrete the Constitution as it was known in 1980.

20 M.J. at 643.

Nor have the decisions emanating from the Court of Military Appeals thus far shown that such a flexible interpretation by the Navy-Marine Court of Military Review to be in error. See, e.g., *United States v. Tipton*, 16 M.J. 283 (C.M.A. 1983) (applied the "totality of the circumstances" approach of *Illinois v. Gates*, 463 U.S. 213 (1983) for military probable cause determinations in spite of the literal language of Mil. R. Evid. 315(f)(2) which still retained the two-prong probable cause test of *Aquilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 392 U.S. 410 (1969)); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (upheld compulsory urinalysis testing on the basis of the fourth amendment's standard of reasonableness rather than upon an application of Mil. R. Evid. sec. III).

The Court of Military Appeals was represented on the Joint Service Committee on Military Justice, and the Committee's Evidence Working Group, which drafted the Military Rules of Evidence as implemented pursuant to Executive Order 12,198. Lederer, *The Military Rules of Evidence*, 12 *The Advocate* 114 n.4 [hereinafter cited as Lederer]; Exec. Order No. 12,198, 45 Fed. Reg. 16, 932 (1980). Although the Court of Military Appeals participated in the review process of the 1980 Military Rules of Evidence, the court chose not to review section III of the Rules. Lederer, *supra* at 114 n.5.

<sup>8</sup> Exec. Order No. 12,743.

<sup>9</sup> *United States v. Kelson*, 3 M.J. 139, 141 (C.M.A. 1977); *United States v. Worley*, 19 C.M.A. 444, 42 C.M.R. 46 (1970); *United States v. Merritt*, 1 C.M.A. 56, 1 C.M.R. 56 (1951). It is the author's opinion that although Military Rule of Evidence 311(b)(3) may correctly mirror the Constitution as interpreted by *Leon*, it cannot be incorporated into the military justice system so that commanders, unlike magistrates and judges, are insulated from their mistakes when issuing search authorizations.

not fall within the ambit of the President's rule-making authority.<sup>10</sup> Although Rule 311(b)(3) is patterned after the constitutional rule enunciated in *United States v. Leon*, applying the "good faith" exception to search authorizations issued by commanders represents an unconstitutional application of a constitutional rule. By not limiting Rule 311(b)(3) to warrants or authorizations emanating from judicial officers so as to be consistent with *Leon*, the President has promulgated a rule that is in conflict with the Constitution when applied to a commander's warrantless search authorization.<sup>11</sup>

Second, the drafters of Rule 311(b)(3) have recognized that a search authorization issued by a commander, as opposed to a military judge or magistrate, should be subject to close scrutiny when applying a good faith exception in a given case.<sup>12</sup> The drafters were so concerned with the commander's neutrality and detachment when issuing a search authorization that several considerations were listed upon which to focus the analysis should Rule 311(b)(3) be litigated at a court-martial.<sup>13</sup>

Now that Military Rule of Evidence 311 has been expressly amended in an attempt to incorporate the Supreme Court's decision in *Leon* into military criminal practice, counsel must closely examine the military commander's search authorization and its evolution within the military justice system to determine whether the purpose of the exclusionary rule can still be maintained.

### Leon and the "Good Faith" Exception to the Exclusionary Rule

The exclusionary rule of prohibiting the admission into evidence of any items which were illegally seized from the accused was first formulated as a rule for the federal courts in *United States v. Weeks*<sup>14</sup> and was later extended to state courts in *Mapp v. Ohio*.<sup>15</sup> Regardless of the exclusionary rule's historical antecedents and purpose, the Supreme Court has now made it clear that the exclusion of illegally seized evidence is a judicially created remedy designed to deter police misconduct.<sup>16</sup> With this premise in mind, the decision to impose the exclusionary sanction in a particular case requires "weighing the costs and benefits of preventing the use . . . of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective."<sup>17</sup> Recognizing that substantial social costs were exacted by using the exclusionary rule to vindicate fourth amendment rights, the Court resolved the balance in favor of admissibility, "[p]articularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."<sup>18</sup>

The strong preference for judicially issued warrants<sup>19</sup> was juxtaposed with the purpose of the exclusionary rule in

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<sup>10</sup> The President is not prohibited from prescribing in the Manual for Courts-Martial "more stringent standards than are enforced in federal courts." J. Munster & M. Larkin, *Military Evidence*, § 9.1(a) (1959) [hereinafter cited as Munster & Larkin]; Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95, 113 (1985). However, if the Military Rules of Evidence "unambiguously [set] forth a more protective rule than is constitutionally required, that rule will prevail. Contrariwise, if the Military Rules of Evidence set forth a rule that is unconstitutional, the constitutional rule will prevail." Gilligan & Kaczynski, *supra* note 5, at 17 (citations omitted). The good faith exception to the exclusionary rule is clearly constitutional within a civilian context, but applying it to a commander's search authorization is an unconstitutional application of a constitutional rule.

Furthermore, a historical review of the various renditions of the Manual for Courts-Martial reveals that the references therein to the exclusionary rule were nothing more than a statement of existing rules of law which were well established by federal decisions at the time that the pertinent provision was drafted. See Munster & Larkin, *supra* at § 9.1(a) (citing Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, at 240-41). See, e.g., *Murray v. Haldeman*, 16 M.J. at 74; *Tipton*, 16 M.J. at 283.

Section III [Mil. R. Evid.] represents a balance between complete codification [of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification]—the approach best suited for situations principally involving laymen—and flexibility, which is generally permitted only when dealing with matters primarily within the province of lawyers. Section III was expressly intended to serve the needs of the numerous laymen, commanders, non-lawyer legal officers, and law enforcement personnel who play important roles in the administration of military justice.

Lederer, *supra* note 7, at 115. Major Frederic Lederer was the Army Member, Evidence Working Group of the Joint Service Committee on Military Justice and primary author of the Analysis of the 1980 Amendments to the Manual for Courts-Martial (Military Rules of Evidence). Manual for Courts-Martial, United States, 1969 (Rev. ed.), Mil. R. Evid. analysis (C3, 1 Sept. 1980), reprinted in Manual for Courts-Martial, United States, 1984, App. 22. Consequently, the military's exclusionary rule was designed to pattern the fourth amendment's exclusionary rule, and section III of the Military Rules of Evidence is nothing more than codification of constitutional decisions.

<sup>11</sup> See Gilligan & Kaczynski, *supra* note 5, at 17 for a discussion of the limitations on the President's rule making authority as embodied in the Mil. R. Evid.

<sup>12</sup> Mil. R. Evid. 311(b)(3) analysis (as amended by Exec. Order No. 12,550).

<sup>13</sup>

In a particular case, evidence that the commander received the advice of a judge advocate prior to authorizing the search or seizure may be an important consideration. Other considerations may include those enumerated in *Ezell* [*United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)] and: the level of command of the authorizing commander; whether the commander had training in the rules relating to search and seizure; whether the rule governing the search or seizure being litigated was clear; whether the evidence supporting the authorization was given under oath; whether the authorization was reduced to writing; and whether the defect in the authorization was one of form or substance.

Mil. R. Evid. 311(b)(3) analysis.

<sup>14</sup> 232 U.S. 383 (1914). See *Boyd v. United States*, 116 U.S. 616 (1886) (applied the exclusionary rule in the context of the fifth amendment and the admissibility of compelled testimony). The exclusionary rule has been applied in courts-martial since at least 1922. See Munster & Larkin *supra* at note 10, 9.1a n.2.

<sup>15</sup> 367 U.S. 643 (1961).

<sup>16</sup> 104 S. Ct. at 3418; Gilligan & Kaczynski, *supra* note 5, at 6. See *United States v. Calandra*, 414 U.S. 338 (1974) (cited in 104 S. Ct. at 3412) (The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than as personal constitutional rights of the person aggrieved."). Cf. *Mapp v. Ohio*, 367 U.S. at 657 ("Our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense.").

<sup>17</sup> 104 S. Ct. at 3412-13.

<sup>18</sup> *Id.* at 3413 (citing *Stone v. Powell*, 428 U.S. 465, 490 (1976)).

<sup>19</sup> *Id.* at 3417 (citing *United States v. Ventresca*, 380 U.S. 102, 106 (1965)); accord *United States v. Stuckey*, 10 M.J. 347, 365 (C.M.A. 1981) (preference for search authorizations issued by military judges).



detering police misconduct rather than judicial misconduct. In *Leon* the Supreme Court concluded that "marginal or nonexistent benefits produced by suppressing evidence obtained in objective reasonable reliance on a subsequently invalidated warrant cannot justify the substantial cost of exclusion."<sup>20</sup>

The role played by judges and magistrates in issuing search warrants played an integral part in the Court's analysis of the purpose of the exclusionary rule. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them."<sup>21</sup> Although the deterrence of judicial misconduct is not the object of the exclusionary sanction, their conduct is not immune from scrutiny. First, deference to a magistrate will not preclude an inquiry into affidavits prepared by law enforcement officers who knew or should have known that the information it contained was false.<sup>22</sup> Second, the judge must also continue to perform his neutral and detached role and "not serve merely as a rubber stamp for the police."<sup>23</sup> Failure to manifest the requisite neutrality and detachment required of a judicial officer would deprive the magistrate or judge of his authority to issue a warrant.<sup>24</sup> "Third, reviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'"<sup>25</sup> The issuance of a warrant by a judicial officer cannot be the mere ratification of the bare conclusions of law enforcement officers.<sup>26</sup>

In considering the application of the "good faith" exception in a given case, the analysis is not limited to an inquiry into the judicial officer's conduct but also focuses on factors upon which to evaluate the good faith conduct of the law enforcement officer. As the exclusionary rule is designed to deter police misconduct, it has no deterrent effect when the police officer has acted in an objectively reasonable belief that his or her conduct complied with the fourth amendment.<sup>27</sup> Therefore, "the officer's reliance on the magistrate's probable cause determination and the technical

sufficiency of the warrant must be objectively reasonable."<sup>28</sup> The Court then set forth four exceptions to the good faith exception. First, law enforcement officers will not be considered to have acted in good faith when they have misled the magistrate or judge by submitting an affidavit that they knew to be false or to have been prepared with a reckless disregard for the truth.<sup>29</sup> Second, it is not reasonable for a police officer to rely on a warrant issued by a magistrate who abandons his judicial role.<sup>30</sup> Third, "an officer would not manifest objective good faith in relying on a warrant 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"<sup>31</sup> Fourth, a warrant may be facially deficient in failing to describe with particularity the items to be seized or the place to be searched so that the executing officer could not reasonably presume the warrant's validity.<sup>32</sup>

### *Leon* and the Military Justice System

The Court of Military Appeals has consistently held that the fourth amendment's prohibitions against unreasonable searches apply with full force to members of the armed forces unless expressly or by necessary implication they are made inapplicable.<sup>33</sup> The burden, however, is upon the government to show that military conditions require the use of a different rule than that which is prevailing in the civilian community.<sup>34</sup> This balancing of military interests has evolved into the concept of "military necessity" and has served as the basis for considering the unique conditions within the military environment.<sup>35</sup>

Inherent in the rationale justifying the need for a special and exclusive system of military justice is the premise that military rules and regulations may exist which would be unacceptable in a civilian setting.<sup>36</sup> Any adoption of a civilian rule of law by the military must first consider the uniqueness of the military justice system which could, therefore, result in the rejection of the civilian rule. Whether or not the rule under examination is more favorable to the accused is immaterial to the analysis. Consequently, the special nature of the military system cuts both ways, and looking to see who might be the rule's ultimate beneficiary,

<sup>20</sup> 104 S. Ct. at 3421.

<sup>21</sup> *Id.* at 3418.

<sup>22</sup> *Id.* at 3417 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

<sup>23</sup> *Id.* at 3417 (quoting *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)).

