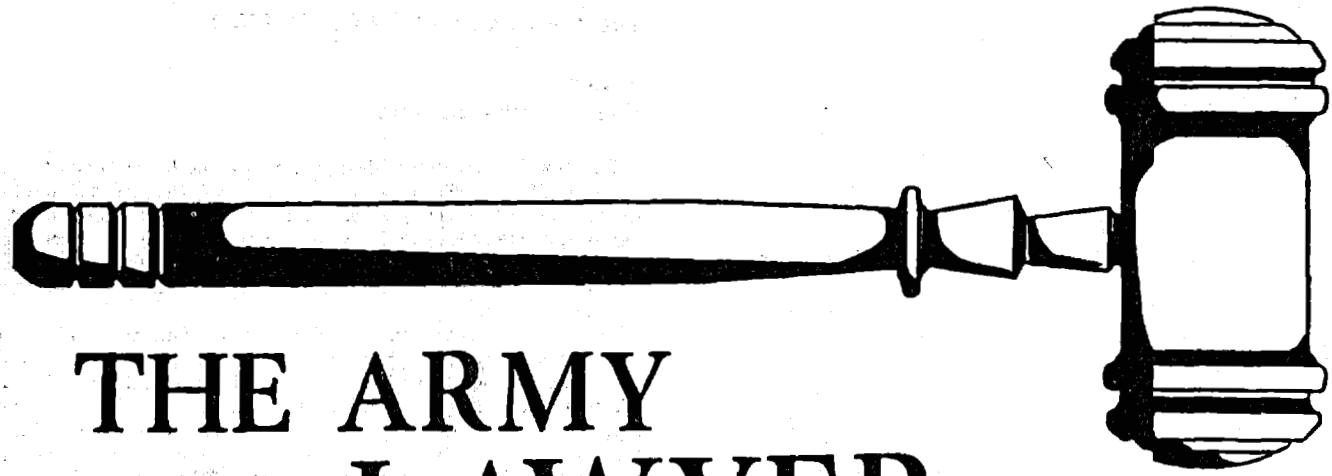

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet
27–50–164

August 1986

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The Army Lawyer (ISSN 0364–1287)

Editor
Captain David R. Getz

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

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

The Army Lawyer articles are indexed in the *Index to Legal Periodicals* and the *Index to U.S. Government Periodicals.*

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

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

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

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

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Brigadier General, United States Army
The Adjutant General

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Update: JAGC Regimental Activation

GO 22

General Orders

No. 22

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, DC *30 May 1986*

ESTABLISHMENT OF . . . THE JUDGE ADVOCATE GENERAL'S CORPS IN THE US ARMY REGIMENTAL SYSTEM (USARS)

. . . .

The Judge Advocate General's Corps is placed under the US Army Regimental System effective 29 July 1986. The home of the Judge Advocate General's Corps is ESTABLISHED at Charlottesville, Virginia.

[DAAG-HDU]

By Order of the Secretary of the Army:

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

Official:

R. L. DILWORTH
Brigadier General, United States Army
The Adjutant General

DISTRIBUTION:
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The Regimental activation ceremony will be conducted during the World-Wide JAG Conference in October 1986.

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

REPLY TO
ATTENTION OF

10 JUL 1986

DAJA-SM

SUBJECT: Enlisted Force Management Study

JUDGE ADVOCATES
LEGAL SPECIALISTS
COURT REPORTERS

1. During December 1985 I directed that an Enlisted Force Management Study Team be constituted to review critical issues pertaining to the management of our enlisted force. The enclosed article outlines issues and recommendations reached by the Study Team. On 3 June 1986 I approved the findings of the study and have directed the implementation of its recommendations.

2. All judge advocates and enlisted soldiers in the Corps should review this study. Comments regarding the study are encouraged. Your comments or suggestions should be addressed to the Corps Sergeant Major by calling AV 225-1036. Letters should be addressed to: DAJA-SM, Washington, DC 20310-2200.

Hugh Overholt

Encl

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

Enlisted Force Management Study

On 1 May 1986, the JAG Enlisted Force Management Study Team submitted its report to The Judge Advocate General. The team was composed of MG William K. Suter, The Assistant Judge Advocate General; MAJ Michael C. Chapman, OTJAG: SGM Gunther M. Nothnagel, OTJAG SGM; SGM Bobbie R. Giddens, Chief Legal NCO, 2d US Army; and SFC Howard Scarborough and SFC Bobbie Bridges, OTJAG Liaison to MILPERCEN. The team analyzed JAG Corps enlisted force management plans and policies, with emphasis on promotion, accessions, assignments, and training. Principal issues concerned strength and promotion problems in the junior enlisted grades because of changes brought about in the Standards of Grade Authorizations (SGA) in AR 611-201. On 3 June 1986, The Judge Advocate General approved the recommendations of the study team and directed the implementation of the recommendations of the team. A synopsis of the issues addressed by the Study team are reflected below.

a. Promotion opportunities in MOS 71D and 71E.

(1) ISSUE: Promotion opportunities in MOS 71D.

(a) There is no promotion problem to grades E-2 through E-4. These promotions are based upon time in service and are automatic, unless the soldier is a substandard performer or disciplinary problem.

(b) Promotions to E-5 have been severely curtailed. Changes in the SGA have caused an excess of 165 soldiers at grade E-5. Until the overage is brought in line with authorizations, there will be no promotions to E-5.

(c) For the past four years, promotions to E-6 have been virtually nonexistent. Since September 1982, only 21 71D E-5s have been promoted. There are presently 392 E-5s on the E-6 standing list, but only 229 E-6 authorizations.

(d) There is currently no promotion stagnation in grades E-7 through E-8. As a result of changes in the SGA, authorizations have increased creating an increase in promotions.

(2) RECOMMENDATIONS:

(a) There is no immediate fix to the E-5 promotion problem. Although reclassification may be an answer, reclassification at the present time would create a more serious problem by reducing the total 71D MOS strength to 76 percent. Initiation of a mandatory reclassification problem when the strength of E-1 through E-4 reaches 95 percent of authorizations would help to eliminate some of the overage. We should reach this strength by FY 87.

(b) Although promotions to E-6 have been very slow, the log jam at E-6 should correct itself in the near future. Based on factors at this time, promotions to E-6 will resume when the current E-7 promotion list is exhausted early in FY 87. Year group management of the mandatory reclassification problem discussed above and natural attrition will also reduce the waiting time to E-6. Voluntary reclassification should be favorably considered.

(c) Because grades E-7 through E-9 are projected to be overstrength, promotions to these grades will be based primarily on vacancies created by retirement. Although this may decrease promotion selection rates, it should not lead to promotion stagnation unless there is a significant loss of authorizations. Future efforts to decrease authorizations at grades E-7 through E-9 should be carefully scrutinized to ensure minimal impact on promotion possibilities.

(3) ISSUE: Promotion opportunities in MOS 71E.

Small overages now exist at grades E-6 through E-9 in MOS 71E; two at E-6, four at E-7, and one each at E-8 and E-9. Because of the small number of authorizations in MOS 71E, however, any overage results in limiting promotions.

(4) RECOMMENDATIONS:

Recommend that voluntary reclassification be permitted on a case-by-case basis only when skill level 2 reaches 95 percent of authorizations and the MOS reaches 100 percent strength. Reclassification should also be limited to soldiers who have served at least five years as a 71E. Through careful management, these initiatives will reduce the overage and keep the MOS at or near full strength.

b. Entry level accessions for MOS 71D and 71E.

(1) ISSUE: 71D accessions.

The March 1985 change to the SGA increased skill level 1 authorizations (E-1-E-3) from 330 to 928. An immediate need for additional school seats was apparent. We were able to obtain 252 additional school seats for FY 86 making the total allocation 660. Seventy-five percent (495) of these seats have been filled.

(2) RECOMMENDATIONS:

If we fill the 165 remaining seats for FY 86 and the 463 seats allocated for FY 87, the shortage of skill level 1 personnel should be resolved. Concerted efforts to fill these seats should continue.

(3) ISSUE: 71E accessions.

For the past few years, we have had difficulty filling 71E school allocations. In FY 84 and 85, of the 30 available seats only 14 and 15, respectively, were filled. This resulted in a decision by the Specialized Training Branch at MILPERCEN to reduce the number of classes in FY 87 from three to two, consisting of ten seats each (budget constraints were also a factor). Intensified efforts to recruit more applicants resulted in 16 court reporters graduating from the last two classes. This increased the 71E E-5 strength to 49 percent of authorizations.

(4) RECOMMENDATIONS:

(a) We need to continue efforts to recruit more 71Es. Seven soldiers are already scheduled for attendance at the next two classes. We also need to continue efforts to recruit non-71D personnel to help fill 71E vacancies.

(b) Recommend obtaining a Variable Reenlistment Bonus (VRB) to help retain and recruit 71E personnel. Other incentives should be sought to make 71E more attractive.

c. Assignments.

Managing 71D and 71E assignments has become increasingly difficult. It is often hard to place the right soldier of the right grade at the appropriate installation at the requisitioned time. Two primary reasons for this difficulty have

been the liberal application of MILPERCEN personnel policies and recent changes to the SGA.

(1) ISSUE: Increase in CONUS and OCONUS no-shows.

(a) The rate of both CONUS and OCONUS no-shows increased markedly in 1985. Liberal MILPERCEN Foreign Service Tour Extensions (FSTE) and Deletion/Deferment policies were contributing causes of this problem.

(b) Prior to 1 October 1985, a commander in USAREUR could grant an oversea extension to an E–1 through E–4 up to 60 days prior to DEROS. An FSTE for an E–5 through E–9 had to be approved six months prior to DEROS. Many of these "gangplank" extensions were not properly posted to the Enlisted Master File (EMF) causing assignment no-shows for certain CONUS installations. In turn, the increase in CONUS no-shows caused the number of Key Soldier Deletions (KSDs), operational deletions, and deferments to increase. This resulted in OCONUS no-shows.

(c) The KSD program allowed FORSCOM installation commanders to delete a certain number of key NCOs each month from their PCS orders. To help cover CONUS no-shows, commanders would request operational deletions or deferments of other soldiers. These deletions and deferments were based upon projected gains and losses and were often approved by HQDA.

(d) In addition to this problem, many lower ranking enlisted soldiers are close to their ETS upon their DEROS. Contrary to Army policy, soldiers were permitted to reenlist for their present duty assignment or a CONUS station-of-choice even if they were already on orders.

(e) Finally, recognizing that their FSTE and deletion/deferment policies were causing problems, MILPERCEN made certain changes, effective 1 October 1985, that will help the enlisted assignment process.

— Once a soldier is on orders, he or she cannot request an FSTE any later than six months prior to DEROS (12 months for E–5 through E–9). Also, a timely request must be approved by Department of the Army (DA) rather than by one's commander. If no assignment instructions are received, a soldier may receive an extension inside the 6/12 month window only after approval by DA. These new policies will alert MILPERCEN that a soldier has a FSTE early enough to preclude placing him or her on orders.

— The Key Soldier Deletion program has been rescinded and operational deletion/deferments will no longer be honored.

— If a soldier is on orders and close to his or her ETS, he can only reenlist to accept that assignment. No other options are available.

(2) RECOMMENDATIONS.

In light of MILPERCEN's recent policy changes, no action is necessary.

(3) ISSUE: Disparity in authorization documents.

(a) Recent restructuring of the SGA has changed, by grade and total number, 71D and 71E authorizations. Many installations have failed to update or complete the restructuring of their respective SGA for 71D and 71E. This causes a problem for MILPERCEN when trying to verify authorizations versus the operating and projected strengths.

(b) Current MILPERCEN policy precludes the filling of any positions unless the requirement has been validated and authorized for fill by the DA force Management Division. This validation is not possible unless installation TAADS have been corrected and coincide with MILPERCEN figures.

(4) RECOMMENDATIONS:

The OTJAG liaison team at MILPERCEN closely monitors the TAADS of each installation and command. Close coordination with the chief legal NCO of each installation keeps the team abreast of current and projected authorizations and strengths. We must continue this coordination to ensure that MILPERCEN has an accurate picture of the personnel status of each installation and command. Although this is a step in the right direction, more is needed. Each installation that has not updated its TAADS must complete this restructuring as soon as possible. To facilitate this process, the study team recommends that each MACOM SJA be directed to TJAG to assume the responsibility of ensuring that respective installations and subordinate commands quickly complete this vital task.

d. Nonresident Legal Specialist Training for MOS 71D and 71E.

(1) ISSUE. Correspondence Courses.

(a) Presently, nonresident legal specialist training is woefully inadequate. Under DA PAM 351–20, only one AG branch correspondence course, the NCOES Advanced Correspondence Course, is administered for MOS 71D and 71E. This course consists of a series of subcourses designed to prepare selected 71D and 71E soldiers to perform administrative skills at grades E–7 and E–8. While the course adequately covers general administration, it does not include 71D and 71E specific tasks. Without such a technical track, the course is insufficient. After 1 October 1986, no credit will be given for taking this course until it is revised.

(b) The Judge Advocate General's School (TJAGSA) administers one other nonresident course for 71D and 71E personnel, the Law for Legal Specialist Course. This course provides legal specialists with substantive knowledge to perform duties as a lawyer's assistant. TJAGSA also offers a Legal Administrative Technician Course to prepare aspiring 71Ds to become legal warrant officers.

(c) The AG School has recognized the need for additional nonresident training. Through coordination with the Legal Specialist Course director, Fort Benjamin Harrison, IN, the AG School has concurred in the development of AIT, BNOC, and ANCOES (MOS specific tract) nonresident training. Development of these new courses will be completed NLT 1 October 1987. This will be of great benefit to our Reserve Component personnel.

(2) RECOMMENDATIONS:

Although the development of the new courses mentioned above will help fill the nonresident training void for 71D and 71E personnel, more can be done. TJAGSA now offers an annual resident Law Office Management Course to 50 enlisted soldiers. Recommend that TJAGSA develop a nonresident Law Office Management Course patterned after the resident course.

(3) ISSUE: Development of a Legal Specialist Handbook.

(a) The Soldier's Manual for MOS 71D has deleted MOS tasks for junior level specialists. Many of these tasks are crucial to job performance.

(b) Chief legal NCOs and legal administrators agree that the 1972 version of DA PAM 27–16 should be revised and updated.