<sup>24</sup> *Id.* at 3417 (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979)).

<sup>25</sup> *Id.* at 3417 (quoting *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983)).

<sup>26</sup> *Id.* at 3417 (quoting 103 S. Ct. at 2332).

<sup>27</sup> *Id.* at 3419.

<sup>28</sup> *Id.* at 3421.

<sup>29</sup> *Id.* (citing 438 U.S. at 154).

<sup>30</sup> *Id.* at 3422 (citing 442 U.S. at 319).

<sup>31</sup> *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

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

<sup>33</sup> See, e.g., *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1079) (citing *Burns v. Wilson*, 346 U.S. 137 (1953)); *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960).

<sup>34</sup> *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (citing *Kaufman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969)); *United States v. McFarlin*, 19 M.J. 790, 792 (A.C.M.R. 1985). For a discussion of the doctrine of military necessity, see *Levine, The Doctrine of Military Necessity in the Federal Courts*, 89 Mil. L. Rev. 3 (1980); *Imwinkelreid & Zillman, Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 Notre Dame Law. 396 (1976).

<sup>35</sup> *United States v. Middleton*, 10 M.J. 127 (C.M.A. 1981). See *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969).

<sup>36</sup> See *Chappell v. Wallace*, 103 S. Ct. 2362, 2365 (1983); *Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Burns v. Wilson*, 346 U.S. at 140; *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); *In re Grimley*, 137 U.S. 147, 153 (1890).

the government or the accused, short-circuits the analysis. It is upon this premise that *United States v. Leon* will be analyzed regarding its extension into the military justice system, a system long recognized by the United States Supreme Court to possess unique conditions which may not exist in civilian life.<sup>37</sup>

#### *A Search Warrant Versus a Commander's Search Authorization*

The Court of Military Appeals has gone to great lengths to point out that a commander's search authorization is not the military equivalent of a civilian search warrant.<sup>38</sup> "A military commander has responsibilities for investigation and for law enforcement that a magistrate does not have. Also, he has responsibilities for the welfare and combat readiness of the personnel under his command."<sup>39</sup> The commander's authority to search personnel and property within the command rests upon his or her inherent authority as a commander and not upon any legal fiction that this function is performed as a judicial officer.<sup>40</sup> Consistent with this interpretation of the commander's role in the issuance of search authorizations was the Court of Military Appeals rejection of any requirement that search authorizations be in writing or supported by oath or affirmation.<sup>41</sup> The commander's power to authorize searches of persons and property within the command exists "not because the commander could by legalistic legerdemain be transmuted into a magistrate; but . . . because, in light of the responsibilities imposed upon the commander, it was reasonable to give him that power."<sup>42</sup> Consequently, Chief Judge Everett concluded in *United States v. Stuckey* that "it seems perfectly clear that a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict sense."<sup>43</sup> "Accordingly, a commander's authorization of a search has never been equated with the judicial-type procedure which comes within the contemplation of the warrant clause of the Fourth Amendment."<sup>44</sup>

The Supreme Court requires a magistrate to have "no connection with any law enforcement activity or authority which would distort the independent judgement the Fourth Amendment requires."<sup>45</sup> By delineating the limitations on the "good faith" exception, the Supreme Court has provided more guidance as to what is meant by the term magistrate:

Judges and magistrates are not adjuncts to the law enforcement team; as neutral and detached officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officer's professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.<sup>46</sup>

Because a commander is neither a magistrate nor a judicial officer, the neutrality and detachment required of a commander when authorizing searches has been evaluated by the Court of Military Appeals in terms of the fourth amendment's requirement that searches be reasonable rather than the requirement that warrants be in writing, issued upon probable cause, and based upon an oath or affirmation.<sup>47</sup> Although a military commander is not a judicial officer, he or she is not per se disqualified from issuing search authorizations under the fourth amendment because

<sup>37</sup> In *United States v. Postle*, the Navy-Marine Court of Military Review, by way of dicta, concluded that the good faith exception formulated in *United States v. Leon* was good law for the military and that the issue of the commander's neutrality and detachment was to be determined by the facts in each case. 20 M.J. at 643.

<sup>38</sup> *United States v. Stuckey*, 10 M.J. 347, 359, (C.M.A. 1981). Cf. *Ezell*, 6 M.J. at 315. This distinction between a search warrant and a search authorization is carried over into Mil. R. Evid. 315(b).

<sup>39</sup> 10 M.J. at 359. See, e.g., *United States v. Reeves*, 21 M.J. 768, 769 (A.C.M.R. 1986) ("[I]t is a commander, and not the provost marshal or criminal investigation division chief, who is primarily responsible for discipline, law, and order within his command. Arguments to the contrary do not impress this court.").

<sup>40</sup> 10 M.J. at 361. See *United States v. Grisby*, 335 F.2d 652, 654 (4th Cir. 1964); *United States v. Ross*, 13 C.M.A. 432, 32 C.M.R. 432 (1963); *United States v. Florence*, 1 C.M.A. 620, 5 C.M.R. 48 (1952); *United States v. Doyle*, 1 C.M.A. 545, 4 C.M.R. 137 (1952).

<sup>41</sup> 10 M.J. at 360, 361. See, e.g., Eisenberg, *Oaths are but Words, and Words but Wind*, *The Army Lawyer*, May 1981, at 7.

<sup>42</sup> 10 M.J. at 359. But see *United States v. Fimmano*, 8 M.J. 197 (C.M.A. 1979), reconsideration not granted by equally divided vote, 9 M.J. 256 (C.M.A. 1980).

<sup>43</sup> 10 M.J. at 361. Cf. *United States v. Cordero*, 11 M.J. 210 (C.M.A. 1981); *Ezell*, 6 M.J. at 315 ("[I]n the military, as in the civilian communities, the official empowered by law to issue search warrants under the Fourth Amendment must be neutral and detached and must perform his duties with a 'judicial' rather than a 'police' attitude.").

<sup>44</sup> 10 M.J. at 360. But see *Ezell*, 6 M.J. at 315.

<sup>45</sup> *Shadwick v. City of Tampa*, 407 U.S. 345, 350-51 (1972). For an analysis of the terms "magistrate" and "judicial officer" within the context of issuing warrants, see *Ezell*, 6 M.J. at 311-12.

<sup>46</sup> 104 S. Ct. at 3419 [emphasis added].

<sup>47</sup> 10 M.J. at 361 ("Impartiality and objectivity are hallmarks of rational action; demanding them of the commander conforms to the Fourth Amendment's basic requirement of reasonableness."). See Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. Ill. L. F. 763, 765 (1980) for a discussion of the tension generated in delineating the boundaries between the fourth amendment's reasonableness clause and its warrant clause. See generally C. Whitebread, *Criminal Procedure* § 4.03 (1980); Comment, *An Emerging New Standard for Warrantless Searches and Seizures Based on Terry v. Ohio*, 35 Merc. L. Rev. 647, 649-650 (1984).

of the status and responsibilities as a commander.<sup>48</sup> Yet, the commander's responsibilities to enforce the law,<sup>49</sup> authorize prosecutions for offenses,<sup>50</sup> maintain discipline,<sup>51</sup> and investigate crime<sup>52</sup> provide a sufficient basis to conclude that a military commander has a stake in the outcome of a particular prosecution so as to come within the scope of deterrence envisioned by the exclusionary rule.

Indeed, the differences between the Court of Military Appeals' and the Supreme Court's interpretations of "neutral and detached" under the two prongs of the fourth amendment would have produced a different result in *United States v. Ezell*. For example, in spite of the commander's tacit admission in *Ezell* that he preferred to see the accused out of his unit, the Court of Military Appeals held that the commander's attitude toward the soldier did not constitute a personal bias in the ultimate prosecution of the case so as to disqualify him from issuing the search authorization.<sup>53</sup> "[I]deally, a judge is impartial as to whether a piece of evidence is admitted or a particular defendant convicted. Hence, . . . suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police."<sup>54</sup> In light of *Leon*, such a personal stake in the outcome of a court-martial should be sufficient to bring the commander's action within the pale of proscribed conduct for a true magistrate and qualify as conduct which should be deterred by the exclusionary rule.<sup>55</sup>

#### *The Exclusionary Rule An Appropriate Method for Deterring the Commander's Misconduct*

Three reasons were given by the Supreme Court in *Leon* to explain its conclusion that the suppression of evidence acquired in "good faith" was an inappropriate method for deterring judicial misconduct.<sup>56</sup> First, the exclusionary rule was designed to curb police misconduct rather than to punish the errors of judges and magistrates. Second, no

evidence existed to support the conclusion that judges and magistrates were inclined to violate the fourth amendment or that they are in need of an exclusionary sanction. "Third, and most important, . . . [the Court] discern[ed] no need or basis, and . . . [were] offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."<sup>57</sup>

Not one of the reasons behind the Court's rationale for declining to apply the exclusionary sanction against judicial errors in a good faith scenario is relevant to a commander's search authorization. First, the commander's stake in the outcome of a particular criminal prosecution is sufficient to bring him or her within the proscription of the exclusionary rule as it applies to law enforcement officials. The commander has been referred to as the "chief law enforcement official" within the command.<sup>58</sup> Although responsibility for discipline is a necessary adjunct of command and serves as partial justification for creating the commander's power to search in the first place, it also provides the commander with a sufficient stake in the ultimate prosecution of a case to disqualify him or her as a "true" magistrate.

Second, a commander does not have the equivalent judicial or legal training of a judge or magistrate to support any conclusion that he or she would be less inclined to subvert the fourth amendment. The only constraint on a commander's search authorization is that he or she be neutral and detached within reason and base the search authorization upon probable cause.<sup>59</sup> A search authorization need not be in writing or based upon an oath or affirmation.<sup>60</sup> In light of *United States v. Stuckey*, the commander's neutrality and detachment, when compared to that of a judicial officer, is already questioned. To allow the commander such wide latitude in issuing search authorizations and then to let him reap the benefits of his errors by applying the "good faith" exception would effectively render the fourth amendment a

<sup>48</sup> 6 M.J. at 317-19 (Although a military commander is not per se disqualified to serve as a neutral and detached official, he must when issuing search authorizations indeed be neutral and detached concerning the specific case in which he purports to act. Commanders may not authorize searches and seizures of persons or things while at the same time performing investigative or prosecutorial functions. Examples of law enforcement functions that would deprive a commander of his impartiality are: approving or directing use of informants, approving use of surveillance operations, and being present at the scene of a search absent extraordinary circumstances). See also *Stuckey*, 10 M.J. at 362; *United States v. Rivera*, 10 M.J. 55 (C.M.A. 1980). For a discussion of the role of the commander when issuing search authorizations, see Cooke, *United States v. Ezell: Is the Commander a Magistrate? Maybe*, *The Army Lawyer*, Aug. 1979, at 9.

<sup>49</sup> 6 M.J. at 317 (citing *United States v. Seay*, 1 M.J. 201 (C.M.A. 1975)).

<sup>50</sup> UCMJ art. 30(b).

<sup>51</sup> 6 M.J. at 317 (citing 417 U.S. at 744; 346 U.S. at 140).

<sup>52</sup> *Id.* at 317 (citing 1 M.J. at 201; *United States v. Hall*, 1 M.J. 162 (C.M.A. 1975); *United States v. Holmes*, 43 C.M.R. 430 (A.C.M.R. 1970), *petition denied*, 43 C.M.R. 413 (C.M.A. 1971)).

<sup>53</sup> 6 M.J. at 320.

<sup>54</sup> 104 S. Ct. at 3418 n.15 (quoting with approval *Commonwealth v. Sheppard*, 387 Mass. 488, 506, 441 N.E.2d 725, 735 (1982) *rev'd*, *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984)).

<sup>55</sup> In *People v. Payne*, the Michigan Supreme Court held that a state magistrate who was also a deputy sheriff was disqualified from issuing a search warrant because of his law enforcement role. *People v. Payne*, 38 Crim. L. Rep (BNA) 2426 (Mich. Sup. Ct. Dec. 30, 1985). Even though the magistrate in *People v. Payne* did not perform ordinary investigative duties and retained his police powers to facilitate functions relating to his post as a court officer, the court concluded that his status alone rendered him incapable of satisfying the neutral and detached requirement of the fourth amendment. *Accord Vaughn v. State*, 387 S.E.2d 277 (Ga. App. 1981). Consequently, status alone can bring the magistrate's impartiality into question so as to come within the pale of proscribed law enforcement duties for purposes of the fourth amendment. For purposes of applying the good faith exception pursuant to the fourth amendment's warrant clause, a commander is no less involved in performing law enforcement functions than the deputy sheriff in *People v. Payne*.

<sup>56</sup> 104 S. Ct. at 3418.

<sup>57</sup> *Id.*

<sup>58</sup> *Stuckey*, 10 M.J. at 359 (quoting with approval *Ezell*, 6 M.J. at 328 (Fletcher, J., concurring)).

<sup>59</sup> *Ezell*, 6 M.J. at 325; *Cordero*, 11 M.J. at 210; *Mil. R. Evid.* 315(f)(1).

<sup>60</sup> *Stuckey*, 10 M.J. at 360; *Mil. R. Evid.* 315(b)(1).

nullity when applied to a commander's search authorization.<sup>61</sup> Ignorance of the law when issuing search authorizations can be as serious a problem as being a rubber stamp for the police when a "good faith" exception is applied to commanders' search authorizations.<sup>62</sup>

Third, and most important, the exclusionary sanction will have a significant deterrent effect on an issuing commander. The very interest the commander has in the prosecution of cases in the unit will be sufficient to ensure that he or she attempts to educate and inform him or herself of the legal requirements for search authorizations and thereby avoid having cases thrown out of court because of error. Insulating the commander from mistakes by applying a "good faith" exception would perpetuate the problems the Supreme Court felt to be inapplicable to judges and magistrates:

[W]e cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officer's professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of colorable warrant requests.<sup>63</sup>

As the Supreme Court stated in *United States v. Janis* and reiterated in *United States v. Leon*, "[i]f . . . the exclusionary rule does not result in appreciable deterrence, then clearly, its use in the instant situation is unwarranted."<sup>64</sup> Clearly, the exclusionary rule deters a commander's misconduct and provides him or her with incentives to comply with the fourth amendment.

Even analyzing the law enforcement officer's objectively reasonable belief in the legal sufficiency of the authorization will be fraught with difficulty. A commander is typically a non-lawyer with minimal legal training who is saddled with the added responsibility of being the "chief law enforcement official" in the command. The commander's legal expertise is often insignificant when compared with that of most law enforcement officials who are thoroughly trained in the law of search and seizure and the Military Rules of Evidence.<sup>65</sup> This disparity in legal expertise inevitably operates to the commander's disadvantage in evaluating the information submitted in support of a search authorization.

Obviously, good faith would not be found if the law enforcement officer misled the commander, but the commander, unlike a judicial officer, is less likely to avoid the traps laid by a crafty investigator. To rely on the police officer's good faith in dealing with a commander defeats the very purpose of the exclusionary rule of controlling police misconduct. An independent and properly trained authorizing official, be it a judicial officer or a commander, serves as the fourth amendment's check on overzealous law enforcement. The police should not be thrown into the anomalous position of educating and protecting our fourth amendment freedoms from an inexperienced or untrained commander while at the same time attempting to fight crime.

#### *Applying Leon's Four Exceptions to Military Search Authorization*

Not only does the commander's search authorization fail to satisfy the three reasons given in *Leon* for concluding that the exclusionary rule was an inappropriate method for deterring judicial misconduct, it also serves as an inadequate vehicle upon which the four exceptions of *Leon* can operate in deterring police misconduct.

First, the "good faith" exception is not available when the police officer misleads the commander by supplying false information. Due to the oral nature of search authorizations and their accompanying information, an after-the-fact analysis into the objective reasonableness of the authorization will rely on memories that have faded since that the immediate need for the search has expired.<sup>66</sup> To rely on the commander and the police officer to remember accurately everything that transpired and then to testify truthfully ignores reality. Memory fades with the passage of time, and witnesses who firmly believe that they are testifying truthfully as to what actually transpired are not aware that they may be subconsciously filling in the gaps in their memory with the benefit of reflective hind-sight and reasonable assumptions and inferences. Absent a written affidavit or search authorization, there may be no independent way of ascertaining the essential facts to conclude whether the commander was misled by the law enforcement official or whether he was provided sufficient information upon which to find probable cause. Current military practice would thrust us into the legal paradox of relying on the good faith of the commander and the law enforcement official at the

<sup>61</sup> See, e.g., *United States v. Little*, 735 F.2d 1048 (8th Cir. 1984) (evidence seized held inadmissible on appeal because the search warrant lacked probable cause under *Illinois v. Gates*), *aff'd on rehearing sub nom*, *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984) (held the same evidence was now admissible in light of *Leon* and the good faith exception).

<sup>62</sup> See, e.g., *Stuckey*, 10 M.J. at 364; *Payne*, 3 M.J. at 355 n.6.

<sup>63</sup> *Leon*, 104 S. Ct. at 3418-19. Furthermore, "[i]f a magistrate serves merely as a 'rubber stamp' for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule." *Id.* at 3419 n.18. Military commanders, unlike federal magistrates, are not subject to the direct supervision of federal courts, or any court for that matter, but rather fall under the supervision of other military commanders. *But see* *McCommon v. Mississippi*, 38 Crim. L. Rep. (BNA) 4079 (U.S. Nov. 13, 1985) (denying cert.) (Brennan & Marshall JJ., dissenting) (Denial of certiorari in this case allowed lower court decision to stand which admitted evidence based upon a search warrant wherein the issuing magistrate admitted with remarkable candor that he had relied principally on the fact that police officers had asked for the warrant, rather than on the underlying facts and circumstances set forth in the affidavit.)

<sup>64</sup> 104 S. Ct. at 3414 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).

<sup>65</sup> See, e.g., *Postle*, 20 M.J. at 635 (commander's apparent willingness to sign authorization prompted law enforcement official seeking authorization to expend extra effort to apprise commander of all the facts); *Stuckey*, 10 M.J. at 364 (In rejecting any requirement for an oath or affirmation in support of search authorizations, the Court of Military Appeals noted that "military commanders will in many instances be less familiar with the form and administration of oaths than are either military investigators or civilian magistrates."); *Payne*, 3 M.J. at 355 n.6 (recognition of problems of competency involving use of lay judges).

<sup>66</sup> Admittedly, oral affidavits are permitted by the Federal Rules of Criminal Procedure. However, oral affidavits are the exception and not the rule. Fed. R. Crim. P. 41(c)(2)(A) (A law enforcement agent may communicate the information in support of a search warrant to "a Federal magistrate . . . by telephone or other appropriate means" where "the circumstances make it reasonable to dispense with a written affidavit.")

time of trial to determine whether there was good faith at the time the search authorization was issued.

Second, it would be difficult, if not impossible, for a law enforcement officer to conclude when the authorizing commander has crossed the line and is no longer neutral and detached. For example, the conduct of the commander who issued the search authorization in *United States v. Postle* placed the police officer on notice that the commander may have abandoned his neutral and detached role since the commander had pen in hand when the investigator arrived seeking the search authorization.<sup>67</sup> The Navy-Marine Court of Military Review even noted that this attitude reflected an "apparent willingness of the commanding officer to sign the authorization."<sup>68</sup> The police officer attempted to overcome the commander's apparent predilection to issue a search authorization when he "spent 3 to 4 minutes relating to the commanding officer the facts then known and upon which the search was being requested."<sup>69</sup> Once the police officer suspects that the commander is not neutral and detached should he seek another commander for a search authorization or can he attempt to rehabilitate the commander as was done in *Postle*?

In addition to problems of misperception and inability to follow and apply judicial standards, it has often been suggested that in situations where the only source of information to explain the substantive issues to the lay judge is either the police or the prosecutor, the "flavor" of the decisions rendered is distinctly pro-government.<sup>70</sup>

Therefore, the investigator in *Postle* probably lacked good faith in continuing to seek an authorization from a commander whom the investigator knew to be more than ready, willing, and able to issue the search before the facts were revealed. Admittedly, by taking the effort to delineate all the facts to the commander, the investigator may have assured the legality of the search because the commander would now have sufficient facts upon which to conclude probable cause existed and the commander was arguable neutral and detached pursuant to the reasonableness prong of the fourth amendment. Bad faith on the part of the law enforcement official is really not an issue so long as the

commander is neutral and detached and probable cause exists.<sup>71</sup> Furthermore, conduct which is not objectively reasonable on the part of a trained law enforcement officer could be objectively reasonable when applied to a soldier who has no law enforcement training or responsibilities.<sup>72</sup>

Third, even assuming the officer's good faith, or at least his self-interest in preserving the fruits of his investigation, the application of a 'good faith' exception places the law enforcement officer in a tenuous position. "Unlike a civilian magistrate, the military commander who is requested to authorize a search will already have acquired information that is relevant to a determination of probable cause."<sup>73</sup> The law enforcement officer will only have a partial picture of the commander's probable cause analysis because the commander may already possess evidence of prior reports of misconduct, reputation, prior convictions, or nonjudicial punishment, which may be essential to the commander's determination but escape the eye of the investigator.<sup>74</sup> Requiring the police to initiate a game of "twenty questions" with the commander to satisfy himself that probable cause exists would be a perverse twist to the search authorization process. Placing such an affirmative duty upon the law enforcement official to inquire further into the basis of the commander's search authorization is inconsistent with the concept that "once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."<sup>75</sup>

Fourth, in determining objective reasonableness, the judicial inquiry would not be limited to the officer executing the search authorization but would also include the officer who originally obtained the authorization and supplied the information to the commander.<sup>76</sup> Because the authorization need not be in writing, it will be difficult to ascertain the true extent of the search authorization that ultimately reaches the executing officer. Furthermore, the executing officer can hardly evaluate a search authorization that is not only oral but also based upon information to which he may not even have been privy.

Revitalizing *United States v. Ezell* to require a strict adherence to judicial-like neutrality and detachment on the part of a commander when issuing a search authorization

<sup>67</sup> *Postle*, 20 M.J. at 635.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> According to an Oregon study

many of the lay judges fell into a pattern of not reading and studying available materials and statutes, but instead simply chose to go directly to the police or prosecutor for advice. Certainly this is a situation ripe for abuse, and at odds with the stated purposes of Article 32.

*Payne*, 3 M.J. at 355 n.6 (noting with approval Note, *Justice Courts in Oregon: An Introduction*, 53 Or. L. Rev. 411 (1974)).

<sup>71</sup> Cf. *Oliver v. United States*, 104 S. Ct. 1735 (1984) (Although police engaged in bad faith misconduct by illegally trespassing on private property to search for marijuana, the Court found no fourth amendment violation because the trespass was into "open fields" and did not intrude upon a legitimate expectation of privacy.); *United States v. Butts*, 729 F.2d 1514, 1518 (5th Cir.), cert. denied, 105 S. Ct. 181 (1984) (The fourth amendment "does not purport to reach all illegal conduct by officers. . ."). For a discussion of bad faith conduct by police in fourth amendment practice, see Bacigal, *The Road to Exclusion Is Paved With Bad Intentions: A Bad Faith Corollary to the Good Faith Exception*, 87 W. Va. L. Rev. 747 (1985).

<sup>72</sup> A police officer who relies on a duly authorized warrant "is a particular compelling example of good faith. A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." *Leon*, 104 S. Ct. at 3420 n.21 (quoting with approval Attorney General's Task Force on Violent Crime, Final Report, 55 (1981) [emphasis added]).