(4) RECOMMENDATIONS:

(a) DA PAM 27–16 be updated and revised to include MOS tasks to assist junior legal specialists in meeting mission requirements.

(b) Input be solicited from chief legal NCOs and legal administrators.

(c) Initial development of the pamphlet be done at a one-week senior NCO/Warrant Office conference.

(d) The pamphlet be reviewed by the chief legal NCOs in attendance at the annual Chief Legal NCO Conference, TJAGSA.

(e) After review by the senior NCOs, TJAGSA be tasked to put the pamphlet in final form for publication.

CONCLUSION

Overall, the health of the JAG enlisted force is good. Our senior NCO strength is adequate and the female content in MOS 71D is well within authorized standards. Once strength and promotion problems in junior enlisted grades are settled, there will be no serious personnel problems confronting the force. To ensure that our enlisted assets are managed properly in the future, recommend that The Judge Advocate General form a JAG enlisted force management study group to meet yearly and discuss issues concerning enlisted force management. This group, headed by the Sergeant Major of the JAG Corps, would brief The Judge Advocate General on the current status of the enlisted force and any new problems that may confront the Corps. The group would also be tasked to brief attendees at the Chief Legal NCO Course.

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

REPLY TO
ATTENTION OF

DAJA-ZX

11 JUL 1986

SUBJECT: Innovation

STAFF AND COMMAND JUDGE ADVOCATES

1. Over the past several months I have read with great interest information received from staff and command judge advocates concerning innovative programs designed to meet contemporary challenges. The enclosure compiles ideas which I found most likely to have broad application.

2. Responses indicate that the Judge Advocate General's Corps is:

a. Getting involved in early stages of decision-making processes;

b. Expanding its ability to bring quality legal assistance to soldiers and their dependents; and

c. Actively seeking ways to improve the quality of legal services provided to the command.

3. Please examine the ideas presented in the enclosure. Some may have no application in your practice; others may be usable in modified form. We must continue to seek ways to improve our services.

4. I appreciate the time and effort so many of you took to respond. Your ideas will undoubtedly help other judge advocates improve the quality of legal services in their commands.

Hugh Overholt

Encl

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

Judge Advocate Initiatives

—Established a Department of Justice Interface Program allowing judge advocates to represent Department of Defense interests in federal district courts. Some judge advocates serve with DOJ on a full-time basis; other judge advocates prosecute felonies occurring on the installation on a part-time basis.

—Established division-wide Tax Assistance Programs using legal assistance officers, unit tax advisors, and Army Community Service volunteers to assist soldiers and dependents in filing tax returns.

—Developed a plan to eliminate burden of initial utility and rental deposits. Credit union and bank agreed to act as guarantors for these deposits. Soldiers agreed to start $25/month allotment at least until amount in account equals deposit. Utility companies and landlords agreed to waive initial deposits under this program.

—Established a "one-stop" claims operation in which transportation office employees are assigned to the claims office. All claims documentation and damage inspection are handled at one location.

—Intensified involvement of judge advocates in medical risk management and quality assurance programs.

—Established a single point of contact for operational law matters. Evaluated law of war play in battalion ARTEP's, interjected operational law scenarios into exercises, drafted rules of engagement, and participated in targeting. Provided an operations law team to the Tactical Operations Center.

—Established a legal assistance outreach program to provide various services, including tax assistance, at convenient locations such as local trailer parks and housing areas.

—Established a test program in which an Army Community Service volunteer assists in legal assistance office operations.

—Involved a judge advocate immediately in a death investigation to facilitate assistance not only to the investigation but also the casualty assistance officer and the public affairs office.

—Used the Defense Technical Information Center distribution network to share locally produced legal publications.

—Employed a judge advocate at the Family Support and Child Abuse Council to aid investigation of alleged spouse and child abuse, and then to conduct follow-up liaison with local welfare authorities. (Should be the JA responsible for liaison with host country authorities in overseas locations.)

—Assigned a judge advocate as a member of the Juvenile Review Council which administratively adjudicates dependent juvenile delinquency cases. (Should not be the JA responsible for liaison with host country authorities in overseas locations, because of adjudicative nature of council.)

—Assigned a judge advocate as an administrative hearing officer for installation traffic and wildlife violations by soldiers.

—Assigned a judge advocate as a member of the Performance Management Review Council to determine performance standards for GM employees and to participate in division of merit pay to deserving employees. (Should not be the Labor Counselor because he is a potential witness in adverse actions where performance standards are challenged.)

—Employed judge advocates full-time in the field on exercises for continuing processing of cases. Trials conducted in the rear.

—Provided special advice to commanders on Article 139 claims, which permit a soldier to recover against the pay of a soldier who damages his personal property.

—Provided legal representation at meetings of the Commercial Activities Steering Committee, the Mobilization Planning Committee, the Human Resources Coordinating Committee, and the Federal Coordinating Committee (Combined Federal Campaign), the Family Advocacy Team, and various other groups which provide day-to-day direction and control of installation activities in order to assist decision-makers with early identification of legal and policy problems.

—Coordinated with American Consulate to provide a special legal assistance service on post, thereby eliminating the need for soldiers to travel on leave or pass to obtain passports, passport extensions, or to record records of birth abroad.

—Established a "one-stop" legal assistance service on post to eliminate need for soldiers to travel on leave or pass to obtain forms and briefings required for marriage overseas.

—Used an experimental program to provide for direct leasing in selected areas of Germany.

—Emphasized affirmative claims against contractors as a means of enhancing contractual compliance. (AR 27–40 requires prior coordination with DAJA–LT.)

—Assigned a judge advocate as a labor counselor to attend weekly case reviews with Management Employee Specialists concerning on-going adverse actions.

—Enhanced office automation to provide electronic links to staff and directorate heads.

—Assumed responsibility for administrative boards, the DWI letter of reprimand program, and the program for suspension of on-post driving privileges.

—Established a program whereby a legal specialist on duty at the county courthouse writes personal recognizance bonds for soldiers and family members.

—Established "working teams" (contract law advisor, chief of justice, etc.) to address legal issues attendant to the discovery of contract fraud and the pursuit of criminal, civil, administrative, and contract remedies.

—Used computer-assisted approaches to Preparation for Overseas Movement/Preparation of Replacements for Overseas Movement/Emergency Deployment Readiness Exercise legal support.

Other Suggestions

—Establish mediation/dispute resolution programs (for example, require that owners placing rentals through the Housing Office consent to mediation to settle disputes).

—Coordinate with the U.S. Attorney and develop duty JA hospital law "emergency book" which includes computer disc with petition for temporary restraining orders, court orders, and other pleadings and papers required to secure a court order to administer life-saving medical care in appropriate circumstances.

Does an Open House Turn a Military Installation into a Public Forum?

United States v. Albertini and the First Amendment

Captain Donna Chapin Maizel
OSJA V Corps, FRG
&
Captain Samuel R. Maizel
OSJA, Giessen Branch Office, 3rd Armored Division, FRG

Introduction

The government has broad powers to regulate speech and other forms of expression on military installations. While not absolute, this broad power may include content-based distinctions that would be prohibited if the communications took place on public streets. This article will address the extent to which the government may regulate expression by civilians directed to other civilians when the public has been invited onto a military installation for an open house.

Armed Forces Day and other holidays are often observed on military installations by holding an open house. Military regulations encourage this practice.[1] Open house activities can foster patriotism, promote positive public relations, and show the taxpayer where dollars are being spent. During the open house, a portion of the installation, as well as its personnel and equipment, are displayed for public inspection. Entertainment is frequently offered, and local civic groups, service organizations, and defense equipment suppliers are invited to participate.[2] Groups opposed to nuclear weapons, military procurement programs, or other aspects of defense programs view open house activities as an attempt by the "military-industrial establishment" to send a message that tax dollars are well-spent on military programs. They protest that the open house is an attempt to solicit support for military procurement or weapons development. Sometimes these groups wish to participate in the open house to protest military programs.[3] When groups are denied access to an open house, they may claim a violation of their first amendment right of free speech, alleging that the open house has created a limited public forum for the discussion of defense-related issues.[4]

First Amendment Protection on Military Installations

The Supreme Court, as well as several circuit courts, has addressed denial of access of civilians to military installations for communication purposes.[5] Unfortunately, the Supreme Court's decisions in this area have left open as many questions as they have answered. Therefore, it is necessary to turn to circuit court decisions, as well as to Supreme Court decisions in other areas, to discern the principles that should guide commanders and their legal advisors in their decision whether to deny access to military installations.

The decision to deny access to an open house may be based upon one or more grounds. In *Persons for Free Speech at SAC v. United States Air Force,*[6] the commander decided that certain groups' activities and messages were

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[1] For example, an Army regulation states:

12–4. Open house. To establish and maintain cordial relationships between military installations and surrounding civilian communities, the holding of an open house is authorized and encouraged. Open houses may be scheduled to coincide with Armed Forces Day, the Army birthday, service branch birthdays, or anniversaries which mark the history of installations or units or community events, or in support of media day in accordance with paragraph 3–4, AR 360–5. Conduct such activities within the limits of available resources and operational capabilities.

a. Open houses, demonstrations, displays, and traveling exhibits should encourage attendance and participation of family groups.

(1) Spectator participation events which appeal to children are considered proper. Such events are vehicle rides, junior jump towers, vision devices, communications equipment, physical fitness skills, and first aid techniques.

(2) Avoid activities which stress the violent aspects of combat and military training. Events which may be considered improper include the following:

(a) Simulated or electronic weapons firing or handling.

(b) Grenade throwing.

(c) Bayonet training.

(d) Hand-to-hand combat demonstrations.

b. Encourage maximum use of ARNG armories and USAR centers for open houses, exhibits, and other programs of interest to the general public. Dep't of Army, Reg. No. 360–61, Community Relations, para. 12–1 (15 Oct. 1980) [hereinafter cited as AR 360–61].

[2] The 1981 Armed Forces Day open house at Offutt Air Force Base, near Omaha, Nebraska, included demonstrations of military equipment, recruiting and information booths, and entertainment. *See* Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir.) (en banc), *cert. denied,* 459 U.S. 1092 (1982). The 1981 Armed Forces Day open house at Hickham Air Force Base, near Honolulu, Hawaii, offered local civilian and military entertainment, aircraft displays, scheduled parachute jumps and aircraft flyovers, as well as a carnival with rides, games, and a beauty pageant. *See* United States v. Albertini, 710 F.2d 1410, 1412 (9th Cir. 1983), *rev'd and remanded,* 105 S. Ct. 2897 (1985), *on remand,* 783 F.2d 1434 (9th Cir. 1986).

[3] In *Persons for Free Speech at SAC,* permission was sought "to present an alternative to the extremely dangerous and costly arms race," 675 F.2d at 1012, while in *Albertini,* no permission was requested. Albertini and four companions entered as part of the crowd, but with the purpose of protesting the arms race. 710 F.2d at 1412.

[4] The Supreme Court has recognized that a limited public forum may be created for the purpose of discussing certain subjects. *See* Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) (citing City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976) (school board business).

[5] *See supra* note 2.

[6] 675 F.2d 1010 (8th Cir.) (en banc), *cert. denied,* 459 U.S. 1092 (1982).

not in keeping with the purpose of the open house and denied them access. If a regulation prohibits the endorsement of political or commercial groups, as in *Greer v. Spock,*[7] the commander may base the denial of access on his or her unwillingness to endorse or to approve political or commercial groups. Once access is denied, a first amendment challenge to that denial will concern two issues. The first is whether a public forum is created when an open house is held on a military installation.[8] Army regulations prohibit conferring a selective benefit upon commercial, religious or political groups.[9] The second issue is whether, if a decision is made to exclude certain groups, the regulation is applied in a content-neutral manner.[10] If, for example, Boy Scouts participate in an open house by having a booth, passing out literature, and discussing their troop activities, but groups wishing to discuss political messages are kept out, there is clearly a distinction being drawn on the basis of the message being disseminated. It is this content-neutrality issue that the Supreme Court avoided in *United States v. Albertini,*[11] the most recent pronouncement by the Court on the government's power to regulate speech on military installations.

Military installations do not become centers for public debate on arms control or other defense-related issues merely by holding an open house. In *Albertini,* the Court stated that "military bases generally are not public fora" and that a military base does not "become a public forum merely because the base was used to communicate ideas or information during [an] open house."[12] While these pronouncements in most cases will dispose of the first prong of the first amendment challenge, the second prong was not addressed in *Albertini.*[13] The Court did not address the issue of whether certain civilian groups can be permitted to participate while others are not. Nor did it address the permissible grounds on which to base the decision to exclude. The facts in *Albertini* permitted the Court to avoid the entire content-neutrality issue.

The facts of the case were that James Albertini, in 1972, used a ruse to gain access to secret documents on Hickam Air Force Base, and poured blood, which he claimed to be human blood, on the documents. For this he was issued a bar letter[14] from the base commander. Notwithstanding the fact that his bar letter had no expiration date, he and some companions entered Hickam Air Force Base in 1981 during an open house on Armed Forces Day for the purpose of protesting the weapons build-up. He took pictures of his friends holding a banner reading "Carnival of Death" in front of a B-52 Bomber, while his friends passed out leaflets. They were all arrested by security police. Subsequently, the bar letter was discovered. He was then prosecuted for trespass and sentenced to three months in jail. The Ninth Circuit Court of Appeals reversed Albertini's conviction, ruling that the Air Force had, by virtue of its Armed Forces Day activities, established a public forum.[15] The court found that the manner of expression employed by the dissenters was compatible with the activity of the base on Armed Forces Day. The court held that members of the public, including those holding bar letters, were invited to enter the installation to respond to the Air Forces' "implicit communication" on defense policy.

The Supreme Court reversed, basing its decision upon the fact that Albertini had been issued a bar letter and had not been invited to re-enter by virtue of the open house.[16] Labeling as "dubious" the circuit court's conclusion that the Air Force installation had become a public forum, the Supreme Court ruled that "the fact that [Albertini] had previously received a bar letter distinguished him from the general public and provided a reasonable grounds for excluding him from the base."[17] The Supreme Court did not address the exclusion of individuals who had not received bar letters, except by referring to the commander's unquestioned power to exclude civilians from the area of his

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[7] 424 U.S. 828 (1976).