<sup>73</sup> *Stuckey*, 10 M.J. at 363.

<sup>74</sup> *Id.* at 359 n.15.

<sup>75</sup> *Leon*, 104 S. Ct. at 3420 (quoting with approval 428 U.S. at 498 (Burger, C.J., concurring)).

<sup>76</sup> See *id.* at 3421 n.24; See, e.g., *United States v. Boyce*, 601 F. Supp. 947 (D. Minn. 1985) (Notwithstanding good faith exception to exclusionary rule, police officers cannot prepare search affidavit with reckless disregard for truth and then circumvent suppression of evidence resulting from search by simply letting other officers, unaware of those circumstances, execute warrant.).

cannot overcome the deficiencies in neutrality which are inherent in his position as commander.<sup>77</sup> For the Court of Military Appeals to ignore their analysis and conclusions in *United States v. Stuckey* and hold that a commander can now qualify as a "true" magistrate would be judicial pragmatism at its worst and render the precedential value of their decisions subject to a rule of convenience rather than a rule of reason.<sup>78</sup>

#### *Military Rule of Evidence 311(b)(3)*

The Military Rules of Evidence now expressly contain language mirroring the Supreme Court's decision in *United States v. Leon*. Rule 311(b)(3) provides that evidence obtained as a result of a search or seizure may be used in a court-martial if the search authorization was issued by a commander, military judge or magistrate, or competent civilian authority; "[t]he individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause"; and the "officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant."<sup>79</sup> The rule also provides that "[g]ood faith shall be determined on an objective standard."<sup>80</sup>

Rule 311(b)(3) adopts the Supreme Court's holding in *United States v. Leon* with two major exceptions. First, the military's "good faith" exception is extended to search authorizations issued by commanders, military judges, or military magistrates and is not limited to warrants issued by competent civilian authorities, presumably civilian judges and magistrates.<sup>81</sup> Second, it also applies to evidence derived from apprehensions or arrests accomplished pursuant to a warrant or authorization that is later found to be defective under Rule for Courts-Martial 302.<sup>82</sup>

Equally as important as the actual language of Rule 311(b)(3) is the drafters' analysis accompanying the rule.<sup>83</sup>

Recognition by the drafters that searches authorized by commanders may be subject to close scrutiny before the "good faith" exception may apply does nothing more than restate the debate which has surfaced from the beginning. Since a commander is not a magistrate as envisioned by the Constitution, any action by him which would purport to take advantage of constitutional rules of law designed by the Supreme Court to address a magistrate's conduct should be addressed with a jaundiced eye and subjected to the most serious scrutiny that a court-martial would allow. By including in the analysis factors upon which to gauge a commander's neutrality and detachment, the drafters may have pursued a cautious approach to executive rule-making, but they have thrust the real issue surrounding *Leon's* applicability to the military into a document which only expresses the intent of the drafters and is not binding upon the courts.<sup>84</sup> By attempting to expound and elucidate upon the issue of applying the good faith exception to a commander's search authorization, the drafters have tacitly recognized the weaknesses inherent in the rule itself—applying judicial-like neutrality to a commander.

Unlike a civilian judge or magistrate, a commander is not presumptively neutral and detached. A civilian judge or magistrate can normally be expected to be neutral and detached, and the burden is on the defense counsel to show that one of *Leon's* four exceptions applies, e.g., the judge is a "rubber stamp." The converse is true in the military. As a commander is not a magistrate, the burden rests upon the government to show that in a particular case the commander was neutral and detached. The closer the search authorization approaches a civilian search warrant, according to the drafters, the more likely it is that the "good faith" exception will apply.<sup>85</sup>

Furthermore, the drafters' assertion that "evidence that the commander received the advice of a judge advocate prior to authorizing the search or seizure may be an important

<sup>77</sup> See *supra* notes 38-55 and accompanying text.

<sup>78</sup> But cf. Gilligan & Kaczynski, *supra* note 5, at 3 ("[W]ere the [C]ourt [of Military Appeals] to extend the [good faith exception] rule to authorizations issued by commanders, the magisterial neutrality required might be strictly required.").

<sup>79</sup> Mil. R. Evid. 311(b)(3)(A)-(C).

<sup>80</sup> Mil. R. Evid. 311(b)(3)(C).

<sup>81</sup> Mil. R. Evid. 311(b)(3)(A); Mil. R. Evid. 315(d).

<sup>82</sup> Mil. R. Evid. 311(b)(3)(A); Mil. R. Evid. 311(b)(3), analysis; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 302 (defines apprehension and establishes who may apprehend and how an apprehension may be made). Whether or not *Leon* can be properly extended to embrace apprehensions and arrests is not within the scope of this article.

<sup>83</sup>

The rationale articulated in *Leon* and *Sheppard* that the deterrence basis of the exclusionary rule does not apply to magistrates extends with equal force to search or seizure authorizations issued by commanders who are neutral and detached, as defined in *United States v. Ezell* [citation omitted]. The United States Court of Military Appeals demonstrated in *United States v. Stuckey* [citation omitted] that commanders cannot be equated constitutionally to magistrates. As a result, commanders' search authorizations may be closely scrutinized for evidence of neutrality in deciding whether this exception will apply. In a particular case, evidence that the commander received the advice of a judge advocate prior to authorizing the search or seizure may be an important consideration. Other considerations may include those enumerated in *Ezell* and: the level of command of the authorizing commander; whether the commander had training in the rules relating to search and seizure; whether the rule governing the search or seizure being litigated was clear; whether the evidence supporting the authorization was given under oath; whether the authorization was reduced to writing; and whether the defect in the authorization was one of form over substance.

Mil. R. Evid. 311(b)(3) analysis [emphasis added].

<sup>84</sup> It should be noted that the Analysis provided with the Military Rules of Evidence states: "This analysis is not, however, part of the Executive Order modifying the present Manual nor does it constitute the official views of the Department of Defense, the Military Departments, or of the United States Court of Military Appeals." Manual for Courts-Martial, United States, 1969 (Rev. Ed.), Mil. R. Evid. analysis (C3, 1 Sept. 1980), reprinted in Manual for Courts-Martial, United States, 1984, App. 22. Furthermore, "[t]he Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation." Manual for Courts-Martial, United States, 1984 analysis, App. 21.

<sup>85</sup> For example, some of the considerations listed are "the level of command of the authorizing commander; whether the commander had training in the rules relating to search and seizure; . . . whether the evidence supporting the authorization was given under oath; whether the authorization was reduced to writing." Mil. R. Evid. 311(b)(3) analysis.

consideration"<sup>86</sup> does not comport with reality. Most commanders do not consult with neutral judge advocates on issues involving criminal law, rather they contact the trial counsel assigned to their command. Commanders normally do not seek out their trial counsel to discuss the legal nuances of the law. Rather the conversation often contains such phrases as—"I want to search . . . , do I have probable cause?" or "I want to search . . . , can I search?" Obtaining approval, permission, or even advice on search and seizure questions from the judge advocate responsible for advising the commander on military justice matters does not comply with language of the drafters of Rule 311(b)(3), much less with the reasoning behind *Leon*.

First, the trial counsel clearly qualifies as an adjunct of the law enforcement team since he or she "prosecute[s] cases on behalf of the United States."<sup>87</sup> Therefore, obtaining advice from the trial counsel hinders rather than helps the commander in obtaining the benefits of the "good faith" exception. Although such a tactic would increase the chances that a search authorization would be legally valid in the first place, it does not solve the issue of the authorizing commander's good faith. Compare this scenario with the situation in *United States v. Payne*, where the Court of Military Appeals held that *ex parte* discussions between the Article 32 investigating officer and the prosecuting attorney violated the investigating officer's role as judicial officer.<sup>88</sup>

When the . . . magistrate and the prosecutor occupy the relationship of attorney and client, it is clear . . . the Government receives an undue advantage. . . . [W]hen the prosecutor's identity is clothed with appointment as the investigating officer's [e.g., commander's] own attorney, he is placed in a position in which his recommendations and advice will surely be accorded unfair attention.<sup>89</sup>

Of course, contacting an impartial legal advisor would, at least, obviate this problem and assist the commander in properly performing the role with accurate advice on the legal standards to apply.<sup>90</sup> However, "it is compliance with the standards of proper judicial conduct, not specific legal training, which must control the disposition of the given case."<sup>91</sup>

Second, it is not the commander's good faith that is in issue, but rather it is the good faith of the law enforcement official seeking or executing the commander's search authorization.<sup>92</sup> A consideration noted in *Leon* which highlighted the law enforcement officer's good faith was the fact that the police officer consulted three deputy district attorneys before seeking the search warrant.<sup>93</sup> Therefore, whether or not the commander sought advice from a judge advocate is really not a consideration in determining the commander's neutrality or detachment. Attempting to place judicial robes upon the commander is not the solution to overcoming his or her interest in the ultimate prosecution of a case involving a soldier within the command. Although Military Rule of Evidence 311(b)(3) mirrors the test in *Leon*, it does not account for the unique nature of the military justice system other than to substitute authorizations for warrants and commanders for magistrates. A simple substitution of terminology is not enough.

Applying *Leon* to a search authorization issued by a military judge or magistrate<sup>94</sup> is more likely to pass constitutional muster because it substitutes a judicial officer for a commander. This would not only cure the requirement that the issuing authority be neutral and detached, but it would also eliminate the concern that the issuing authority may already possess information relevant to the probable cause determination. As the procedures required for both a commander's and a military judge's search authorization are substantially similar, the problems involving oral search authorizations and an absence of a supporting oath or affirmation still remain.<sup>95</sup> Furthermore, "[t]he requirements set forth in [Army Regulation 27-10] . . . are administrative only, and the failure to comply does not, in and of itself, render the search or seizure 'unlawful' within the meaning of MRE [Military Rule of Evidence] 311."<sup>96</sup> The oral nature of the search authorization and the supporting information still frustrate the law enforcement officer's capability to make an objectively reasonable conclusion regarding the legal sufficiency of the search authorization. Even though a military judge's search authorization is not a search warrant,<sup>97</sup> it does come closer to falling within the rationale of *Leon* to support a limited extension of the "good faith" exception into the military

<sup>86</sup> Mil. R. Evid. 311(b)(3) analysis.

<sup>87</sup> R.C.M. 502(d)(5).

<sup>88</sup> *Payne*, 3 M.J. at 354.

<sup>89</sup> *United States v. Young*, 13 C.M.A. 134, 141, 32 C.M.R. 134, 141 (1962) (Ferguson, J. dissenting) (quoted with approval in 3 M.J. at 357). *But see United States v. Land*, 10 M.J. 103, 104 (C.M.A. 1980) (Commander who sought legal advice prior to authorizing search was not disqualified to issue search authorization so long as ultimate decision to search was his own.). The decision in *Land* only addressed whether the commander was qualified for purposes of the reasonableness prong of the fourth amendment and is, therefore, not dispositive of the issue whether the commander would be similarly qualified pursuant to the with-warrant clause of the fourth amendment so as to reap the benefit of the good faith exception under a similar fact pattern.

<sup>90</sup> For an excellent discussion of the difficulties encountered when using lay judges to perform judicial functions, see *Payne*, 3 M.J. at 355 n.6.

<sup>91</sup> *Payne*, 3 M.J. at 356 (citing *North v. Russell*, 427 U.S. 328 (1976)).

<sup>92</sup> *United States v. Breckenridge*, 38 Crim. L. Rep. (BNA) 2449 (5th Cir. Feb. 18, 1986) (Failure of county judge who issued search warrant to actually read the underlying affidavit did not spoil officers good faith for purposes of *United States v. Leon*; police officers recounted to judge the contents of the affidavit and the judge questioned them concerning probable cause and appeared to read the affidavit.).

<sup>93</sup> *Leon*, 104 S. Ct. at 3405 n.4.

<sup>94</sup> Mil. R. Evid. 315(d)(2).

<sup>95</sup> Compare Mil. R. Evid. 315 with Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, ch. 9, sec. III (July 1, 1984) [hereinafter cited as AR 27-10].

<sup>96</sup> AR 27-10, para. 9-13.

<sup>97</sup> Mil. R. Evid. 315(b)(2).

justice system,<sup>98</sup> and a strong case can be made for applying the "good faith" exception to search authorizations issued by military magistrates whenever the authorization also comports with the warrant requirements of the fourth amendment.<sup>99</sup>

### Conclusion

Searches and seizures under the fourth amendment are justified under one of two constitutional predicates: the search or seizure must be reasonable, or it must be based upon a warrant issued on probable cause supported by oath or affirmation.<sup>100</sup> The "good faith" exception applies to those searches based upon a warrant issued by a neutral and detached judicial officer. The commander's power to issue search authorizations exists not because it is a warrant but because it is reasonable for the commander to have that authority under the fourth amendment.<sup>101</sup>

As a reasonable search and seizure, there is no requirement for a commander's search authorization to be in writing or based upon oath or affirmation.<sup>102</sup> The oral nature of the military search authorization process renders the

four exceptions of *Leon* an insufficient check on police misconduct. Furthermore, the commander's status as a "commander" not only gives him or her authority to issue search authorizations, but it also provides him or her with a personal stake in the outcome of any criminal cases involving soldiers within the command. This personal stake in particular criminal prosecutions forever precludes the commander from donning the judicial robes of a magistrate for purposes of the fourth amendment's warrant clause. "Ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted."<sup>103</sup> Any commander sufficiently ambivalent towards, or disinterested in, the ultimate prosecution of the soldiers he or she commands neglects an important responsibility of a commander.<sup>104</sup>

Absent a significant overhaul of the requirements for military search authorizations, applying the "good faith" exception to military commanders is not yet supported by the Supreme Court's holding in *United States v. Leon*.

## Contract Appeals Division Trial Note

### Application of the Debt Collection Act of 1982—Restraining the Beast

Major Murray B. Baxter  
Contract Appeals Division

Until 1984, a contracting officer relied solely upon the Defense Acquisition Regulation (DAR) appendix E, part 6, for guidance in collecting debts to the government arising from contracts. The guidelines included provisions for notice (§ E-606.2) and information to be contained in the demand for payment (§ E-608).

On 2 March 1984, the Armed Services Board of Contract Appeals (ASBCA) held in *DMJM/Norman Engineering Co.*, ASBCA No. 28154, 84-1, BCA ¶ 17, 226, that the Debt Collection Act of 1982 (DCA) applied to the use of administrative off-sets to collect contractors' debts to the

government. The main DCA provisions considered by the board in *DMJM/Norman* are at 31 U.S.C. § 3716, which describes the preliminary steps, including notice, required before a debt can be collected. In *DMJM/Norman*, the contractor owed money to the government under one contract (contract #1). The government, having already completely paid for contract #1, decided to set off the amount owed against the unpaid balance of a second contract (contract #2). The board held that the amount the contractor owed was a debt and the withholding of funds under contract #2 to be an "administrative off-set" as defined in the DCA (31

<sup>98</sup> See Gilligan & Kaczynski, *supra* note 5, at 21. See, e.g., *People v. Barbarick*, 37 Crim. L. Rep. (BNA) 2236 (Calif. Ct. App. 4th Dist., May 23, 1985) (applied good faith exception to a warrantless search of a suspect's yard conducted pursuant to an invalid search condition of his release pending appeal of another conviction since a judicial officer had issued the facially valid search condition).

<sup>99</sup> Compliance by the military judge or magistrate with the fourth amendment's requirement that the evidence supporting the warrant be in writing and the information in support of the warrant be under oath or affirmation should satisfy the requirements of *Leon*, as well as Rule 311(b)(3). Ideally Military Rule of Evidence 315 would be modified to recognize the distinction between a commander's search authorization and a warrant issued by a military judge or magistrate. The procedures for the military warrant would then be consistent with the fourth amendment so long as the requirements are met for probable cause, oath or affirmation, and a writing. Allowing a military judge or magistrate to issue a search warrant would not only benefit from the "good faith" exception but give substance to the preference for search authorizations issued by military judges. See *Stuckey*, 10 M.J. at 365.

<sup>100</sup> U.S. Const. amend. IV.

<sup>101</sup> *Stuckey*, 10 M.J. at 361.

<sup>102</sup> *Id.* at 347.

<sup>103</sup> *Leon*, 104 S. Ct. at 3418 (quoting with approval 441 N.E.2d at 735, *rev'd*, 104 S. Ct. at 3424).

<sup>104</sup> Comm. on the Uniform Code of Military Justice, Report to Hon. Wilbur M. Brucker, Secretary of the Army, Good Order and Discipline in the Army at 11 (1960):

To many civilians discipline is synonymous with punishment. To the military man discipline connotes something vastly different. It means an attitude of respect for authority developed by precept and training. Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not characteristic of a civilian community. Development of this state of mind among soldiers is a *command responsibility and a necessity* [emphasis added].



U.S.C. § 3701(a)(1)). (*DMJM/Norman* at 85,774). The government had argued that the DCA did not apply to withholding actions under the less rigorous requirements of DAR appendix E.

The board applied the DCA retroactively, creating the prospect of significant litigation because few, if any, contracting officers had complied with the DCA since its inactment on 25 October 1982. The possibility existed that there were a great number of cases where a contracting officer had withheld money under DAR appendix E but had not complied with the DCA. The board acknowledged that prospect but assumed from specific statutory language and a review of legislative history that "Congress must have been aware of the overall impact of this requirement". (*Id.* at 85,776).

In July 1984, the ASBCA decided *Pat's Janitorial Service, Inc.*, ASBCA No. 29129, 84-3 BCA ¶ 17,549. In that case, the government mistakenly paid the contractor's invoice without deducting a sum for services the contractor had failed to perform. The contractor declined to return the sum mistakenly paid. The Department of Labor (DOL) in a separate action had withheld money from the contractor for an alleged underpayment of wages on the same contract. Almost four years later, DOL ordered the release of the withheld funds. At that time the contracting officer deducted the amount for unperformed services and paid the balance. The board, in a short opinion issued pursuant to Rule 12.3, held that the DCA applied and that the government had failed to comply with the DCA requirements.

In both *DMJM/Norman* and *Pat's Janitorial*, the remedy for violating the DCA was that the government had to release the withheld amounts to the contractors and pay interest. The government was not foreclosed from trying to collect the debts, but it had to do so in accordance with the DCA. There was concern that the government's common law remedy of set off had been seriously eroded by *DMJM/Norman* and *Pat's Janitorial*. Many contractors have cited the cases in efforts to resist set offs.

On 26 November 1985, the board in *Fairchild Republic Company*, ASBCA No. 29385, 85-2 BCA ¶ 18,047, *motion for recon. denied*, 86-1 BCA ¶ 18,608, foreshadowed a limit on the application of the DCA to the recoupment of money by the government by clarifying the term "debt." A price reduction for defective cost or pricing data effected by withholding from payments was held not to be a collection of a "debt."

On 2 April 1986, the ASBCA in *Application under the Equal Access to Justice Act—Pat's Janitorial Service, Inc.*, ASBCA No. 29129 (*Pat's Janitorial—EAJA*) found the government's withholding under the circumstances was substantially justified. The board's language in this opinion, however, indicated that it would not consider applying the DCA to a price reduction within one contract. The board stated:

Our determination was based on the unique facts present in the appeal . . . the underlying Contract Disputes Act appeal here in issue involved a single contract from which the Government had withheld funds. Certainly the situation in this case was much closer to a price reduction within one contract which is distinctly different than an off-set between two contracts as in *DMJM/Norman*.

...  
If [only a price reduction] had been the case, the Government would have been entitled to enforce the price reduction terms of the contract. . . . It appears that the Government did in fact proceed as it had in earlier instances where it had alleged that appellant's performance was lacking and reduced the contract price in accordance with the contract provisions. Were it not for our administrative determination that there was a pre-existing debt, the Government's actions would have been completely proper and binding. The Government had to act, however, without the benefit of our hindsight.

The board, through this language, was sending strong signals that it will limit the application of the DCA. Should a case with the same facts as *Pat's Janitorial* be brought before the board, but without the four year hiatus between the contractor's performance failure and the government's off set, then the board may distinguish *Pat's Janitorial* into oblivion.

To emphasize that point, on 3 April 1986, the board in *A.J. Fowler Corporation*, ASBCA No. 28965, held that the DCA did not apply where a price reduction for nonperformance was taken from the unpaid proceeds of the same contract. In *A.J. Fowler*, the contracting officer determined that the contractor failed to paint some trash collection containers as required by the contract and issued a contract modification under the Changes Clause reducing the contract price for nonperformance. The contracting officer deducted the amount of this equitable adjustment from the contractor's subsequent invoice on the same contract. The board distinguished *DMJM/Norman* and *Pat's Janitorial* on the basis that in those cases the government was attempting to recover money already paid to the contractor as opposed to the situation in *A.J. Fowler* where payment was reduced to reflect the lower contract price. The focal point of distinction is the characterization of the amount claimed as a "debt." If the contractor has the funds (e.g., due to erroneous payment), the government claim is a debt and the DCA applies. If the government has not fully paid the contractor, then the contracting officer may effect a price reduction and the DCA does not apply.

To avoid problems with the DCA, a contracting officer should look for ways to use the price reduction authority if the government still owes money to the contractor on the same contract. The contracting officer must comply with the DCA when the contractor has been fully paid on the contract or the government intends to reduce payment on another contract in order to recoup the owed amount.

## Regulatory Law Office Note

### Reports to Regulatory Law Office

In accordance with AR 27-40, all judge advocates and legal advisors are reminded to continue to report to the Regulatory Law Office (JALS-RL) the existence of any action or proceeding involving communications, transportation, or utility services and environmental matters that affect the Army.

The address for the Regulatory Law Office is USALSA, ATTN: JALS-RL, Falls Church, Virginia 22041-5013. The current commercial telephone number is (202) 756-2015, AUTOVON 289-2015.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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## Contract Law Note

### General Accounting Office Considers Protest Involving Nonappropriated Fund Procurement

The General Accounting Office has considered a bid protest involving a procurement for a nonappropriated fund activity. In *Artisan Builders*, B-220804, January 24, 1986, 65 Comp. Gen. —, 86-1 CPD ¶ 85, the Comptroller General stated that his office has jurisdiction under the Competition in Contracting Act of 1984 (PL 98-369, 98 Stat. 1175) to decide bid protests concerning alleged violations of procurement statutes and regulations where a federal agency conducts the procurement on behalf of a nonappropriated fund activity.

*Artisan Builders* involved a solicitation for the construction of concrete paths for golf carts at the Williams Air Force Base golf course. Although *Artisan Builders*' protest was ultimately denied, the General Accounting Office for the first time found jurisdiction over a contract using nonappropriated funds.

Prior to the Competition in Contracting Act of 1984, the Comptroller General's jurisdiction over bid protests was based on the General Accounting Office's authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers pursuant to 31 U.S.C. § 3526 (1982). Under this authority, the GAO could not review protests involving exclusively nonappropriated funds. Under the Competition in Contracting Act, however, the Comptroller General's authority extends to a written objection by an interested party to a solicitation by an agency for bids or proposals for a proposed contract or a written objection by an interested party to a proposed award or award (31 U.S.C.A. § 3551(1) (West Supp. 1985)). Accordingly, in *T.V. Travel, Inc. et al.,—Request for Reconsideration B-218198.6 et al.*, December 10, 1985, 65 Comp. Gen. —, 85-2 CPD ¶ 640, the Comptroller General considered protests involving competitive selection of no cost, no fee travel management services contractors.