[8] *See* United States v. Albertini, 710 F.2d at 1413; Persons for Free Speech at SAC, 675 F.2d at 1015.

[9] AR 360–61, para. 2–3.

[10] *Persons for Free Speech at SAC* was heard en banc. The judges split four to three in favor of the Air Force. The dissenting judges felt that the Air Force had violated an Air Force regulation prohibiting conferring selective benefits upon ideological movements or corporate ventures. The dissent stated "The Air Force violated this regulation by permitting defense contractors to participate in and benefit from the open house—in both commercial and ideological capacities—while denying the appellants the same opportunity. This selective exclusion of the appellants is a facial violation of the Air Force regulation." 675 F.2d at 1024 (Heaney, C.J., dissenting).

[11] 105 S. Ct. 2897 (1985).

[12] *Id.* at 2905.

[13] In its grant of certiorari, the Court asked for argument on two issues:

> Questions presented: (1) Does First Amendment prohibit enforcement of 18 USC 1382, which makes it unlawful to re-enter military base after having been barred by commanding officer, against civilian who was subject to valid bar order but re-entered during "open house" for purpose of engaging in anti-war demonstration? (2) Was respondent's attendance at "open house" at Hickam Air Force Base on May 16, 1981 kind of reentry that Congress intended to prohibit in 18 USC 1382?

53 U.S.L.W. 3413 (U.S. Dec. 4, 1984).

In its petition for certiorari, the government had rested its case on the general intent nature of 18 U.S.C. § 1382 which states:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation for any purpose prohibited by law or unlawful regulation; or whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by an officer or person in command or charge thereof—shall be fined not more than $500 or imprisoned not more than six months or both.

[14] A bar letter forbids reentry into a military installation without the express permission of the installation commander. If an individual who has received a bar letter does reenter the installation without permission, he or she is subject to prosecution for a violation of 18 U.S.C. § 1382 (1982).

[15] United States v. Albertini, 710 F.2d 1410 (9th Cir. 1983), *rev'd and remanded,* 105 S. Ct. 2897 (1985), *on remand,* 783 F.2d 1434 (9th Cir. 1986).

[16] This result was predicted by military legal commentators. Cruden & Lederer, *The First Amendment and Military Installations,* 1984 Det. C.L. Rev. 845 [hereinafter cited as Cruden & Lederer].

[17] 105 S. Ct. at 2906–07.

command.[18] This did not resolve the question of whether the commander risks suit for a first amendment violation by excluding some groups from participating in an open house while allowing other groups to join in.[19]

The Supreme Court denied certiorari in *Persons for Free Speech at SAC*,[20] a case that might have answered this question. In 1981, Offutt Air Force Base had an open house on Armed Forces Day. A group requested permission to participate, asking leave to distribute leaflets speaking to "the propriety of nuclear proliferation, bilateral disarmament, the conversion of weapons of war instruments of peace and the very existence of [Offutt Air Force Base] in our community."[21] The commander of Offutt Air Force Base denied the group's request, stating that the proposed activities would not be in keeping with the purpose of the open house program. Other nonmilitary groups who received permission to participate included current defense contractors, local public service organizations, and public safety concerns.

The Eighth Circuit held that holding an open house was not government speech and that a public forum was not created by holding an open house. The Eighth Circuit went further than the Supreme Court's later decision in *Albertini* by holding that the commander did not abuse his discretion by limiting access to the open house to groups that he viewed as related to the purpose of the open house.[22] Thus, the commander could bar groups that he felt would not foster good community relations, as the creation of good community relations was the purpose of the open house. The court noted that under certain narrow circumstances, the government may regulate the "subject matter" of speech.[23] The court further noted that public debate concerning weapons was best reserved to the civilian arena. The defense contractors involved in the open house were contractors who were currently supplying weapons. Their participation was limited to a "blandly informative" role.[24] Defense contractors who had pending contracts were not invited to participate.

The Eighth Circuit decision abandoned the content-neutrality standard for speeches on military installations. To evaluate whether the Eighth Circuit's view of the constitutionality of excluding groups who are not supportive of the goals of fostering good community relations is the correct one, it is necessary to first consider the evolution of the public forum doctrine as it relates to government-owned property in general and military bases in particular.

The Public Forum Doctrine

Historical Evolution

The public forum doctrine was first enunciated by Justice Roberts in *Hague v. CIO.*[25] Justice Roberts rejected the then-prevailing notion that the state could regulate parks and streets to absolutely exempt their use from speech purposes, stating:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all, it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order; but it must not, in the guise of regulations, be abridged or denied.[26]

Whether or not a public place was considered a public forum for free speech purposes was determined by historical usage. The historical use test focused upon whether a place had been traditionally used for public debate or for the communication of ideas. Access to public property that had been dedicated to speech and assembly purposes for "time out of mind" could not be "abridged or denied." Access to public parks and streets could be restricted only be reasonable time, place, and manner regulations necessary to further significant governmental interests. No restrictions could be placed upon the content of the message. The historical use test for determining the right of access to public property for first amendment purposes was the preeminent method

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[18] *Id.* at 2906 (citing Cafeteria Workers' v. McElroy, 367 U.S. 886 (1961)). In *Cafeteria Workers*, the Court recognized an almost unlimited discretion of installation commanders to exclude individuals for reason of good order and military discipline. This discretion was only subject to the limited review courts give to agency decisions, *i.e.*, did it have a rational basis, or was it arbitrary or capricious. *Id.* at 892–94. The Court did not require the government to show the particular reason it had revoked the individual's security clearance, thereby barring her from the installation and her employment. Lower courts applied the ruling in *Cafeteria Workers* to cases arising in the context of dissent to the Vietnam War and generally upheld the broad powers of installation commanders. *See, e.g.*, Weisman v. United States, 387 F.2d 271 (10th Cir. 1967). This recognition of an installation commander's powers is consistent with the Court's recognition that the military is, at least to some extent, a separate society. *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738 (1975); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974); Parker v. Levy, 417 U.S. 733 (1974); *see also* Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on a Society Apart*, 51 Notre Dame L. Rev. 396 (1976).

[19] On remand, the Ninth Circuit addressed only due process considerations regarding the issuance of Albertini's bar letter, holding that due process was not violated by failing to hold a hearing at the time the bar letter was issued or by the fact that Albertini had on various occasions entered the base by invitation of persons connected with the base. 783 F.2d at 1486.

[20] 675 F.2d 1010 (8th Cir.) (en blanc), *cert. denied*, 495 U.S. 1092 (1982). *See* Note, Persons for Free Speech at SAC: *Military Installations as a Public Forum*, 16 Creighton L. Rev. 960 (1983).

[21] 675 F.2d at 1012.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 307 U.S. 496 (1939) (municipal ordinance that forbade public meeting held in streets or other public places without a permit held unconstitutional); *see generally* B. Schmidt, Freedom of the Press v. Public Access 87–100 (1976); Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1288–98 (1979).

[26] 307 U.S. at 515 (dictum).

of first amendment analysis for approximately thirty years.[27]

Compatibility Analysis

In the mid-1960s, the Warren Court began to expand the public forum doctrine. Public property that had not been used since "time out of mind" for speech purposes might nonetheless be considered a public forum. The Warren Court examined the manner of expression employed to see if it was compatible with the normal activity of a particular place at a particular time. If wearing black armbands to protest war in Vietnam did not unduly interfere with the process of education, then black armbands were to be permitted in the schoolhouse.[28] Because demonstrating outside of a jail disrupted the running of a jail by blocking access to the facility, that type of demonstration was not permitted.[29] The test became the compatibility of the first amendment activities and the government facility rather than a traditional or historical use analysis. The Court balanced the degree of disruption which the government was expected to tolerate and the protection of first amendment rights.

The Military Installation as a Public Forum

The first evaluation of a military installation as a public forum occurred in *Flower v. United States.*[30] This two-page, per curiam decision found that a street running through Fort Sam Houston was to be treated like any other public street because the military had abandoned any special interest in excluding or regulating traffic. Thus, an individual who had previously received a bar letter could not be prohibited from returning and distributing anti-war leaflets because Fort Sam Houston was an open post.[31] Lower courts dutifully tried to analyze military installations in subsequent cases to decide whether the installations were "open" or "closed." The question of what constituted a "closed" installation troubled the courts. A military installation may be open to the public even if the entrances are guarded.[32] The designation of the installation as "open" or "closed" was made on a case-by-case basis.[33] Given this standard of review, the lower courts' decisions were inconsistent.[34]

Chief Justice Burger and Justice Rehnquist dissented from the majority in *Flower.* They suggested that the government must be able to draw "reasonable distinctions" in permitting access to public buildings and grounds depending upon whether the proposed first amendment rights were compatible with the intended purpose of the government property.[35] Rejecting openness as the test, the dissent stated "the unique requirements of military morale and security may well necessitate control over certain persons and activities on base, even while [unrestricted access is otherwise] tolerated.[36]

Within four years, the Supreme Court had retreated from its position in *Flower.*[37] In *Greer v. Spock,*[38] the Court found that the fact that an installation was open to the public did not automatically make it an open forum for partisan political exchanges.[39] A military regulation at Fort Dix prohibited speeches and demonstrations of a partisan political nature. When a candidate for the office of President of the United States applied for permission to address a rally at Fort Dix, he was refused permission. The Fort Dix regulation was aimed at keeping the military installation free of identification with any partisan political group. The Court found that the regulation had been enforced in a content-neutral manner, that is, all candidates were treated equally as none were permitted access. The Court suggested that political debate on military installations was incompatible with the need for a politically neutral military: "[T]he military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates."[40]

Application of the historical usage test and the compatibility test would not necessarily render the same result. Additionally, special considerations apply to military installations. The need to promote uniformity of result led the Supreme Court to consolidate the two tests.

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[27] *See, e.g.,* Niemotko, v. Maryland, 340 U.S. 268 (1951) (ordinance restraining Bible classes in park held unconstitutional). Justice Frankfurter's concurring opinion has an insightful review of first amendment law.

[28] Tinker v. Des Moines Independent Community Schools, 393 U.S. 503 (1969).

[29] Adderly v. Florida, 385 U.S. 39 (1966).

[30] 407 U.S. 197 (1972). For excellent historical overviews of cases concerning first amendment rights on military installations, *see* Cruden & Lederer, *supra* note 16; Rosenow, *Open House or Open Forum: When Commanders Invite the Public on Base,* 24 A.F.L. Rev. 260 (1984).

[31] Flower had been barred from Fort Sam Houston under the provisions of 18 U.S.C. § 1382.

[32] United States v. Gourley, 502 F.2d 785 (10th Cir. 1973).

[33] *Id.* at 788.

[34] *See, e.g.,* United States v. Gourley, 502 F.2d 785 (10th Cir. 1973) (Air Force Academy an open post); United States v. Floyd, 477 F.2d 217 (10th Cir. 1973), *cert. denied,* 414 U.S. 1044 (1973) (Tinker A.F.B. a closed base); Burnett v. Tolson, 474 F.2d 877 (4th Cir 1973) (Fort Bragg an open post); CCCO-Western Region v. Fellows, 359 F. Supp. 644 (N.D. Cal. 1972) (Presidio of San Francisco an open post); Jenness v. Forbes, 351 F. Supp. 88 (D.R.I. 1972) (fenced-in area of post off limits to individuals but not unfenced areas).

[35] 407 U.S. at 200 (citing Adderly v. Florida, 385 U.S. 39 (1966) and Cox v. Louisiana, 379 U.S. 559, 562 (1965).

[36] 407 U.S. at 200–01.

[37] *Flower v. United States* was a summary decision, decided without oral argument or the submission of full appellate briefs. It has never been explicity overruled but has no precedential value within contemporary public forum analysis.

[38] 424 U.S. 828 (1976).

[39] Justices Brennan and Marshall, in dissent, noted that Fort Dix was no less open than Fort Sam Houston. 424 U.S. at 851. This reversion by the Supreme Court to the historical test has been criticized. *See, e.g.,* Zillman & Imwinkelreid, *The Legacy of* Greer v. Spock: *The Public Forum Doctrine and the Principles of the Military's Political Neutrality,* 65 Geo. L.J. 773, 783 (1977).

[40] 424 U.S. at 839.

Present Status of the Public Forum Doctrine

Faced with a variety of tests and methods of analysis in determining the types of public forums and the treatment to be accorded first amendment interests, the Supreme Court in *Perry Educ. Ass'n v. Perry Local Educators Ass'n*[41] recognized three classifications of public forums, together with varying levels of constitutional protection assigned to each classification.[42] These classifications are generally known as the traditional public forum, the limited public forum,[43] and the nonpublic forum. The statutes or regulations that affect speech are reviewed against a standard that will vary according to how the court classifies the military installation at the time of the speech in question.

Public property dedicated "from ancient times" to the communication of ideas is considered a traditional public forum.[44] In these locations, citizens enjoy an absolute protection of the right of access for speech and assembly purposes.[45] The government is required to make available these traditional public forums subject only to reasonable time, place, and manner regulations that are addressed to the manner of use, as opposed to the right to use.[46] If a location rests within the public forum category, no balancing of interests or compatibility analysis is performed. Speech may be regulated in a content-neutral fashion, but may not be completely prohibited.

Any regulation must leave open ample alternative channels of communication and be narrowly tailored to ensure that less restrictive alternatives are used if available. Courts will review regulation of a traditional public forum using a strict scrutiny standard. The government will be required to demonstrate a compelling state interest in order to uphold the regulation.[47] This category has been held to include parks and streets,[48] state capital grounds,[49] bus terminals,[50] and train stations.[51]

A limited public forum is public property which has some connection with the communication of ideas and which the state has chosen to open for use by the public, but which is not necessarily traditionally associated with free expression or free speech.[52] On this public property, individuals are granted a limited right to communicate in a manner compatible with the intended use of the property.[53] Included in this category have been public schools,[54] theaters,[55] public meetings,[56] and libraries.[57] Although the Supreme Court has stated that these limited public forums are to be held to the same standards of first amendment review as a traditional public forum,[58] it has recognized the existence of a limited public forum accessible for use only by certain groups or for the discussion of certain subjects,[59] restrictions that would be inconsistent with traditional public forum analysis.