Similar to the reasoning espoused in *T.V. Travel, Inc.*, the Comptroller General determined that the General Accounting Office had jurisdiction in *Artisan Builders* because, although the Bid Protest Regulations provide that GAO will not consider protests of procurements by nonappropriated fund activities (4 C.F.R. § 21.3 (f)(8) (1985)),

the procurement was conducted by the agency (the Air Force) on behalf of the nonappropriated fund activity and the protest alleged violations of procurement statutes and regulations.

In the Army, most nonappropriated fund activity contracting is accomplished under AR 215-1 and DA Pam 215-4 by nonappropriated fund contracting officers. Under the provisions of DA Pam 215-4, paragraph 1-4 d, however, the dollar limitations of nonappropriated fund activity contracting officer appointments may not exceed \$25,000. Pursuant to AR 215-1, paragraph 21-3 e(1), *appropriated fund contracting officers* will be appointed to solicit, award, and administer nonappropriated fund contracts in excess of \$25,000. Under the rationale of *Artisan Builders*, the Comptroller General may decide that any procurement action performed by an appropriated fund contracting officer is one done by the agency on behalf of the nonappropriated fund activity and that the General Accounting Office, therefore, has jurisdiction over any protest arising from such a procurement action.

It is unclear whether the Comptroller General will take jurisdiction of protests resulting from nonappropriated fund procurement solely on the basis of the involvement of appropriated fund contracting officers. In *Artisan Builders* the Comptroller General premised jurisdiction on the basis of agency action on behalf of the nonappropriated fund activity and the alleged violation of a "procurement statute or regulation." Arguably, AR 215-1 and DA Pam 215-4 are not "procurement regulations." AR 215-1, paragraph 21-3 e also provides that appropriated fund contracting officers, like nonappropriated fund contracting officers, will utilize the policies and procedures of AR 215-1 and DA Pam 215-4. Language similar to AR 215-1, paragraph 21-3 e, is found in AFARS § 1.9003(2). The AFARS goes on to say, however, that the "FAR and AFARS shall be followed to the extent practicable, tailoring pertinent clauses and forms as required." Following the rationale of *Artisan Builders*, the Comptroller General undoubtedly will determine that the General Accounting Office has jurisdiction when an appropriated fund contracting officer makes use of some Federal Acquisition Regulation provision (which is often the case) in connection with a solicitation or an award of a nonappropriated fund contract.

In any event, this area of the law deserves your attention. Do not be surprised to see the General Accounting Office

take jurisdiction of bid protests involving solicitations, proposed awards, and awards of contracts for nonappropriated fund activities where those procurement actions exceed \$25,000 and are handled by appropriated fund contracting officers. Lieutenant Colonel Graves.

## Criminal Law Note

### Providence Inquiry—New Source of Prosecution Evidence?

Can information elicited from the accused during the guilty plea providence inquiry be argued by the trial counsel and considered by the sentencing authority? In two recent cases, *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986) and *United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985), the Army Court of Military Review concluded that it can!

These two cases reached a conclusion opposite the Navy Court of Military Review in *United States v. Richardson*, 6 M.J. 654 (N.C.M.R. 1978); and the Air Force Court of Military Review in *United States v. Brooks*, 43 C.M.R. 817 (A.F.C.M.R. 1971). They also purport to overrule the Army Court of Military Review decisions in *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985) and *United States v. Brown*, 17 M.J. 987 (A.C.M.R. 1984).

Mil. R. Evid. 410 provides:

[E]vidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas.

Mil. R. Evid. 410 clearly makes statements made during a providence inquiry inadmissible in subsequent proceedings if the plea of guilty is later withdrawn. Mil. R. Evid. 410 does not clearly address the admissibility of the accused's statements made during a providence inquiry if the plea of guilty is accepted. No military case has expressly used Mil. R. Evid. 410 as the basis for excluding providence inquiry statements from consideration during sentencing.

In *United States v. Richardson*, the Navy Court of Military Review relied on policy considerations to hold that providence inquiry statements could not be considered during sentencing. The court reasoned that the providence inquiry required the accused's full cooperation and this full cooperation could be achieved only if there was no risk that the providence inquiry could later be used against the accused. *Richardson*, 6 M.J. at 655.

In *United States v. Holt*, the Army Court of Military Review determined that the policy considerations relied on in *Richardson* were no longer applicable. R.C.M. 910(e) of the 1984 Manual changed prior practice by requiring the accused to testify under oath at the providence inquiry. The Army court concluded that "Because an accused is already subject to further prosecution for giving false information during the providence inquiry, any 'chilling' effect arising from the use of that information during sentencing is de minimis." *Holt*, 22 M.J. at 556. The court also relied on

federal practice under Fed. R. Evid 410 and Fed. R. Crim. P. 11 to argue that the military should generally broaden the scope of evidence considered by the sentencing authority.

The better view should be that *all* statements made during the providence inquiry are privileged except in a subsequent prosecution alleging that the statements were false. Mil. R. Evid. 410 can be interpreted to achieve this result. Mil. R. Evid. 410 excludes from evidence "any statement . . . regarding either of the foregoing *pleas*" (emphasis added). The "foregoing pleas" specified in the rule are a plea of nolo contendere and a *plea of guilty*. Arguably, the phrase "which was later withdrawn" was not intended to apply to the phrase "foregoing pleas" but was simply intended to make it clear that the sentencing authority can always consider the fact that the accused pled guilty to the offenses for which he or she is being sentenced.

An even stronger argument can be made that the policy considerations relied on in *Richardson* continue to be valid today. In *Holt*, the Army court accepted the fact that prior to R.C.M. 910(e) the providence inquiry was justifiably "privileged" because of the need to encourage full and truthful discussion between the accused and the military judge. A "full" discussion is necessary so the military judge can adequately explore the factual basis of the offenses and a "truthful" discussion is necessary so the military judge can ascertain whether the plea of guilty is truly voluntary. The Army courts' holding in *Holt* substantially compromises both of these objectives. Attempting to justify this compromise based on R.C.M. 910(e) ignores reality. The following example illustrates this point:

The accused is charged with one sale of a small amount of marijuana to an undercover military policeman and has entered a plea of guilty at a special court-martial. Sentencing will be by court members. During the providence inquiry, the accused states that on three prior occasions the policeman came to his barracks room asking for drugs. On the fourth visit, the accused finally went to the room across the hall and procured one marijuana cigarette which he sold to the policeman for five dollars. The military judge, concerned that there may be an entrapment defense, decides to explore the accused's predisposition to sell drugs by asking the accused "Have you ever sold drugs before?" The accused's full and truthful response to that question would be "Yes, in fact over the last three years I have sold hundreds of pounds of marijuana to soldiers and dependents on this post. The only reason I could not sell marijuana to the policeman on his three prior visits was because my main runner, Private Jones, was apprehended the day before with my monthly supply." Up to this point in time the government has no idea that the accused is a major drug seller.

The Army court is correct in its analysis that R.C.M. 910(e) encourages a full and truthful response to the military judge's question because a false response could conceivably be prosecuted as perjury. If *Holt* is followed, the accused's full and truthful response can be considered during sentencing at this court-martial *and* the accused's statements would be admissible at a new general court-martial where the accused is prosecuted for the drugs found in Private Jones' possession.

If *Richardson* and the proposed interpretation of Mil. R. Evid. 410 are followed, the accused's statements will never be disclosed to the sentencing authority and the accused's statements cannot be used at any subsequent court-martial. This "privilege" against subsequent use clearly has substantial impact on the probability that the accused will respond fully and truthfully—not just in this hypothetical but in any situation where the military judge seeks to explore uncharged misconduct during the providence inquiry.

If full and truthful discussion is actually the objective of the providence inquiry, Mil. R. Evid. 410 should be interpreted to reach that result. There is no indication that the drafters of R.C.M. 910(e) sought to change the way *Richardson* and *Brooks* treated information gained during the providence inquiry. There is also no indication that the drafters of the 1984 Manual sought to discard the military's adversarial presentation of evidence, limited by enumerated categories of aggravation evidence and the Military Rules of Evidence, in favor of the more liberal federal sentencing procedures. If the "privilege" is to be discarded, some more supportable rationale should be employed. Saying that the "privilege" plays a de minimis role in promoting full and truthful discussion because the accused is now placed under oath during the providence inquiry simply defies logic. Interpreting Mil. R. Evid. 410 consistent with *Richardson*, or changing the wording of the rule to more clearly reach that result, would not only promote full and free discussion during providence inquiries but would also achieve uniformity in the application of the law. Major Gaydos.

## International Law Note

### Country Law Studies

With the advent of operational law as a concept that combines all facets of judge advocate responsibilities to prepare for any contingency, judge advocates worldwide are in the process of accumulating the resources they will need on deployment. Reserve Component and active duty units have specific geographical areas to which they will deploy on mobilization, and they are becoming very involved in operational law planning.

Among the many questions that have been asked is, "Who is responsible for country law studies, and where can I get a copy?" The following is a synopsis of a response prepared by Colonel McNealy, Chief, International Affairs Division, OTJAG.

Country law studies are not designed for every possible contingency. They are the result of the concern expressed by the Senate when it advised and consented to the NATO Status of Forces Agreement in July 1953. Because of the uncertainty at that time about how U.S. forces would be treated by the courts of countries in which the forces would be stationed, the Senate Resolution provided:

Where a person subject to US military jurisdiction is to be tried by the authorities of a receiving state, under

the treaty, the commanding officer of the US armed forces in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States<sup>1</sup>

AR 27-50<sup>2</sup>, promulgated in part to implement the Senate's directive, clearly states the legal basis and the responsibility for the preparation of country law studies. The regulation provides that they will be prepared "[f]or each country in which US forces are regularly stationed and are subject to the criminal jurisdiction of foreign authorities."<sup>3</sup> Thus, country law studies are limited in scope and purpose. Their focus is primarily on criminal law and procedure and they are reserved for actual peacetime stationing situations where criminal jurisdiction is shared with host country authorities. In the event of actual hostilities, the U.S. would insist on exclusive jurisdiction over its own forces; therefore the underlying need for the country law study would not exist.

Commanders responsible for preparing country law studies are specified in AR 27-50, appendix C. The studies are maintained by the Designated Commanding Officers (DCOs) and at the service TJAG levels only, and they are updated as necessary to address the Senate's concerns by incorporating significant changes in the host countries' criminal laws. They can assist trial observers<sup>4</sup> and DCOs determine whether U.S. personnel receive fair trials in foreign courts.

A country law study, being specific in nature, may not be available for every country to which Army units deploy. Therefore, the commander may wish to include in contingency or operations plans information concerning the legal climate prevailing in a particular country. Such information does not fall within the ambit of a country law study, so it is the responsibility of the command staff judge advocate to research and prepare the report. The staff judge advocate may seek assistance through technical channels from the appropriate Unified Command Legal Office, i.e., PACOM, CENTCOM, EUCOM, etc., or from the Army component headquarters that supports that CINC. Some Reserve Component civil affairs and international law teams also compile legal materials for foreign countries, and may also serve as a source of information for the staff judge advocate.

One area of the law that would lend itself for inclusion in an operations plan is that which is relevant to the processing of claims in a foreign country. AR 27-20 provides that "[i]n determining an appropriate award, local law and custom relating to elements of damage, and compensation therefor, will generally be applied. . . ."<sup>5</sup> Inclusion of any provisions of law in a foreign country that are a substantial departure from U.S. practice and custom will assist in streamlining the claims process.

The International Law Division, TJAGSA, would welcome any information from judge advocates who have addressed similar concerns in legal annexes to operations plans. Upon compilation of the combined experiences of

<sup>1</sup> S. Res. of Ratification, with Reservations, 82d Cong., 2d Sess., (1953), reprinted in AR 27-50, app. B, *infra* note 2.