The third category is public institutions that do not have a speech-related purpose. Property not historically and traditionally dedicated or created on a limited scope as "a place for free assembly on communication of thoughts by private citizens"[60] is a nonpublic forum.[61] Included in this category are military installations,[62] prisons,[63] and mailboxes.[64] Property owned or controlled by the government which is a nonpublic forum may be subject to prohibition of

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[41] 460 U.S. 37 (1983).

[42] *See generally* J. Nowak, R. Rotunda, & J. Young, Constitutional Law 982–84 (1983).

[43] Professor Tribe refers to this category as "semi-public" forums. *See* L. Tribe, American Constitutional Law, 688–90 (1978) [hereinafter cited as Tribe].

[44] *See, e.g., Perry*, 460 U.S. at 45; Hague v. CIO, 307 U.S. 496, 515 (1939).

[45] *Perry*, 460 U.S. at 45.

[46] *Hague*, 307 U.S. at 515.

[47] *See, e.g., Perry*, 460 U.S. at 45; Feiner v. New York, 340 U.S. 315, 319–21 (1951); Neimotko v. Maryland, 340 U.S. 268, 272 (1951); *Hague*, 307 U.S. at 516.

[48] *Hague*, 307 U.S. 496.

[49] Edwards v. South Carolina, 372 U.S. 229 (1963).

[50] Wolin v. Port of New York Authority, 392 F.2d 836 (2d Cir. 1968).

[51] *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

[52] Tribe, *supra* note 43, at 689–90. "Status as a public forum is triggered . . . by its deliberate use as a place for the exchange of views among members of the public."

[53] Tribe, *supra* note 43, at 690. In Grayned v. Rockford, 408 U.S. 104 (1972), the Court explained its rationale for upholding a statute prohibiting disturbing the peace by saying that "[t]he crucial question is whether the manner of expression is basically *incompatible with the normal activity of a particular place at a particular time.*" 408 U.S. at 116 (emphasis added). Implicit in this compatibility analysis is a weighing and comparison of competing interests. In *Grayned*, the Court went on to say that "Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the States interest." *Id.*

Two years later in Procunier v. Martinez, 416 U.S. 396 (1974), the Court reminded the government that the regulation must at least appear to be content neutral: The regulation abridging First Amendment rights could be justified only if the regulation furthered important government interests unrelated to the content of the expression and if the limitation was no greater than necessary to protect government interests. 416 U.S. at 413.

[54] Widmar v. Vincent, 454 U.S. 267 (1981); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

[55] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

[56] Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976).

[57] Brown v. Louisiana, 383 U.S. 131 (1966).

[58] *Perry*, 460 U.S. at 45–46.

[59] *Id.* at 46 n.7.

[60] *Hague*, 307 U.S. at 515–16.

[61] *Perry*, 460 U.S. at 46.

[62] Greer v. Spock, 424 U.S. 828 (1976).

[63] Adderly v. Florida, 385 U.S. 39 (1966).

[64] United States Postal Service v. City of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).

speech, leafleting, picketing, or other forms of communication, without violating the first amendment if those activities are inconsistent with the intended use of the property.[65] The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[66] In a nonpublic forum, regulations prohibiting speech need only be reasonable. Additionally, there must be no effort to suppress a particular viewpoint. This is historically referred to as the content-neutrality standard.[67]

The concept of the limited public forum and the protections to be afforded speech there was addressed in *Perry Educ. Ass'n v. Perry Local Educators Ass'n.*[68] *Perry* involved a dispute over the access to an interscholastic mailing system. In prior years, two unions had access to the mailing system and had used it to contact their members and disseminate their viewpoints.[69] A union election was held and the Perry Education Association (PEA) was designated as the sole bargaining event. The union's contract contained the provision that only PEA could have access to the mailing system.[70] The other union, Perry Local Educators Association (PLEA), was then refused access to the mailing system on the grounds that PEA's status as sole bargaining unit gave it the right of access. PLEA protested, noting that other groups such as the Cub Scouts and church groups were permitted to use the mailing system, and alleging that a limited public forum was created by giving the right of access to the forum to a limited groups of individuals.[71] Alternatively, PLEA argued that if the system was in fact a nonpublic forum, then the policy was not content-neutral, as only one viewpoint was permitted distribution. This, PLEA argued, amounted to content discrimination because the messages were permitted or not depending upon who was speaking.[72]

The Supreme Court rejected the argument that giving certain groups communicative privileges within a public system turned a nonpublic forum into a limited public forum.[73] The Court narrowed the use of the limited public forum concept by first holding that the right of selective access did not transform government property into a public forum, citing *Greer v. Spock.*[74] The Court in *Greer* had held that inviting inspirational speakers and entertainers onto a military base did not transform it into a public forum for political speech purposes.[75] The Court in *Perry* found that the government may be permitted to allow only organizations of "similar character" to share a limited forum.[76] Thus, access to the mailing system might be limited to groups that were engage[d] in activities of interest and educational relevance to students." The PLEA, "which is concerned with the terms and conditions of teacher employment" was not such a group.[77]

The holding that the government can make a forum available to some groups, but not others, was departure from lower court precedent which had generally found selective exclusions from a forum unconstitutional.[78] It was, however, in consonance with the Court's decisions in *Jones v. North Carolina Prisoners Labor Union*[79] and *Lehman v. Shaker Heights,*[80] which upheld selective exclusions on the basis of content.

The facts in *Lehman* concerned access to advertising signboards posted in the city bus system. Advertisements promoting commercial products were accepted while advertisements for individuals running for a political office was refused. The Court in *Lehman* relied on the city's interest in producing revenue, avoiding identification with political favoritism, and in preventing a message from being forced upon a captive audience.[81] In *Jones,* the Court permitted regulations which excluded bulk mailing and meeting privileges to a prisoner's union. Although the exclusions have only been addressed in the context of prisons, military installations, and commercial speech, which have been defined as specialized context forums,[82] it appears this right to selectively exclude or permit groups to use a limited forum greatly reduces the utility of the equal protection argument relied upon by proponents of the limited public

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[65] "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry,* 460 U.S. at 46 (quoting *Greenburgh,* 453 U.S. at 129–30). Professor Tribe stated that the government may exclude "even peaceful speech and assembly which interferes, instrumentally *or symbolically,* with the function of the government institution." Tribe, *supra* note 43, at 690 (emphasis added).

[66] *Perry,* 460 U.S. at 46 (quoting *Greenburgh,* 453 U.S. at 129 n.20).

[67] United States Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980); Grayed v. City of Rockford, 408 U.S. 104 (1972).

[68] 460 U.S. 37 (1983).

[69] *Id.* at 39.

[70] *Id.* at 40.

[71] *Id.* at 47.

[72] *Id.* at 63 (Brennan, J. dissenting).

[73] *Id.* at 47–48.

[74] 424 U.S. 828 (1976).

[75] *Id.* at 838, n.10.

[76] *Perry,* 460 U.S. at 48.

[77] *Id.*

[78] *See* Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 255 n.85 (citing Bynum v. Shiro, 219 F. Supp. 204 (E.D. La. 1963); Madole v. Barnes, 20 N.Y.2d 169, 282 N.Y.S.2d 225, 229 N.E.2d 20 (1967); East Meadow Community Concerts Ass'n v. Bd. of Education of Union Free School Dis. No. 3, 18 N.Y.2d 129, 272 N.Y.S.2d 341, 219 N.E.2d 172 (1966); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (N.Y. Co. 1962); Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P.2d 885 (1946)).

[79] 443 U.S. 119 (1977).

[80] 418 U.S. 298 (1974).

[81] *But see* Planned Parenthood Ass'n Chicago Area v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) (advertising system on public transit became a public forum by accepting political ads and guaranteeing access by anyone able to pay the fees).

[82] Justice White, writing for the court in *Perry,* rejected the view that *Greer, Lehman,* and *Jones* were "decisions of limited scope involving 'unusual forums.' " 406 U.S. at 49 n.9.

forum. The right of selective exclusion reduces any continued viability that the limited public forum doctrine poses in regards to military installations. The government need only make a rational distinction between the "character" of the group it wishes to exclude and the character of the groups it wishes to allow to use public property.

Recognizing that the property had been defined as a nonpublic forum accessible only to a limited number of groups, the PLEA in *Perry* argued that the government was regulating speech on the basis of viewpoint, which violates the principle that even in nonpublic forums regulations controlling speech must be content-neutral. In its second major departure in public forum decisions, the Court enunciated a new standard of content-neutrality. The Court employed a test based not upon the content of the speech,[83] but upon the motive of the government which regulates it. In *Perry* "there [was] no indication in the record that the policy was motivated by a desire to suppress the PLEA's views."[84] The content-neutrality requirement had become a motive-neutrality requirement: the government's action must not appear to be motivated by a desire to support one viewpoint nor suppress another. The Court phrased this requirement in relation to the compatibility test raised earlier in *Greer*. The government is permitted to limit "a nonpublic forum to activities *compatible within the intended purpose* of the property."[85] In *Perry*, although civic service groups were deemed compatible with the purpose of the forum, the PLEA's union-related messages were not. Inevitably, the speaker's identity and the content of the message may serve as a basis for exclusion if compatibility between the purpose of the forum and the proposed communication may be required.

The Military Installation as a Limited or Nonpublic Forum

A military installation is a nonpublic forum. On occasions like Armed Forces Day, however, the public is encouraged to enter the installation in an effort to promote good community relations. More importantly, some civilian groups are permitted to participate in the open house by having booths and passing out literature. Under the Supreme Court's reasoning in *Perry*, this does not transform the military installation into a limited public forum and does not mean that all speech is permitted during an open house. Only groups and speech relevant to the purpose of the open house need be allowed.

The Supreme Court impliedly rejected the concept of a military base as a limited public forum in its decisions in *Albertini*, *Greer*, and *Perry*. These decisions show that a nonpublic forum does not become a limited public forum merely because selected groups deemed supportive of the forum's mission or "strangers" to the system have been permitted access. In *Greer*, for example, civilian entertainment groups had been previously permitted to come on Fort Dix to entertain. This did not make it impermissible to deny political speakers permission to come on the installation. The use of the mail system in *Perry* by civic groups did not make it impermissible for the school to deny a labor union use of the mail system.

Even if other groups have been permitted to participate in Armed Forces Day activities, the government is permitted under this reasoning to allow only organizations sharing a character compatible with the forum's purpose, regardless of the issues addressed, to be permitted to share the right of access. This reasoning is supported by the Eighth Circuit's decision in *Persons for Free Speech at SAC*, wherein the court noted that the open house was an attempt to foster good community relations, not to open a debate over the air base's mission. This selective access was "supportive of the military mission" and therefore not a nontraditional or incompatible use of the property.[86]

The fact that defense contractors were permitted to display literature depicting weapons systems currently supplied to the Air Force was termed by the Eighth Circuit in *Persons for Free Speech at SAC* as "reasonably related to the open house program." The protestors were denied permission to distribute literature opposing weapons build-up because these "proposed activities would not be in keeping with the purpose of the Open House Program."[87] The Eighth Circuit found that the Air Force was not promoting an ideological message. The court held that the defense contractors' presence at the open house served a "blandly informative" purpose as opposed to an ideological one. Going even further, the court denied that holding an open house constituted ideological speech at all: the military is nonpolitical and does not determine political policy. That power is held by the civilian sector and that is where debate is legitimately held. This reasoning has been criticized as permitting content-based discrimination.[88] The term "viewpoint-neutrality" serves better than content-neutrality because, while some types of speech are prohibited, *i.e.*, political speech, it does not matter who the speaker is or to which political party they belong.

On its face, this appears to be a content-based regulation. In fact, the prohibition results in a selective exclusion of a particular message. This is not unconstitutional under the *Perry* standard, however, which was applied, although not specifically invoked, in *Persons for Free Speech at SAC*.[89] The military must avoid ideological entanglement and not appear to promote one type of political message while suppressing the opposite viewpoint. In *Perry*, it was PEA's status as the sole collective bargaining agent that justified its access to the mailing system. In *Persons for Free Speech at SAC*, it was the contractors' status as equipment suppliers that justified their selective participation in the open house. As long as the contractors are monitored and not permitted to try to sell other types of products or future

[83] *See* Carey v. Brown, 447 U.S. 455 (1980); First National Bank v. Bellotti, 435 U.S. 765 (1978). In *Carey*, the Court struck down a statute which prohibited picketing within 150 feet of a school except for labor picketing. The rationale employed was that the statute impermissibly distinguished between labor picketing and all other picketing on the basis of content.

[84] *Perry*, 460 U.S. at 49 n.9.

[85] *Id.* at 49 (emphasis added).

[86] *Persons for Free Speech at SAC*, 675 F.2d at 1016.

[87] *Id.* at 1019.

[88] Note, *Civilian Speech on Military Bases: Judicial Deference to Military Authority*, 71 Geo. L.J. 1253 (1983).

[89] *Perry* was decided February 23, 1983, while *Persons for Free Speech at SAC* was decided April 28, 1983.

products, the distribution of information concerning equipment already purchased by the military after authorization by civilian authorities can hardly be considered political speech.

The compatibility issue, after *Perry*, is not whether the group's use of the forum is compatible with the present use of the forum, but whether the groups' message is compatible with the purpose of the forum. When civilian groups participate in an open house, the compatibility of their message with the purpose of the open house is the key to deciding whether to grant or deny them access. The government may distinguish between speakers at an open house based upon reasonable distinctions in light of the purpose served by the open house:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherently and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves. [90]

In *Greer*, the Court noted that the "business of military installations . . . [is] to train [service members], not to provide a public forum." [91] Portions of all installations support activities other than training missions, *i.e.*, post exchanges and commissaries are located on most installations. The government should not be forced to distinguish installations by section and justify which sections directly support a training mission and which only indirectly support such a mission. This does not change when, on a particular day, areas normally held reserved for direct support of the training mission are opened to the public. The fact that the government opens part of the installation to the public no more requires it to abrogate control over who may enter than it does over its ability to control what portions of the installation the public may enter as part of the open house.

The purpose of an open house is not and should not be to provide a forum for discussion of defense issues. Such issues are of a political nature, and the "military [must be] insulated from both the reality and the appearance of acting as a hand maiden for partisan political causes." [92] Nor are the type of activities normally held on an installation conducive to such discussions. [93] The use of rides and entertainment are to encourage attendance and foster good public relations. Displays of military equipment or exhibitions of military operations encourage patriotism and show taxpayers where their monies are spent. The presence of information booths, whether provided by local service organizations and church groups or defense contractors, provides information to the attendees but can hardly be considered to be speech on defense issues if properly monitored.

Conclusion

Commanders holding open house activities may invite the public onto their installations without creating a situation over which they have no control. A public forum is not created on the installation by holding an open house. This much is clear from the Supreme Court's decision in *Albertini*. The Supreme Court has not ruled to date on the more complex constitutional considerations of whether civilian service groups, public safety concerns, and defense contractors may be invited to participate in an open house while political protest groups are excluded. To guarantee freedom from constitutional challenge, the commander may decide against participation by any civilian participants in open house activities. There is probably no need to take such a cautious approach, however, given the Supreme Court's pronouncements in *Perry* and *Albertini*. Civilian speakers whose message are consistent with the purpose of fostering good community relations may be invited to participate. This category includes both public service groups and public safety concerns.

Caution should be exercised in inviting groups whose message is commercial or political. For instance, the open house must not turn into an opportunity for defense contractors to "sell" their products to the public. Only current weapons systems or information about those systems utilized by the government should be displayed. Contractors' presentations must be monitored to ensure they do not abuse their privilege. Disclaimers may be placed at contractors' presentations reiterating that these individuals do not

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[90] *Perry*, 460 U.S. at 49.

[91] 424 U.S. at 838.

[92] *Id.* at 839.

[93] The Air Force conceded in argument before the Ninth Circuit in *Albertini* that "one of the purposes of the activity was to present the military's view in the current arms debate, to show the public that its money is being used efficiently, that the forces are 'strong and ready.' " 710 F.2d at 1415. The Ninth Circuit distinguished *Greer* by noting that the speech was directed at the non-military public and finally stated that Albertini's actions had not disrupted the base's functioning because it was already disrupted for Armed Forces Day Open House. *Id.* at 1416.

To concede that public debate was a purpose of the open house seems both unnecessary and irreconcilable with the facts. The only military activities at Hickam during the open house consisted of entertainment indistinguishable from civilian entertainment, except that it was offered by individuals in uniform, *i.e.*, bands, static displays of equipment, parachute jumps, and aircraft flyovers. These activities do not present a military viewpoint on current arms debates or offer any clue as to what would be the most efficient use of the defense budget. Such displays may give a general impression of a "strong and ready" force, but this is not incompatible with what must be a permissible goal of fostering patriotism. Why counsel made such a concession is unexplainable. This concession, and the installation commander's attitude if it accurately represents it, is also in conflict with the Air Force regulations that provide the limits of Air Force participation in such public events:

> a. Participation is authorized, encouraged, and essential, within the limits defined in this regulation, to:
> (1) Inform the public on Air Force preparedness and promote national security;
> (2) Demonstrate US partnership with allies in collective security;
> (3) Develop public understanding of the Air Force mission;
> (4) Assist Air Force personnel procurement programs; and
> (5) Aid community relations. Commanders at all levels will give positive emphasis to the importance of good community relations in the execution of their missions.

Dep't of Air Force, Reg. No. 190–5(3)(a), *quoted in Persons for Free Speech at SAC*, 675 F.2d at 1016.

represent the government's viewpoint. Failure to abide by these guidelines should be dealt with immediately and strictly to protect the government's interest.

Commanders must also ensure that neither they nor their subordinates try to influence citizens, and indirectly their elected representatives, on political issues such as the proper size or allocation of the defense budget. The permissible objectives of an open house include promoting understanding between the civilian and military sectors, fostering patriotism, supporting recruiting, and aiding community relations. The military, to accomplish its mission, needs the support of the general population. Patriotism and good relations between the civilian and military communities is a permissible objective as long as it does not take the form of influencing political decisionmakers through their constituents.

Holding an open house on a military base does not cause the military base's character to deviate from that of a nonpublic forum, applying either the historical use test or the compatibility analysis as currently interpreted by the Supreme Court. Recognizing that certain groups are permitted access to the installation and others are excluded, it must be concluded that the Supreme Court will allow exclusion of groups not sharing a "similar character" with those groups permitted access. The government is acting reasonably to hold that groups which support the installation's mission (civic groups) have similar character with other groups permitted access (such as defense contractors), while those who seek to argue political issues do not share a similar character.[94] Therefore, as long as the military does not actively seek to suppress the message the groups with to convey, the new standard embraced by the Supreme Court permits these groups to be excluded from participation in open house activities on military installations.

[94] *See* Dep't of Army, Pam. No. 190-2, Military Police: Guidance on Dissent, para. 4e (1 Mar. 1983). Additionally, counsel must ensure that commanders recognize the permissible goals of the open house program and that they accurately represent those goals in any judicial proceedings.

The Installation Commander Versus an Aggressive News Media in an On-Post Terrorist Incident: Avoiding the Constitutional Collision

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The relationship of the news media to the national defense establishment presents government with one of its greatest challenges. It requires each defense official to appreciate the value and role of the news media in our democracy and to weigh that value against the competing national defense requirement for secrecy in some areas.[1]

The Scenario

School bus 254, carrying thirty-five dependent children, never arrived at the Fort Kerwin elementary school in northeast Texas. Instead, an armed terrorist had forced the bus driver to drive within 200 yards of the heavily guarded Pershing II missile storage site. Moments later, the terrorist forced the bus driver to drive the bus through the front gate of the site. Fearful of killing the children, the perimeter guards did not fire as the bus crashed through the gate. The bus came to rest next to an operational Pershing II missile. The guards immediately established a 100 yard perimeter around the bus and waited for the threat management force (TMF) to arrive. At the same time, copies of the terrorist's previously drafted letter reached the major news networks.

His demands are clear. If anyone approaches the bus, he will begin shooting the children. Four pounds of highly volatile nitroglycerine are taped to his body. Unless the United States publicly renounces its policy toward his native Mediterranean country, he will "vaporize the southwest U.S. back into the Stone Age." Seeking the maximum publicity for his cause, the terrorist has demanded that the national anchor for XYZ television news interview him on the site.

Within two hours, dozens of news media vehicles are at the main gate. Two news media helicopters will violate Fort Kerwin airspace in five minutes. The installation commander has called for a crisis management meeting with the staff judge advocate, public affairs officer, and provost marshal.

[1] Weinberger, *The Delicate Balance Between A Free Press and National Security,* Defense, Oct. 1985, at 2. Secretary of Defense Weinberger made these remarks in a speech to the International Association of Business Communicators on July 18, 1985. In his view, "the conflict between press freedoms and defense needs is a conflict between two legitimate interests of a democracy." *Id.* at 3. "For us in government, however, this issue has added significance. It presents, in a very real sense, a moral and legal dilemma." *Id.* at 2.

The FBI special agent-in-charge will arrive within one hour by helicopter.[2]

The Critical Role of the SJA

In the foregoing scenario, the installation commander may find it necessary to take measures toward the news media that will incidentally burden its constitutional freedom to gather news and inform the public. The scenario poses the question of what restraints, if any, can an installation commander legally impose on the news media when a terrorist incident occurs on a domestic military installation? Can the installation commander deny the interview between the terrorist and the television anchor? Can news media representatives be detained? Can television transmissions be delayed? Can a news media helicopter be denied permission to fly near an on-post terrorist incident? It is evident that the constitutional right of the news media to gather information and inform the public will collide with the implied and inherent authority of the installation commander. Considering "the lack of clear-cut court decisions with respect to the first amendment rights of the media"[3] in this context, the delicate balance between freedom of the news media and national security places an exceptionally heavy onus on the installation SJA. Unlike military intervention in a distant land, a domestic hostage-terrorist incident on a military installation could invite a unique clash between constitutional freedom and military necessity. It is axiomatic that the advance of technology has greatly facilitated public scrutiny of military actions. "In the politically sensitive environments in which military commanders must now function, every military move can be observed by a news media served by instant satellite communication."[4] As "commanders want to avoid unsolicited appearances on the nightly news, a competent SJA involved in the planning and conduct of operations is a good preventive measure."[5]

As long as the Army remains a potential target for terrorist activities, "[j]udge advocates must be thoroughly familiar with their responsibilities to plan for and respond to terrorist incidents involving their installations, activities, units, or personnel."[6] The purpose of this article is to provide the SJA with the requisite constitutional and statutory framework to advise the installation commander on how to avoid the collision of freedom of the news media with military necessity in the context of an on-post terrorist incident.[7] First, this article will define the constitutional collision. Next, it will consider national security and the news media. Because the Supreme Court has yet to rule on the proper military-news media constitutional relationship, it will then briefly analyze the Court's treatment of the news media in certain nonmilitary contexts to gain an understanding of how the Court might rule in a terrorist context. Next, it will examine the implied and inherent powers of the installation commander in the context of our scenario. Finally, the article will attempt to answer the questions posed by the scenario.[8]

Defining the Constitutional Collision

The idea that a free press could lose its constitutional immunity under certain exigent circumstances is probably anathema to some Americans, particularly members of the news media. One legal commentator has gone so far as to propose that "some degree of comprehensive planning as to the control of speech and press, reflected in the form of standby legislation, should be undertaken by the Congress—at least for any factual emergencies which the

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[2] Under the 1983 Memorandum of Understanding Between the Department of Defense, Department of Justice, and the Federal Bureau of Investigation, subject: Use of Federal Military Force in Domestic Terrorist Incidents, "the FBI will be promptly notified of all terrorist incidents and will exercise jurisdiction if the Attorney General or his designee determines that such incident is a matter of significant federal interest." (*Reprinted in* The Army Lawyer, Mar. 1985, at 12) [hereinafter cited as Terrorism MOU]. The FBI special agent-in-charge (SAC) of the appropriate region acting under the supervision of the Director of the FBI "shall be the Attorney General's designee in such matters." Arguably, the terrorist seizure of a nuclear weapons storage site would be a matter of "significant federal interest." Thus, in our scenario the installation commander would be subordinate to the FBI SAC as to the terrorist incident once the SAC arrives on the scene. It should be noted that in our scenario, the SAC would not arrive until one hour after the terrorist's demands become national news. Once on the scene, the SAC would consult with the Attorney General for legal advice on how to deal with the media.

Until the SAC arrives, "the installation commander is responsible for the maintenance of law and order on a military reservation and may take such immediate action in response to a terrorist incident as may be necessary to protect life and property." *Id.* One of the commander's first responsibilities would be to report the incident to the Army Operations Center. Dep't of Army, Reg. No. 190–52, Military Police-Countering Terrorism and Other Major Disruptions on Military Installations, para. 1–7 (15 July 1983) [hereinafter cited as AR 190–52]. For an overview of the "numerous governmental policies which directly or indirectly affect how the Army prepares for and responds to acts of terrorism," see Jackson, *Legal Aspects of Terrorism: An Overview,* The Army Lawyer, Mar. 1985, at 1.

[3] Sidle, *The Military and the Press: Is the Breach Worth Mending?* Army, Feb. 1985, at 24 [hereinafter cited as Sidle]. In November 1983, General John W. Vessey, Jr., then chairman of the Joint Chiefs of Staff, asked General Sidle, a veteran public affairs officer and former deputy assistant secretary of defense for public affairs, to convene a panel of news media representatives and government officials to study the proper military-news media relationship in light of the October 1983 Grenada intervention. The official title of this meeting was Chairman of the Joint Chiefs of Staff Media-Military Relations Panel (Sidle Panel), Report 3 (1984) [hereinafter cited as Sidle Panel Report].

[4] Barnes, *Special Operations and the Law,* Mil. Rev., Jan. 1986, at 52.

[5] *Id.* at 53. Although the thrust of Lieutenant Colonel Barnes' article was on special commando-type operations, his exhortation to SJAs to study operational law and become the commander's legal "troubleshooter to negotiate and resolve potentially damaging command problems" applies equally to a domestic terrorist incident. *Id.* at 55.

[6] Policy Letter 85–5, Office of The Judge Advocate General, U.S. Army, subject: Terrorist Threat Training, 4 Nov. 1985, *reprinted in* The Army Lawyer, Dec. 1985, at 3 [hereinafter cited as Policy Letter 85–5].

[7] This article does not address the plethora of international law problems that may accrue from a terrorist incident on a U.S. military installation in a foreign country. *See generally* AR 190–52, para. 4–2; Green, *International Law and the Control of Terrorism,* 7 Dalhousie L.J. 236 (1983).

[8] Unfortunately, a major terrorist incident in the United States may be inevitable. Drew Middleton, a noted military commentator, has expressed this caveat:

> Intelligence analysts in this country and in NATO Europe believe the West can expect a steady escalation of terrorism. Although they believe American garrisons and airfields abroad will continue to be the prime targets, many expect at least one terrorist operation in the United States. If such an operation is mounted, the objective, as in all such operations, will be to win maximum publicity for the terrorists' cause.

Middleton, *Future Terrorism Will Blur Lines of War and Peace,* Army Times, Jan. 20, 1986, at 21 (commentary section). Nuclear emergency experts and FBI officials "admit that the possibility of a timely serious threat of nuclear terrorism is no longer a question of if, but when." Motley, *If Terrorism Hits Home, Will the Army Be Ready?,* Army, Apr., 1984, at 21 (referring to a June 21, 1983 article in the Washington Post) [hereinafter cited as Motley].

atomic age and its nuclear war horrors may thrust upon us."[9] The commentator further stated:

> Our examination of some instances in which the government has sought to sacrifice freedom of speech and press on the altar of national emergency or national security will be brief. What is of practical importance is the answer to this question: When in the future, and under what circumstances, will the Supreme Court uphold a partial or total censorship of speech and press on the home front *sans* the actuality of a wartime emergency?[10]

Although the foregoing question is relevant to our examination, it is not the purpose of this article to second-guess the Supreme Court regarding our scenario. Rather, it is desirable, from the standpoint of providing viable legal advice to the installation commander, that we arrive at an articulable constitutional standard.