<sup>2</sup> Dep't of Army, Reg. No. 27-50, Legal Services—Status of Forces Policies, Procedures, and Information (1 December 1984).

<sup>3</sup> *Id.* at para. 1-6a.

<sup>4</sup> See *id.* at para. 1-8 for a list of the qualifications and duties of trial observers.

<sup>5</sup> Dep't of Army, Reg. No. 27-20, Legal Services—Claims, para. 10-12 (18 September 1970).

Army commands, we could then serve as a source of information to those preparing for deployment. Major McAtamney.

## Legal Assistance Items

### Tax News

#### *Interest Rate on Unpaid Taxes*

The aggressive tax assistance programs being run by legal assistance offices should have encouraged people to file their taxes on time. For individuals who did not file on time and owed taxes, or who filed on time but did not pay all taxes due, the Internal Revenue Service has announced that the interest rate charged on deficiencies and unpaid taxes will be reduced from 10 percent to 9 percent. The new rate will go into effect on 1 July 1986, and will remain in effect until 31 December 1986. Interest is compounded daily, and, accordingly, even at this reduced interest rate, the amount of interest builds up quickly. The interest rate charged on overdue taxes is calculated and adjusted twice a year, and is based on the prime rate charged by banks.

#### *Are Points Paid for Refinancing a Home Deductible?*

One factor in the decision whether to refinance a home loan concerns the deductibility of points charged by the lender to refinance the loan. Although I.R.C. § 163 indicates that interest paid on indebtedness is deductible, I.R.C. § 463(g) limits this section by requiring that prepaid interest be deducted over the life of the loan. Points constitute prepaid interest, and thus would generally have to be deducted on a prorata basis over the life of the loan. Fortunately, there is a potential exception to proration requirement for points paid in connection with the purchase or improvement of a principal residence. Until recently, however, there has been no specific guidance concerning whether refinancing a home would fit into the exception to the requirement to prorate prepaid interest.

The Internal Revenue Service has just announced that points paid to refinance a home mortgage will not be considered financing to purchase or improve a residence. As a result, points paid for refinancing will have to be deducted on a prorata basis over the life of the loan. For example, if the home owner pays \$2400 in points to refinance a mortgage, and the new note will be payable over 240 months (20 years), then the owner will be permitted to deduct \$10 in interest each month (\$120 per year) attributable to the points paid for the refinancing. To the extent the loan is used to make improvements on the home, the proportional amount of the points paid for the loan would be currently deductible. The Internal Revenue Service is working on a formal ruling concerning points on refinancing. In the interim, home owners should not plan on deducting all of the points paid to refinance the home in the year they are paid. Rather, they will have to be deducted over the life of the loan. Major Mulliken.

#### **Individual Retirement Accounts**

As the tax filing deadline approaches each year and individuals are roughing out their taxes, they are frequently motivated to make a deductible contribution to an Individual Retirement Account (IRA), which significantly reduces the tax liability. The problem frequently encountered is a

lack of funds with which to make the contribution. Based on a past private letter ruling from the Internal Revenue Service, it has been advised that people short of cash borrow the money with which to make the IRA contribution. The IRS determined that the interest on the loan would be deductible, despite the prohibition of I.R.C. § 265, which precludes deductions which are paid or incurred for production of tax-exempt income. Although the private letter ruling is not binding on the IRS, it has been generally accepted in the past that taxpayers can borrow money, use it to make a deductible IRA contribution, and also deduct the interest on the loan. The taxpayer can then use the tax refund to repay the loan (at least in theory).

This scheme would lose part of its tax benefit if one proposed bill passes. One tax reform proposal being considered by the Senate Finance Committee would deny a deduction for interest on a debt incurred to make an IRA contribution. Whether the bill will pass is uncertain. Legal assistance officers may want to publicize this proposal to their clients and encourage them to plan ahead this year to fund the IRA. It is, of course, advantageous from a tax viewpoint to make the contribution as early as possible, because tax on earnings on amounts in an IRA are deferred until withdrawn. It should be noted, however, that in the future, soldiers may no longer be able to deduct contributions to IRAs. The tax reform legislation recently approved by the Senate Finance Committee would permit only individuals who do not participate in any employer-provided retirement arrangement to deduct IRA contributions. Major Mulliken.

#### **Uniform Gift to Minors Act Accounts**

Parents who save to fund college education costs for their children frequently attempt to do so in a way that shifts the tax imposed on the earnings of those savings from themselves to their children who frequently incur no tax or are taxed at a lower marginal rate. For parents with enough money to justify it, a Clifford Trust can be established to accomplish this objective. Parents who do not have substantial funds frequently accomplish the objective by establishing an account for the children under the Uniform Gift to Minors Act (UGMA). Those interested in a thorough analysis of the UGMA should read Delorio, *Uniform Gifts to Minors Act*, 112 Mil. L. Rev. 159 (1986). A few recent opinions place the effectiveness and wisdom of this scheme in jeopardy.

In *Sutliff v. Sutliff*, 489 A.2d 764 (Pa. Sup. Ct. 1985), Mrs. Sutliff challenged Mr. Sutliff's use of funds in a UGMA account to pay for support costs and educational expenses of their children. The Sutliff's were separated at the time and Mrs. Sutliff had obtained an interim court order requiring Mr. Sutliff to provide \$400 per week support for their minor children and to pay the college educational expenses for one of their daughters. Mr. Sutliff met these expenses by using money in the children's UGMA account of which he was the custodian. Mrs. Sutliff challenged his authority to do so, alleging that these support requirements were his obligation and that he had ample funds with which to meet them. She also moved to have him removed as custodian of the accounts. The court held in favor of the wife, determining that a custodian under the UGMA abuses his discretion and acts improperly if he expends funds from a custodial account to fulfill a parent's support obligation in lieu of the parent making payments out of his own funds.

The court also determined that the assets of a minor child held by a custodian under the UGMA could not be considered by a court when determining the proper level of support required of a parent who is financially able to support the child. In support of her case, Mrs. Sutliff relied on an IRS ruling that a parent will be taxed on the income of an account set up for the child to the extent that the parent uses funds from the account to discharge his or her legal obligation. Rev. Rul. 56-484, Treas. Reg. 1.662(a)-4.

At this time, most states would not find that parents have a legal obligation to provide money for college for their children. When the traditional family breaks down, however, a support obligation to fund college may be imposed or recognized. *Newberg v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982). If a support obligation is recognized or imposed upon the parent, and the parent uses funds from the child's account to pay the bills, this will result in the income from that account being taxable to the parent. *Braun v. Commissioner*, T.C. Memo 1984-285. What is perhaps more alarming about this recent development is that the parent may actually be precluded from using money in a UGMA account to pay those bills, at least to the extent that the parent is financially able to pay them. It is unclear whether a trend may develop in the states to recognize a parental obligation to fund college for their children. Cases finding such an obligation have generally arisen in the divorce context. Legal assistance officers should be aware of the uncertainty in this area and watch for further developments. Clients should be advised of the potential risks when considering establishing UGMA accounts for their children. Separated parents or parents contemplating divorce should probably be advised against establishing or further funding UGMA accounts for their children.

At present, the possibilities for shifting tax on college accounts to the children are becoming more limited. The tax advantages of interest free loans to children was significantly reduced by the Tax Reform Act of 1984. While Clifford Trusts are still an option today, they are generally expensive to establish and administer, and tax reform proposals, if passed, would eliminate the tax incentives for those as well. The recent court cases noted above make the use of UGMA accounts somewhat risky. Major Mulliken.

#### Guidelines for Mortgage Refinancing

The following was written by LTC Pielke, USAFR, and was provided by the Air Force Preventive Law Office.

The decline of mortgage interest rates from the high rates prevalent during the period from 1980-1984 has encouraged many homeowners who obtained mortgage loans at high interest rates to consider refinancing their loans at current lower rates.

The guidelines in this article assume that the borrower is a member of the military on active duty, subject to frequent PCS moves, and has a VA or FHA mortgage. This analysis may not apply to borrowers who do not fit the above assumptions.

1. **Interest Rate Differential.** As a rule of thumb, a difference in interest rates of 2% to 3% between the existing mortgage and the refinance loan makes refinancing viable.

2. **Closing Costs.** A homeowner will incur many of the same costs upon refinancing as were incurred upon purchase. These costs include: application fee (usually not

refundable); appraisal fee; credit check fee; survey; title report; attorney's fees; and "points." A "point" is 1% of the face value of the loan. Most lenders charge a minimum of 2 points, some lenders may charge 4 to 6 points. However, many lenders will add closing costs to the principal balance of the loan so that the borrower will not have to pay additional cash at settlement of the new loan.

3. **General Advice.** Some commentators advise that a borrower should determine the total amount of closing costs and divide this amount by the savings per month to determine how long it will take to recover the cost of refinancing. If the owner will occupy the house for longer than the time it takes to recover the costs, then it pays to refinance.

For example: If a drop of 3% in the interest rate will generate a \$100 savings in monthly payments and refinancing costs are \$4,800, then it will take four years to recover the costs. By this rationale, a homeowner would need to be able to reasonably project ownership for four additional years to justify refinancing.

Many military members could not justify refinancing by using the above criteria. They refinance anyway, however, to reduce the monthly payment by \$100 per month. They then hope to recoup the price of refinancing when they sell the house. Before refinancing your mortgage, whether or not you finance the closing costs by adding them to the principal amount of the mortgage, consider the following:

4. **Market Liquidity.** How liquid is the market where your house is located? Do houses turn over rapidly, or does it take six to twelve months or more to close a sale after the house is put on the market? Is there a rental market if the house cannot be quickly sold? If not, how will the monthly payments be met?

5. **Appreciation Potential.** Are houses in your area appreciating rapidly? Slowly? Are they, or could they be, declining in value? Many areas in the U.S. are over-built or are suffering local recessions. House values in those areas may actually be dropping.

Because military members must move frequently, poor market liquidity and lack of appreciation are normally more of a problem to them than interest rates. These problems can be compounded if refinance costs are added to the principal balance and market appreciation does not rise enough to allow the homeowner to recover all of the debts and expenses upon sale.

If refinancing is still viable after considering the monthly savings, closing costs, market liquidity, and appreciation potential, there are some additional issues to consider:

6. **Interest Rates and "Lock-Ins."** The interest rate on VA and FHA loans is normally fixed at settlement, not frozen in advance while waiting to settle. The VA, however, will allow mortgage lenders to sign an *unconditional contract* with a veteran that could mean closing at a rate different than the VA rate in effect on the day of settlement (either higher or lower!). If the rate is not unconditionally locked-in, it could be higher or lower at settlement compared to the time of loan application. Be sure you know which type of "lock-in" you have—one that truly is locked, or one that "unlocks" if the VA rate changes.





# Enlisted Update

*Sergeant Major Gunther Nothnagel*

**Proponency Transfer of MOS 71D and 71E.** The Office of the Deputy Chief of Staff for Personnel has approved The Judge Advocate General's proposal to transfer personnel proponency responsibilities for MOS 71D (Legal Specialist) and MOS 71E (Court Reporter) from the Soldier Support Center to The Judge Advocate General. Although MOS 71D/E will remain within CMF71, for which The Adjutant General's School is proponency, The Judge Advocate General will exercise personnel proponency responsibilities for all aspects of both MOSs as required by AR 600-3. The Adjutant General's School will retain training proponency for MOS 71D. As proponency for MOS 71D/E, The Judge Advocate General will have expanded capability for up-front analysis on structural, manpower, personnel, and training matters pertaining to both MOSs.