The court in *Flynt v. Weinberger*[11] had an opportunity to set guidelines regarding these first amendment issues. In 1984, Larry Flynt, publisher of *Hustler* magazine, filed suit in federal district court, asserting that the exclusion of his magazine reporters from the October 1983 Grenada intervention was a violation of freedom of the press under the first amendment. The district court judge dismissed the request for an injunction on grounds of mootness: "the military action that precipitated the temporary press ban on Grenada is long since over."[12] This decision should not be relied on in future incidents, however, as the courts may not always use mootness. Additionally, three key facts in the scenario distinguish it from *Flynt*. First, the location was in Grenada, a foreign country. In our scenario, the terrorist incident occurs at a southwest U.S. military installation. Second, prior public knowledge of the Grenada invasion might have caused it to fail, with great loss of life.[13] The need for secrecy in certain military operations is self-evident.[14] Due to the pre-planned simultaneous arrival of the terrorist's letter to the major news networks, the seizure of the nuclear weapons site and the demands and intentions of the terrorist are already national news in our scenario. Finally, the news media was temporarily excluded from the Grenada intervention by the decision of the naval commander in charge of the joint operation.[15] In our scenario, the installation commander has yet to make a decision on the news media. He is waiting for legal advice from the SJA.

Not only did the decision of the naval commander to exclude the news media from the early stages of the Grenada intervention precipitate an unresolved constitutional crisis, but it also prompted the United States Senate to take action. Recognizing that American history demonstrated that "a free press is an essential feature of our democratic system of government," the Senate passed an amendment that called for the cessation of all restrictions imposed upon the news media in Grenada.[16] Although this congressional proposal never became federal law, it does serve to underscore the serious repercussions that can accrue from a military commander's decision to place restrictions on the news media during a military operation. Obviously, a keen sensitivity to the legal implications inherent in a domestic terrorist incident will be at a premium.[17]

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[9] Forkosch, *Speech and Press in National Emergencies*, 18 Gonz. L. Rev. 1, 48 (1983). [hereinafter cited as Forkosch]. Professor Forkosch submits that "the United States needs a substantive policy as to free speech and press vis-a-vis a grave national emergency, together with clear guidelines for its application and enforcement." *Id.* at 5. In the "case of a grave national emergency requiring swift action, the Presidency itself may have constitutional powers to act independently, even if only temporarily and during the emergency." *Id.* at 49. *See generally* Fuller, *The National Emergency Dilemma*, 52 S. Cal. L. Rev. 1453 (1979).

[10] Forkosch, *supra* note 9, at 30. The seizure of a nuclear weapons storage site by terrorists would probably qualify for Forkosch's emergency exception to the first amendment.

[11] 588 F. Supp. 57 (D.D.C. 1984), *appeal filed*, No. 84–5888 (D.C. Cir. filed Aug 20, 1984). Flynt sought declaratory and injunctive relief against Secretary of Defense Weinberger.

[12] *Id.* at 58.

[13] For an analysis of the constitutionality of temporarily denying the news media access to military operations in Grenada, see Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and Off-the Record Wars*, 73 Geo. L.J. 931 (1985) [hereinafter cited as Cassell]; Note, *The First Amendment, the Press and the U.S. Invasion of Grenada: Balancing the Constitutional Interests*, 12 W. St. U.L. Rev. 217 (1984).

[14] The U.S. news media was denied access to Grenada for the first 48 hours of the intervention. Safety of journalists and U.S. forces is the most cited reason for the exclusion of the press. *See generally Pro and Con: Censor Journalists Covering Wars?* U.S. News & World Report, Nov. 14, 1983 at 33 (interview with Vice Adm. Mack, retired). "Although reporters always say that safety is their own problem, a commander would feel remiss if he allowed them to go into an area where they got killed." *Id.* "Restrictions [on the news media] are required anytime the safety of U.S. forces is a consideration." *Id.* Obviously, in our scenario the safety of the 35 hostage children is also a serious concern.

[15] *See Admiral Says It Was His Decision to Tether the Press*, N.Y. Times, Oct 31, 1983, § 1, at A12, col. 3. Despite the press ban, four members of the news media were able to reach Grenada by civilian boat. They were taken off the island to the aircraft carrier U.S.S. *Guam* and detained for 48 hours. *See* Cassell, *supra* note 13, at 944 n.101. The detention of news media personnel in our scenario would probably pass constitutional scrutiny. For safety and operational reasons, the news media certainly would not be allowed to "interfere" with any counter-terrorist rescue operation in our hostage scenario.

[16] 129 Cong. Rec. 14,957 (1983). Although this amendment never became law, it is important to note how the drafters of the amendment defined "restrictions":

> (1) preventing the press from freely accessing news sources of its choice;
> (2) unreasonably limiting the number or representation of the press permitted to enter Grenada; and
> (3) unreasonably limiting freedom of unsupervised movement of the press in Grenada.
>
> Provided, however, that nothing in their [sic] resolution shall be construed to require any action which jeopardizes the safety or security of U.S. or allied forces or citizen [sic] in Grenada.

Id. The authority of the Congress "to attempt to issue orders to the military in this fashion is unclear." *Cassell, supra* note 13, at 944 n.101. *See also* Carter, *The Constitutionality of the War Powers Resolution*, 70 Va. L. Rev. 101, 119 n.81 (1984). For a penetrating analysis of the historical relationships between the military and the news media in military operations in the 20th century, *see Battle Lines*, Twentieth Century Fund Report (1985).

[17] In Policy Letter 85–5, *supra* note 6, The Judge Advocate General of the Army directed that all judge advocates "have a working knowledge" of AR 190–52; Training Circular 19–16, Countering Terrorism on U.S. Army Installations; the Terrorism MOU, *supra* note 2; and HQDA (DAMO–ZA) message 101608Z Sept. 85, subject: Department of the Army Travel Security Policy. One terrorism expert has advocated that, in order to "strengthen the Army's ability to combat and deter acts of domestic terrorism," it must "resolve potential legal constraints and limitations which may restrict and/or hinder the use of military force responding to acts of domestic terrorism." Motley, *supra* note 8, at 26.

What emerges here is the proper role of the news media in a democratic society.[18] Unfortunately, the Sidle Panel Report,[19] which studied the media restrictions in Grenada, did not come to any definitive conclusions as to the role of the news media in military operations.[20] In the same vein, commentators appear to be about as equally divided as the Justices of the Supreme Court as to where the line should be drawn on freedom of the news media in the context of national security. A concrete constitutional standard that balances the competing interests appears to be elusive.

National Security and the News Media

A divided Supreme Court rendered eight separate opinions in *New York Times Co. v. United States*,[21] the famous *Pentagon Papers Case*. The Court attempted to articulate a viable constitutional standard for the collision between the freedom of the news media and national security. The factual setting was the government's request to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The Court ruled that the government failed to meet its heavy burden of establishing justification for the imposition of such a prior restraint on the news media. In dissent, Chief Justice Burger bore witness to the onerous task that was before the Court:

> Adherence to this basic constitutional principle [resistance to prior restraints against publication], however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.[22]

Justice Blackmun, also in dissent, pointed out that no standard existed to balance the constitutional interests at issue:

> What is needed here is a weighing, upon properly developed standards of the broad right of the press to print and of the very narrow right of the Government to prevent. *Such standards are not yet developed.* The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional.[23]

In their concurring opinions, Justices Stewart and White saw a free news media as a necessary check and balance on the executive branch that ensured the existence of an "enlightened citizenry."[24] Seen in this perspective, "an informed and critical public opinion" was the linchpin in protecting the values of democratic government."[25] Apparently these two Justices perceived the news media as a responsible institution that would exercise self-restraint when confronted with sensitive materials, considering the substantial danger to national security and the "hazards of

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[18] *See generally* A. Meiklejohn, Free Speech and Its Relation to Self Government (1948) [hereinafter cited as Meiklejohn]; BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 Cal. L. Rev. 482 (1080); Bird, *The Role of the Press In a First Amendment Society*, 20 Santa Clara L. Rev. 1 (1980); Cann, *Drawing a Line on Freedom of the Press: The Burger Court Picks Up the Chalk*, 66 Judicature 303 (1983); Emerson, *The State of the First Amendment As We Enter 1984*, 1 Com. Law. 3 (1984); Sack, *Reflections on the Wrong Question: Special Constitutional Privilege of the Institutional Press?*, 7 Hofstra L. Rev. 629 (1979); Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975); Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position," 28 Hastings L.J. 761 (1977);* Note, *The Right of the Press to Gather Information*, 71 Colum. L. Rev. 838 (1971); Comment, *Problems in Defining the Institutional Status of the Press*, 11 U. Rich. L. Rev. 177 (1976). Is the news media a "special watchdog" over public officials? *See* Blasi, *The Checking Value in First Amendment Theory*, Am. B. Found. Research J. 521, 593–94 (1977).

[19] The panel concluded its report with this exhortation:

> [T]he optimum solution to insure proper media coverage of military operations will be to have the military—represented by competent, professional public affairs personnel and commanders who understand media problems—working with the media—represented by competent, professional reporters and editors who understand military problems—in a nonantagonistic atmosphere. The panel urges both institutions to adopt this philosophy and make it work.

Sidle Panel Report, *supra* note 3, at 32.

[20] The juxtaposition of the press exclusion from Grenada with the British experience in the 1982 Falkland Islands conflict might be beneficial here. Much of the antagonism between the Ministry of Defense and the news media was "the product of the lack of a considered policy or plan for the reporting of a British War." Hastings & Jenkins, The Battle for the Falklands 331 (1983) [hereinafter cited as Hastings & Jenkins]. The British Government delayed TV transmissions for two weeks or more after the events they described, "a lag almost unprecedented in modern media history," *Id.* at 332. One near catastrophic confrontation occurred between the military and the news media:

> The most serious breach of relations between the correspondents and the command occurred a few days before the final British attack, when it was discovered that one reporter had telephoned another correspondent on the civilian telephone circuit, and talked freely about the details of the forthcoming attack. Although it was later learned that the line had been cut well short of Port Stanley, Brigadier Thompson was sufficiently dismayed by the possibility of the conversation having been monitored by the enemy to consider changing his plans. Thereafter, all correspondents were forbidden to attend brigade or unit orders groups, and faith in the trustworthiness of the journalists was never recovered.

Id. at 333.

One American has argued that the British "censorship" of the press in the Falklands "may be worth imitating." Kiernan, *The Case for Censorship*, Army, Mar. 1983, at 24. He based his argument on the Wartime Information Security Program type training that "both military public affairs people and civilian censors had received" prior to the Falklands War.

[21] 403 U.S. 713 (1971) (per curiam). The eight separate opinions expressed the view of six members of the Court in this 6–3 decision.

[22] *Id.* at 748 (Burger, C.J., dissenting).

[23] *Id.* at 761 (Blackmun, J., dissenting) (emphasis added). Justice Blackmun cited Justice Holmes' oft-cited dictum in Schenck v. United States, 249 U.S. 47 (1919) (distributing of a printed circular denouncing conscription and urging opposition to the selective service draft during World War I not protected by first amendment) for a possible standard for the Court to follow:

> It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

403 U.S. at 761.

[24] *Id.* at 728 (Stewart, White, JJ., concurring).

[25] *Id.*

criminal sanctions."[26] But neither Justice deemed it appropriate to sustain the government's burden, "at least without congressional guidance and direction."[27]

Of chief concern was the apparent inability of the Court to shed light on the meaning of "national security." For Justice Black, the term was ambiguous:

> The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, religion, and assembly should not be abridged.[28]

Perhaps Justice Brennan came the closest to establishing a coherent standard for this genre of cases when he postulated the following from influential dicta in two prior cases:

> The First Amendment tolerates absolutely no prior judicial restraints on the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation is "at war" . . . during which times "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[29]

Emphasizing that the government had failed to persuasively demonstrate that the publication of the "Pentagon Papers" would genuinely imperil the nation, Justice Brennan further opined:

> Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.[30]

Then Justice Brennan spelled out the heavy burden of proof that was on the government's shoulders: Thus, only governmental allegation and proof that publication must *inevitably, directly,* and *immediately* cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.[31]

New York Times Co. demonstrates not only the division of the Supreme Court over the proper role of the news media, but also the jurisprudential elusiveness of the term "national security." Although one federal district court has held that national security clearly overrides freedom of the news media when a newspaper attempts to publish "secret" hydrogen bomb data for public consumption,[32] the Supreme Court has yet to *affirmatively* use the Brennan compelling interest test against the background of the unique exigencies of the nuclear age. This poses a difficult task for the SJA who hopes to establish that a given terrorist incident falls into the narrow national security exception of *New York Times Co.* In developing a parallel argument, the SJA must be careful to ensure that any restraint on the news media must be shown to be "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest."[33] Arguably, the threat of nuclear detonation in our scenario may fall into this "extremely narrow exception."

Having examined the Court's view of the news media in the context of national security, it is now appropriate to examine the Court's treatment of the news media in certain nonmilitary contexts with a view toward resolution of some of the issues presented by our scenario.

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[26] *Id.* at 733 (White, Stewart, JJ., concurring).

[27] *Id.*

[28] *Id.* at 719 (Black, Douglas, JJ., concurring) Justice Black questioned whether any of the three branches of the government had the authority to enjoin publication:

> In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of press in the name of equity, presidential power, and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.

Id. at 718.

[29] *Id.* at 725–26. (Brennan, J., concurring by quoting Schenck v. United States, 249 U.S. 47, 52 (1919) and Near v. Minnesota 283 U.S. 697, 716 (1931) (Minnesota statute that exercised a prior restraint on an allegedly scandalous newspaper held unconstitutional) respectively).

[30] *Id.* at 726 (Brennan, J., concurring).

[31] *Id.* at 726–27. (emphasis added). *See* United States v. Progressive, 467 F. Supp. 990 (W.D. Wisc. 1979), where a federal court used this test and the *Near* analogy of the publication of military movements to the publication of the technical information on the U.S. development of the hydrogen bomb. The Progressive had published an article entitled "The H-Bomb Secret, How We Got It, Why We're Telling It." *See* Knoll, *National Security, The Ultimate Threat to the First Amendment,* 66 Minn. L. Rev. 161, 165 (1981) for the editor's "chilling effect" rebuttal.

[32] *See Progressive. Compare* this decision *with* the absolutist view of the first amendment espoused by the constitutional scholar Miklejohn, *supra* note 18. In his extreme view, there are no exceptions to the prohibition against abridgement of freedom of the press, either "in war or in peace, in danger as in security." *Id.* at 26–27.