**Legal Basic Noncommissioned Officer Course.** On 28 March 1986, thirty soldiers in PMOS 71D/E graduated from the first Legal Basic Noncommissioned Officer Course (BNCOC), developed and conducted at Fort Benjamin Harrison, IN. The course was designed to prepare legal NCOs and court reporters for duty as Skill Level 3 soldiers. Future iterations of BNCOC will incorporate an additional six days of common skills training. Receiving academic honors for graduating first and second, respectively, in this class were Sergeant John M. Sill, Office of the Staff Judge Advocate, Fort Stewart, GA, and Sergeant Robyne D.

Davis, Office of the Staff Judge Advocate, 8th Infantry Division, Germany.

**Chief Legal NCO & Senior Court Reporter Course.** The 6th Chief Legal NCO and Senior Court Reporter Course, Course Number 512-71D/71E/40/50, will be held at The Judge Advocate General's School, Charlottesville, VA, from 9-13 June 1986. Attendance is by invitation only. Attendees will review the new draft Legal Specialist Handbook and an update on matters pertaining to office management and personnel policies which impact on the enlisted side of the Corps.

**Soldier's Manual Distribution for PMOS 71D/E.** Soldier's Manuals are no longer distributed automatically. Chief Legal NCOs must ensure that sufficient quantities of Soldier's Manuals for PMOS 71D/E are requisitioned from the U.S. Army Adjutant General Publications Center, Baltimore, MD. Publication number for MOS 71D is STP12-71D15-SM-TG; for MOS 71E, STP12-71E25-SM-TG. The SQT test window for PMOS 71D/E (active component) is 1 August through 31 October 1986. The Reserve Component's test window is 1 August 1986 through 31 January 1987.

## 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: 928-1304).

### 2. TJAGSA CLE Course Schedule

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: 110th Basic Course (5-27-C20).

July 28-8 August: 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).

September 15-26: 109th Contract Attorneys Course (5F-F10).

October 7-10: 1986 Worldwide JAG Conference.

October 14-17: 6th Commercial Activities Program Course (5F-F16).

October 20-24: 8th Legal Aspects of Terrorism Course (5F-F43).

October 20-24: 5th Advanced Federal Litigation Course (5F-F29).

October 20-December 19: 111th Basic Course (5-27-C20).

October 27-31: 34th Law of War Workshop (5F-F42).

October 27-31: 19th Legal Assistance Course (5F-F23).

November 3-7: 86th Senior Officers Legal Orientation Course (5F-F1).

November 17-21: 17th Criminal Trial Advocacy Course (5F-F32).

December 1-5: 23d Fiscal Law Course (5F-F12).

December 8-12: 2d Judge Advocate and Military Operations Seminar (5F-F47).

December 15-19: 30th Federal Labor Relations Course (5F-F22).

1987

January 12-16: 1987 Government Contract Law Symposium (5F-F11).

January 20-March 27: 112th Basic Course (5-27-C20).

January 26-30: 8th Claims Course (5F-F26).

February 2-6: 87th Senior Officers Legal Orientation Course (5F-F1).

February 9-13: 18th Criminal Trial Advocacy Course (5F-F32).

February 17-20: Alternative Dispute Resolution Course (5F-F25).

February 23-March 6: 110th Contract Attorneys Course (5F-F10).

March 9-13: 11th Admin Law for Military Installations (5F-F24).

March 16-20: 35th Law of War Workshop (5F-F42).

March 23-27: 20th Legal Assistance Course (5F-F23).

March 31-April 3: JA Reserve Component Workshop.

April 6-10: 2d Advanced Acquisition Course (5F-F17).

April 13-17: 88th Senior Officers Legal Orientation Course (5F-F1).

April 20-24: 17th Staff Judge Advocate Course (5F-F52).

April 20-24: 3d SJA Spouses' Course.

April 27-May 8: 111th Contract Attorneys Course (5F-F10).

May 4-8: 3d Administration and Law for Legal Specialists (512-71D/20/30).

May 11-15: 31st Federal Labor Relations Course (5F-F22).

May 18-22: 24th Fiscal Law Course (5F-F12).

May 26-June 12: 30th Military Judge Course (5F-F33).

June 1-5: 89th Senior Officers Legal Orientation Course (5F-F1).

June 9-12: Legal Administrators Workshop (512-71D/71E/40/50).

June 8-12: 5th Contract Claims, Litigation, and Remedies Course, (5F-F13).

June 15-26: JATT Team Training.

June 15-26: JAOAC (Phase IV).

July 6-10: US Army Claims Service Training Seminar.

July 13-17: Professional Recruiting Training Seminar.

July 13-17: 16th Law Office Management Course (7A-713A).

July 20-31: 112th Contract Attorneys Course (5F-F10).

July 20-September 25: 113th Basic Course (5-27-C20).

August 3-May 21, 1988: 36th Graduate Course (5-27-C22).

August 10-14: 36th Law of War Workshop (5F-F42).

August 17-21: 11th Criminal Law New Developments Course (5F-F35).

August 24-28: 90th 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

September 1986

- 5: GICLE, Tax Law, Savannah, GA.
- 7-12: NJC, Alcohol & Drugs: Handling User Abuse Cases, Reno, NV.
- 7-12: NJC, Case Management: Reducing Court Delay, Reno, NV.
- 8-10: FPI, Practical Environmental Law, Williamsburg, VA.
- 10: PBI, Wrongful Discharge: How to Try the Case (Video), State College, PA.
- 11-12: PLI, Annual Employee Benefits Institute, New York, NY.
- 12: GICLE, City/County Attorney Institute, Athens, GA.
- 12: GICLE, Tax Law, Atlanta, GA.
- 13-19: PLI, Patent Bar Review Course, New York, NY.
- 14-10/3: NJC, General Jurisdiction, Reno, NV.
- 14-19: NJC, Managing the Complex Case, Reno, NV.
- 18-19: PLI, Annual Estate Planning Institute, San Francisco, CA.
- 18-20: PLI, Computer Law Institute, New York, NY.
- 18-20: PLI, Product Liability of Manufacturers, New York, NY.
- 19-20: ALIABA, Sophisticated Estate Planning Techniques, Boston, MA.
- 21-25: NCDA, Trial Advocacy, San Antonio, TX.
- 21-26: NJC, Introduction to Computers & Technology in Courts, Reno, NV.
- 22-24: FPI, Construction Contract Litigation, San Francisco, CA.
- 22-24: FPI, Practical Construction Law, Washington, DC.
- 25: PBI, Matrimonial Litigation Across State Lines (Video), Waynesburg, PA.
- 25-26: PLI, Aircraft Crash Litigation, New York, NY.
- 25-26: PLI, Annual Employee Benefits Institute, San Francisco, CA.
- 25-27: GICLE, Bridge-the-Gap, Atlanta, GA.
- 25-27: GICLE, Insurance Law Institute, St. Simons, GA.
- 26-27: NCLE, Real Estate, Lincoln, NE.
- 28-10/3: Scientific Evidence, Reno, NV.

29-10/1: FPI, Claims & the Construction Owner, Las Vegas, NV.

29-10/1: FPI, Proving Construction Contract Damages, Atlanta, GA.

29-30: NELI, EEO in Federal, State and Local Government, Washington, DC.

29-30: PLI, Secured Creditors & Lessors under Bankruptcy Reform, San Francisco, CA.

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. Microfiche Field Law Library

Last year the Office of the Staff Judge Advocate, Third U.S. Army, designed and acquired a microfiche field law library. Their library includes two country studies, treaties, international law materials, procurement regulations and decisions, and criminal justice materials.

Using battery-powered, lap-size microfiche readers, a library of this kind will be invaluable to deploying legal offices. It fits easily in a briefcase or rucksack and can be tailored to meet individual mission needs.

The Judge Advocate General's School, U.S. Army (TJAGSA) is pursuing Information Management Master Plan initiatives which, if approved, will allow for the production of microfiche copies of TJAGSA deskbooks, DA Pamphlets, and other important research materials. These will be used to create microfiche field law libraries for TOE legal offices.

More advanced, state-of-the-art equipment is being developed and will become the subject of future JAGC information management initiatives.

### 2. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the

relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

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

#### Contract Law

- AD B090375 Contract Law, Government Contract Law Deskbook Vol 1/  
JAGS-ADK-85-1 (200 pgs).
- AD B090376 Contract Law, Government Contract Law Deskbook Vol 2/  
JAGS-ADK-85-2 (175 pgs).
- AD 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

- AB087847 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-86-4 (40 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-86-6 (377 pgs).  
AD B100756 Reports of Survey and Line of Duty  
Determination/JAGS-ADA-86-5 (110  
pgs).  
AD B100675 Practical Exercises in Administrative and  
Civil Law and Management (146 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 and  
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  
Practical Exercises/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.

#### 3. Regulations & Pamphlets

Listed below are new publications and changes to ex-  
isting publications.

Number	Title	Change	Date
AR 608-1	Army Community Service Program		28 Mar 86
UPDATE #8	All Ranks Personnel		1 Apr 86
UPDATE #8	Enlisted Ranks Personnel		15 Apr 86
UPDATE #2	Evaluations		22 Apr 86
UPDATE #8	Officer Ranks Personnel		30 Apr 86
DA Pam 310-1	Index of Army Publications and Blank Forms		Mar 86

#### 4. Articles

The following civilian law review articles may be of use  
to judge advocates in performing their duties.

- Anastaplo, *How to Read the Constitution of the United States*, 17 Loy. U. L.J. 1 (1985).  
Auster, *Selected Tax Strategies Involving the Principal Residence*, 64 Taxes 229 (1986).  
Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 Colum. L. Rev. 9 (1986).  
Caplan, *Questioning Miranda*, 38 Vand. L. Rev. 1417 (1985).  
Davis, *Language and the Justice System: Problems and Issues*, 10 Just. Sys. J. 353 (1985).  
Ehlke, *the Privacy Act After a Decade*, 18 J. Mar. L. Rev. 829 (1985).  
Engholm, *Affordable Laser Printing for the Smaller Law Firm*, 12 Legal Econ. 31 (1986).  
Garner, *Structural Changes in Military Criminal Practice at the Trial and Appellate Level as a Result of the Military Justice Act of 1983*, 33 Fed. B. News & J. 116 (1986).  
Glaser, *The Criminal Law's Nemesis: Drug Control*, 1985 A.B.A. Research J. 619.  
Heinzelmann, *Mandatory Confinement as a Response to Community Concerns About Drunk Driving*, 10 Just. Sys. J. 265 (1985).  
Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).  
Lindsay, *Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations*, 8 Campbell L. Rev. 71 (1985).  
Parker, *The Constitutional Status of Public Employee Speech: A Question for the Jury?*, 65 B.U.L. Rev. 483 (1985).  
Riggs, *the United Nations and the Development of International Law*, 1985 B.Y.U. L. Rev. 411.  
Sybesma-Knol, *The New Law of Treaties: The Codification of the Law of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations*, 15 Ga. J. Int'l L. 425 (1985).

Unger, *The Vexatious Litigant: Awarding Attorney's Fees as a Deterrent to Bad Faith Pleading*, 1985 Det. C.L. Rev. 1019.

Weissman & Leick, *Mediation and Other Creative Alternatives to Litigating Family Law Issues*, 61 N.D.L. Rev. 263 (1985).

Wells, *The 1984 A.B.A. Criminal Mental Health Standards and the Expert Witness: New Therapy for a Troubled Relationship?*, 13 W. St. U.L. Rev. 79 (1985).

Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735 (1985).

Comment, *The Feres Doctrine: Will it Survive the Radiation Cases?*, 37 Mercer L. Rev. 839 (1986).

Note, *The Freedom of Information Act: A Fundamental Contradiction*, 34 Am. U.L. Rev. 1157 (1985).

Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 Mich. L. Rev. 1925 (1985).

Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 Geo. L. Rev. 429 (1985).

Case Note, *The Armed Services' Continued Degradation and Expulsion of Their Homosexual Members: Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

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