[33] L. Tribe, American Constitutional Law, 582 (1978) [hereinafter cited as Tribe]. I would submit that the wholesale exclusion of the news media from a military installation would be tantamount to the prior restraint addressed by the Supreme Court in *New York Times Co.*

The Supreme Court's Treatment of the News Media in Certain Nonmilitary Contexts

Delayed Television Broadcasts

In our modern, technocratic era, live television broadcasts have become the norm. In an era of where "old news is no news," the news media has been obliged to satiate a news-hungry public with instantaneous on-the-scene feedback via satellite. But does the first amendment mandate the right to the live television broadcasting of events? In resolving this issue, it may be helpful to use *Nixon v. Warner Communications, Inc.*[34] as an analogy. At a criminal trial arising from the famous Watergate investigation, copies of tapes of conversations recorded by President Nixon were admitted into evidence and played at trial. During the course of the trial, transcripts of these tapes were provided to the news media. In turn, the news media reprinted them extensively. Several broadcasters, asserting that the first amendment guarantee of freedom of the news media and the sixth amendment guarantee of a public trial compelled release of the tapes, petitioned the U.S. District Court for immediate access to the tapes for the purpose of "copying, broadcasting, and selling" them to the public.[35]

Justice Powell, writing for the majority, noted that because the news media "serves as the information-gathering agent of the public," the state could not preclude the media from "reporting what the public was entitled to know."[36] But as the press and the "electronic media" gave such wide publicity to the content of the tapes via the transcripts, the Court held that the information was already in the public domain.[37] In this specific context, there was no issue of a "truncated flow of information to the public."[38] In sum, the first amendment did not grant the news media a right to information regarding a trial "superior to that of the general public."[39]

In addressing the sixth amendment contention by the broadcasters, the Court opined that that amendment did not require that any trial "be broadcast live or on tape to the public."[40] As long as the news media had a viable alternative means of disseminating newsworthy information to the public, there was no constitutional right to have the testimony of a live witness "recorded and broadcast" at a trial.[41] In *Nixon,* neither the argument of freedom of the news media nor guarantee of a public trial convinced the Court that a live television broadcast was an inherent part of the news media's function.[42] To avoid the "truncated flow of information to the public" concern of *Nixon,* the installation commander in our scenario may want to ensure that alternative means of dissemination of news are available to the news media if he opts to delay live television broadcasts for reasons of "national security."

Denial of Interviews

In *Pell v. Procunier,*[43] the Court decided whether government should open its penal institutions to permit "face-to-face interviews" between news media representatives and individual inmates whom the representatives specifically named and requested to interview. Although the California Department of Corrections allowed both the press and general public to observe prison conditions, the news media enjoyed special access to state prisons.[44] To this end, the news media was allowed to go into the prisons to interview inmates selected at random by prison officials, to sit in on inmate meetings, and to interview inmates.[45]

The paramount privilege given to the news media was that "every journalist had virtually free access to interview any individual inmate whom he might wish."[46] Unfortunately, this policy "resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual *'public figures'* within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates."[47] These prisoners "often became the source of severe disciplinary problems" due to the "notoriety and influence" generated

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[34] 435 U.S. 589 (1978). The Court rendered a 5–4 decision in this case. Note that in our scenario the installation commander may deem it necessary to delay live television broadcasts. *See* Hastings & Jennings, *supra* note 20, at 332 for how the British government delayed television broadcasts of the Falkland Islands War for two weeks or more.

[35] 435 U.S. at 608. The news media was permitted to listen to the tapes and report accordingly.

[36] *Id.* at 609 (Powell, J., for the majority, citing Cox Broadcasting Corp. v. Cohn 420 U.S. 469, 491–92 (1975)). For a general discussion of the public's "right to know," *see* Schmidt, Freedom of Press v. Public Access (1977); Klein, *Towards an Extension of the First Amendment: A Right of Acquisition,* 20 U. Miami L. Rev. 114 (1965); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution,* 28 Geo. Wash. L. Rev. 311 (1971).

[37] 435 U.S. at 609.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 610.

[41] *Id.* (Powell, J., citing Estes v. Texas 381 U.S. 532, at 539–42 (1965)).

[42] Perhaps the Court would hold to this line of reasoning in contexts other than the courtroom. Although a public trial obviously differs greatly from an on-post terrorist incident, I believe that the Court would see the issue of live broadcasting as the same. For a general understanding of how the Court has ruled on the news media in the courtroom, *see* Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment accords a newsperson no privilege against appearing before a grand jury and answering questions as to the identity of confidential news sources); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (court order restraining news media from publishing or broadcasting accounts of admissions made by accused violated first amendment); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (state statute that excluded press and public from courtroom during testimony of minor victim in sex-offense trial violated first amendment).

[43] 417 U.S. 817 (1974). *See also* Saxbe v. Washington Post, 417 U.S. 843 (1974).

[44] 417 U.S. at 830. "This policy reflects a recognition that the conditions in this nation's prisons are a matter that is both newsworthy and of great public importance." *Id.* at 830 n.7. Certainly a domestic terrorist incident on a military installation would be "newsworthy and of great public importance."

[45] *Id.* at 830.

[46] *Id.* at 831.

[47] *Id.* at 831–32 (emphasis added).

from a news media with special access.[48] For example, inordinate press attention to a prisoner who espoused a practice of disobedience to prison regulations encouraged other prisoners to follow suit, thus eroding the prison's ability to deal effectively with the prisoners generally.[49] Finally, this disciplinary erosion led to an escape attempt at San Quentin where three staff members and two prisoners were killed.[50]

In response to this tragedy, the state of California abruptly enacted a regulation that terminated one media privilege: interviews with individual prisoners specifically designated by members of the news media were prohibited.[51] This collision between the news media and the government precipitated a law suit by the prisoners and news media representatives challenging the regulation's constitutionality under the first and fourteenth amendments.[52] The news media argued that "face-to-face interviews with specifically designated inmates is such an effective and superior method of news gathering that its curtailment amounts to unconstitutional state interference."[53]

In rejecting the news media's contention, Justice Stewart, expressing the view of five Justices, cited important compelling dictum from *Branzburg v. Hayes:*[54]

> It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. *Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.*[55]

In balancing the substantial governmental interest in maintaining order and discipline in penal institutions with freedom of the news media, the Court ruled that the Constitution did not impose "upon government the affirmative duty to make available" to the news media "sources of information not available to members of the public generally."[56] From the perspective of the Court, security of penal institutions was a weighty, legitimate policy objective:

> When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that in drawing such lines, prison officials must be accorded latitude.[57]

To this end, "reasonable time, place, and manner" restrictions on the news media were "necessary to further significant governmental interests."[58] "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable."[59] In determining that "security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions" on the news media,[60] the Court clearly established that there is no absolutist foundation for the first amendment; the news media has no "unrestricted right to gather information."[61]

In *Houchins v. KQED, Inc.*,[62] the Court reaffirmed its reasoning in *Pell.* In holding that the Sheriff of Alameda County, California could deny a local television and radio broadcasting station access to a county jail for the purpose of investigating the suicide of an inmate and the allegedly abject conditions in the jail, Chief Justice Burger, joined by two of the seven members of the Court who participated in the decision, expressed the view that "there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information"

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[48] *Id.* at 832.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 831. The tragedy was viewed by prison officials "as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews." *Id.* at 832.

[52] It should be noted that the Court did not view the regulation as a restriction on the inmates freedom of speech given their alternative channels of communication with the press. *Id.* at 823–26.

[53] *Id.* at 833.

[54] 408 U.S. 665 (1972).

[55] *Pell,* 417 U.S. at 834 (citing Branzburg v. Haynes, 408 U.S. at 684 (emphasis added). Our terrorist scenario would probably be analogous to a potential "disaster."

[56] *Id.* at 834–35.

[57] *Id.* at 826 (citing the phrase "prison officials must be accorded latitude" from Cruz v. Beto, 405 U.S. 319, 321 (1972)).

[58] Grayned v. City of Rockford, 408 U.S. 104, 105 (1972); Adderley v. Florida, 385 U.S. 39, 46–48 (1966); Cox v. Louisiana, 379 U.S. 536, 554–55 (1965); Poulos v. New Hampshire, 345 U.S. 395, 398 (1953); Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941).

[59] *Grayned,* 408 U.S. at 116.

[60] *Pell,* 417 U.S. at 827.

[61] *Id.* at 834 n.9. (citing Chief Justice Warren in Zemel v. Rusk, 381 U.S. 1, 17 (1965). Chief Justice Warren had stated:
[T]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.
Id. at 16–17.

[62] 438 U.S. 1 (1978).

within governmental control.[63] Although the Court acknowledged that the news media acted as the "eyes and ears" of the public and was a "powerful and constructive force," contributing to needed reform,[64] the Court reasoned that the media's function had to be weighed against the important governmental interest to be advanced. In analogizing security at a penal institution to that of a hostage-terrorist situation, the SJA should carefully examine *Pell* and *Houchins* for the proposition that the exigencies of a hostage-terrorist incident far outweigh the news media's qualified need for face-to-face interviews.

The Authority of the Installation Commander

A strong line of Supreme Court cases and commentaries supports the concept that an installation commander has "inherent authority" and "historically unquestioned power" to control access to the installation.[65] In applying a deferential analysis to the military installation in the context of the exercise of first amendment freedoms, the Court has consistently articulated that a military installation is not a public forum.[66] In recognizing "the special constitutional function of the military in our national life," the Court has firmly established the principle that the primary function of a military installation is to "provide for the common defense" by preparing and training soldiers "to fight wars should the occasion arise," not to provide a public forum.[67]

Two military commentators have captured the essence of the Court's judicial deference to the military mission:

> The primacy of the military mission is, and must be, at the core of the military persona. All other issues, all other concerns, pale before this central principle. The installations on which our military materiel is stored, our weapons systems are developed, and our soldiers, sailors, marines and airmen are trained and exercised must be preserved for the uses to which they are lawfully dedicated. The focus of installation commanders must be to channel human and material resources to the military mission.[68]

In an on-post terrorist incident, the primary military mission would be mounting effective counterterrorist operations and maintaining installation safety and security. An aggressive news media could jeopardize this mission. Given the Supreme Court's deference to the installation commander's "inherent authority" to reasonably regulate the exercise of first amendment freedoms during peacetime, it should be evident that the deference would be enhanced during a terrorist incident. Although not rising to the level of actual war, a terrorist incident does appreciably cross the peacetime threshold.

A terrorist incident on a military installation not only threatens soldiers, but also their dependents. Every aspect of order and security on a military installation could be dramatically jeopardized by a terrorist incident. Accordingly, an installation commander's authority under such circumstances would be extraordinary and pervasive. Temporary and reasonable restrictions, such as curfews and identification checks on soldiers as well as dependents would be appropriate. If necessary, the installation commander apparently has the authority to close the

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[63] *Id.* at 14. Although recognizing that the news media and the government each have "special, crucial functions, each complementing" the other, Chief Justice Burger pointed out that sometimes they conflict. *Id.* at 8–9. When they conflict, "there is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Id.* at 14 (Burger, C.J., citing *Pell*, 417 U.S. at 834 at n.9).

[64] *Id.* at 8. "[U]ntil the *political branches* decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally." *Id.* at 6 (emphasis added). In light of this rationale, whether Congress could pass a federal law limiting news media access in certain contexts, for example our terrorist scenario, remains to be seen.

[65] *See* United States v. Albertini, 105 S. Ct. 2897 (1985) (a bar letter remains in effect even when an installation temporarily opens its gates to the public); Greer v. Spock, 424 U.S. 828 (1976) (installation commander has power to summarily exclude civilians who seek entry to make political speeches and distribute leaflets on the installation); Cafeteria & Restaurant Workers Union v. McElroy 367 U.S. 886 (1961) (installation commander has broad authority to exclude civilians from the installation for security reasons); Cruden & Lederer, *The First Amendment and Military Installations*, Det. C.L. Rev. 845 (1984) [hereinafter cited as Cruden & Lederer]; Lieberman, Cafeteria Workers *Revisited: Does the Commander Have Plenary Power to Control Access to His Base?* 25 JAC J. 53 (1970); Stine, *Base Access and the First Amendment: The Rights of Civilians on Military Installations*, 18 A.F.L. Rev. 18 (1976); Zillman & Imwinkelreid, *The Legacy of* Greer v. Spock: *The Public Forum Doctrine and the Principal of the Military's Political Neutrality*, 65 Geo. L.J. 773 (1978). It should be noted that neither the Supreme Court nor the various commentators have mentioned freedom of the press in their analysis of the exercise of first amendment rights on a military installation.

[66] For an examination of the Supreme Court's public forum cases, see Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121 (1982). In Greer v. Spock, 424 U.S. at 838, the Court expressly held that military installations were not public fora. Public forum and right to access appear to be dichotomous doctrines that have been considered by the Court in this context. For an analysis of the right of access doctrine, see M. Franklin, Mass Media Law: Cases and Materials 348–426 (2d ed. 1982); W. Van Alstyne, Interpretations of the First Amendment 55–57 (1984); Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 Sup. Ct. Rev. 1; Note, *The First Amendment Right to Gather State-Held Information*, 89 Yale L.J. 923 (1980); Note, *Press Access to Government-Controlled Information and the Alternative Means Test*, 59 Tex. L. Rev. 1279 (1981). *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) and Press Enterprise Co. v. Superior Court, 104 S. Ct. 831 (1984) for the Court's most recent articulations of the right to access doctrine. At least one zealous proponent of the right of access doctrine has acknowledged that national security is overriding. *See* Emerson, *Legal Foundations of the Right to Know*, Wash. U.L.Q. 1, 17 (1976). Apparently this commentator would view our scenario—the seizure of a nuclear weapons storage site—as one that would outweigh freedom of the news media.

[67] Greer v. Spock, 424 U.S. at 837–38. One noted constitutional scholar has distinguished between "semi-public forums" — schools and libraries — and "government institutions doing the people's business but not performing speech-related functions at all" — such as hospitals, jails, and military installations. In the latter, he concludes that the "Supreme Court's position is that government may exclude even peaceful speech and assembly which interferes, instrumentally or symbolically, with the function of the government institution." Tribe, *supra* note 33, at 690. *Contra* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 886–87 (1979). Yudof takes the view that there should be a "presumption of access" to military bases.

[68] Cruden & Lederer, *Supra* note 65, at 846. The commentators "caution against a constitutional analysis that would define military installations as public forums, creating Hyde Park corners in places historically reserved for national defense." *Id.* at 869.

installation and any public highways which cross the installation.[69]

Seen in the foregoing perspective, an installation commander would have greater powers to regulate the news media during a terrorist incident than during normal operations. Exigent circumstances may require extraordinary measures. In the January 28, 1986 space shuttle tragedy, NASA officials "impounded the cameras and film of news-media photographers in the search for helpful evidence" as to the cause of the loss of seven astronauts and the two billion dollar space vehicle.[70] Apparently this impoundment would pass constitutional muster under the national security exception articulated in *New York Times Co.* The space shuttle incident serves to underscore the apparent authority that government officials would have during a bona fide national emergency.[71] Virtually any terrorist incident on a military installation, no matter how serious, could trigger this national security exception. This is due to the nature of a military installation. Given the fact that the Supreme Court has consistently ruled that the primary function of a military installation is to "provide for the common defense,"[72] any disruption of that function would affect national security to some degree. Unlike a terrorist incident in a city that would primarily only affect that city's security, a terrorist incident on any military installation would cause a concomitant degradation of national security.

In *Pell*, the Supreme Court deemed the security of penal institutions to be a weighty, legitimate policy objective that far outweighed the freedom of the news media.[73] Certainly in a terrorist incident the Supreme Court would view the security of a military installation as an even greater policy objective that far outweighed the freedom of the news media. In *Pell*, the Court ruled that penal institutions could place "reasonable time, place, and manner" restrictions on the news media to further security.[74] Because it is official Army policy that "news media representatives receive timely, accurate information regarding terrorist incidents and other major disruptions on installations,"[75] a news media center would have to be established during a terrorist incident.[76] An unrestricted news media could hinder counterterrorist operations and unintentionally aid terrorists. Under the *Pell* rationale, the installation commander could impose "reasonable time, place and manner" restrictions on the news media at the news media center. If a photographer or journalist violated these restrictions, he or she could be temporarily detained or his or her camera or film could be seized.

The Internal Security Act is[77] another possible basis for such action by the installation commander. Under this act, the installation commander could issue orders that provide for the "safeguarding" of the installation "against destruction, loss, or injury by accident or enemy action, sabotage or other subversive actions."[78] A terrorist incident is analogous to sabotage or other subversive actions. Thus, under this act, an installation commander could issue orders that placed reasonable restrictions on the news media.[79] Violations of such orders would constitute a misdemeanor.[80]

As the persons "responsible for the maintenance of law and order on their installations,"[81] installation commanders have "inherent authority and responsibility to maintain order, security, and discipline necessary to assure the proper functioning of their command."[82] A news media

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[69] The Judge Advocate General of the Army has expressed this opinion in DAJA-AL 1982/2479, 24 Aug. 1982, *digested* in The Army Lawyer, Apr. 1983, at 21. Although such opinions are only advisory in nature, there are several arguable bases for this authority. First, the Terrorism MOU, *supra* note 2, provides that, until the FBI SAC arrives, "the installation commander is responsible for the maintenance of law and order on a military reservation and may take such immediate action in response to a terrorist incident as may be necessary to protect life and property." Second, "military commanders have inherent authority and responsibility to maintain order, security and discipline necessary to assure the proper functioning of their command." Dep't of Army, Reg. No. 210-10, Installations—Administration, para. 2-14 (12 Sept. 1977) [hereinafter cited as AR 210-10]. Third, a strong line of Supreme Court cases defers to the "historically unquestioned power" of the installation commander. *See Supra* note 65. Finally, section 21 of the Internal Security Act of 1950 (50 U.S.C. § 797 (1982)) permits the installation commander to issue orders that provide for the "safeguarding" of the installation "against destruction, loss, or injury by accident or enemy action, sabotage or other subversive actions." Clearly, closing the installation and any public highways that cross it would be an effective and reasonable measure to "safeguard" the installation. *See also* United States v. Aarons, 310 F.2d 341 (2d Cir. 1962), where the court upheld the order of a commander of a Coast Guard District that restricted access to a harbor during the launching of a submarine.

[70] William J. Broad, New York Times News Service, Jan. 30, 1986. The news media has yet to constitutionally challenge this impoundment.

[71] *See* Forkosch, *Supra* note 9, for one view of government powers in relation to the first amendment during a national emergency.

[72] Greer v. Spock, 424 U.S. at 837-38.

[73] Pell v. Procunier, 417 U.S. at 556-57.

[74] Grayned v. City of Rockford, 408 U.S. at 116.

[75] AR 190-52, para. 2-3c. This regulation further states:

> Since publicity is often a principal objective of terrorists, public affairs plays a key role in counterterrorist efforts. Public reaction to terrorist incidents is formed by what the public sees and hears through the media, and that reaction will continue well after the end of the terrorist incident. Therefore, during the monitoring period and execution phase, *the objective of public affairs is to limit the media exposure that terrorists seek* and to communicate a calm, measured, reasoned reaction on the part of counterterrorist decision makers. Care must be taken to focus attention away from the preparation and deployment of counterterrorism forces and tactics.

Id. at para 2-3 (emphasis added).

[76] *Id.* at para 2-3c. "The idea of a press poll has already been tested twice as an approach to solving the practical, operational problem." Zilain, *The Military Versus the Media: Easing the Tension*, Army, Feb. 1986, at 13.

[77] Internal Security Act of 1950, 50 U.S.C. §§ 781-826 (1982).

[78] 50 U.S.C. § 797 (1982).

[79] Given the broad context of the statute, it "appears to apply not only to regulations tied to the protection of sensitive Government property but to any regulation which protects the installation." Dep't of Army, Pam No. 27-21, Military Administrative Law, para. 2-15 (1 Oct. 1985) [hereinafter cited as DA Pam 27-21]. In a terrorist incident, safety of news media personnel and counterterrorist operations would be a primary concern. To avoid claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), news media personnel should be asked to sign "hold harmless agreements."

[80] 50 U.S.C. § 797(a)(1982).

[81] DA Pam 27-21, para 2-19*a* (citing AR 210-10, para. 2-9).

[82] *Id.*

helicopter that violated an installation's air space during a terrorist incident could hinder counterterrorist operations, endanger the lives of hostages, and threaten installation security. Pursuant to his "inherent authority and responsibility" to maintain order and security, the installation commander, under the Internal Security Act, could designate the entire installation as a "restricted area" during a terrorist incident.[83] Once declared a "restricted area," the following sign or notice would be posted at gates and other appropriate places on the installation:

> All persons and vehicles entering herein are liable to search. Photographing or making notes, drawings, maps, or graphic representations of this area or its activities are prohibited unless specifically authorized by the Commander. Any such material found in the possession of unauthorized persons will be confiscated.[84]

In light of this authority, the installation could take reasonable measures to prevent the news media helicopter from flying near the terrorist incident.[85] Not only could the installation commander declare the installation a "restricted area" but he could, if necessary "to protect classified defense information, and [Department of Defense] DOD equipment or materiel," also establish a "National Defense Area" (NDA) in the area surrounding the installation.[86] Such a declaration would temporarily place "non-Federal lands under the effective control of DOD."[87] Under this authority, an installation commander could "deny access to the NDA" and "remove persons who threaten the orderly administration" of the NDA.[88] Accordingly, even if a news media helicopter never violated an installation's airspace but flew on the periphery of an installation's boundary with a civilian community, the installation commander, pursuant to his declaration of an NDA, could take reasonable measures to prevent the helicopter from filming the on-post terrorist site. In sum, once an installation commander designates the installation as a "restricted area" or the surrounding community as an NDA, the news media could not photograph or report from the air or the ground anything about the installation without the express permission of the installation commander. The detention of news media personnel and the seizure of their cameras and film would be legally justified pursuant to this authority, if they failed to comply.

Finally, a brief analysis of United States v. Albertini,[89] the Supreme Court's most recent case on the authority of the installation commander, may provide yet another basis for the installation commander to exercise control over the news media during a terrorist incident. Albertini was convicted before the United States District Court for the District of Hawaii for illegal entry onto Hickam Air Force Base in 1981 after having received a bar letter from the commanding general in 1972.[90] Although the bar letter was nine years old and Hickam Air Force Base had opened its gates to the public for its annual "open house" for Armed Forces Day, Justice O'Connor, speaking for six members of the Court, stated that a military installation "is ordinarily not a public forum for first amendment purposes even if it is open to the public."[91] The reasonable basis for the bar letter in 1972 "did not become less weighty" in 1981 "when other persons were allowed to enter the base."[92] In dictum, the Court discussed a "substantial government interest" test for the exercise of first amendment freedoms on military installations. The thrust of the test was than an "incidental restriction" on the exercise of first amendment freedoms could be "no greater than is essential to the furtherance" of an "important or substantial governmental interest."[93] Such a test is similar to the one found in *New York Times Co.* and *Pell*: reasonable restrictions on the news media are constitutional if those restrictions promote a significant governmental interest, such as security. In the context of our scenario, the detention of news media personnel, seizure of cameras, and exclusion of the media helicopter from the terrorist site, if the need should arise, would probably find support under this dictum test. Arguably, none of these restrictive measures would be "greater than" that which is "essential to the furtherance" of installation security during a terrorist incident.

Conclusion—Avoiding the Constitutional Collision

An on-post hostage-terrorist incident could cause a unique military-news media clash. Before the arrival of the FBI special agent-in-charge, the SJA's legal advice to the installation commander on how to deal with the news media would be critical. Accordingly, this article has attempted to provide an SJA with a viable constitutional and statutory framework for advising the installation commander during a terrorist incident. Although the news media acts as the nation's "eyes and ears," it does not have an "unrestricted right to gather information," particularly during a terrorist incident. Pursuant to furthering the significant governmental interests of security, safety, and counterterrorist operations, the installation commander

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[83] "*When conditions warrant*, commanders of Army installations will designate restricted areas in writing to protect classified defense information or safeguard property or material for which they are responsible." Dep't of Army, Reg. No. 190–13, The Army Physical Security Program, para. 6–3*a* (20 June 1985) (emphasis added) [hereinafter cited as AR 190–13]. This regulation superseded Dep't of Army, Reg. No. 380–20, Security—Restricted Areas (15 Mar. 1982). Section 21 of the Internal Security Act of 1950 (50 U.S.C. § 797 (1982)) gives the commander this authority.

[84] AR 190–13, para. 6–4*c*.

[85] "When required, adequate physical safeguards will be installed to deter entry of unauthorized persons into the restricted area." AR 190–13, para. 6–3*d*. For example, installation air traffic controllers could warn news media helicopters not to cross the restricted area or dispatch aircraft to escort the helicopter away from the area.

[86] AR 190–13, para. 6–5*a*.

[87] *Id.* at para. 6–5*b*.

[88] *Id.* at para. 6–5*d*.

[89] 105 S. Ct. 2897 (1985).

[90] The statutory authority of the installation commander to issue bar letters and exclude individuals from the installation is 18 U.S.C. § 1382 (1982)

[91] *Albertini*, 105 S. Ct., at 2904.

[92] *Id.* at 2906.

[93] *Id.* (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

could impose reasonable restrictions on an aggressive news media.

Our scenario posed several specific questions. Barring a dramatic reversal by the Supreme Court or new legislation by Congress, the SJA could confidently posit his advice to the installation commander on *Pell* for denial of interviews with the terrorist; on *New York Times Co., Pell*, the Internal Security Act, inherent authority, and the dictum test in *Albertini* for the detention of news media representatives, seizure of cameras and film, and exclusion of news media helicopters from the vicinity of the terrorist site; and on *Nixon* for the delay of live television broadcasts. As long as the Supreme Court and Congress continue to recognize the special status of military installations, the installation commander, acting in good faith and within the foregoing constitutional and statutory framework, should be able to take effective measures to restrict the news media in a domestic terrorist incident if the need should arise. A constitutional collision can be avoided.

A Legal Guide to Providing Army Assistance to Local Communities

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Introduction

Local communities often request assistance from the Army in a variety of ways, including disaster relief, emergency assistance, the loan of equipment and personnel for community projects, and Army participation in community events. In reviewing such requests for legal sufficiency, a judge advocate must refer to a number of unrelated sources of regulatory authority. A practitioner may spend more time determining which regulations to consult than interpreting them. This article is designed to serve as a reference tool in providing installation level legal advice in this area.[1] It contains a discussion of the various types of support the Army can provide, along with practice tips for use in conducting legal reviews of support requests.

Requests for support will normally fall under one of the following categories of programs: disaster relief;[2] other emergency programs;[3] the Army Domestic Action Program;[4] or community relations.[5] The following section examines these programs, describing their scope and application.

Programs Available

Disaster Relief

It is Army policy to "assist civil authorities, recognized relief agencies, and Federal agencies charged with disaster relief" in the event of major disasters or emergencies.[6] Domestic[7] assistance may be provided where directed by higher authority[8] or where a serious emergency requires an immediate response to save life or property.[9] A major disaster refers to any natural or man-caused occurrence[10] which, in the opinion of the President, causes damage of such magnitude to warrant disaster assistance under the Disaster Relief Assistance Act of 1974.[11] A serious emergency[12] is any natural or man-caused occurrence requiring federal supplementation of state and local efforts to save

*This article is based upon a paper written in satisfaction of the Writing for Publications course of the 33d Judge Advocate Officer Graduate Course.

[1] The purpose of this paper is to serve as an aid for the installation practitioner; references cited will be primarily those available at an installation. Therefore, most citations will be to Army Regulations.

[2] Dep't of Defense Directive No. 3025.1, Use of Military Resources During Peacetime Civil Emergencies within the United States, its Territories, and Possessions (May 23, 1980) [hereinafter cited as DOD Dir. 3025.1]; Dep't of Army, Reg. No. 500–60, Disaster Relief (1 Sep. 1981) [hereinafter cited as AR 500–60].

[3] Dep't of Army, Reg. No. 500–4, Military Assistance to Safety and Traffic (MAST) (15 Jan. 1980) [hereinafter cited as AR 500–4]; Dep't of Army, Reg. No. 420–90, Fire Protection (1 Feb. 1985) [hereinafter cited as AR 420–90]; Dep't of Army, Reg. No. 500–2, Search and Rescue (SAR) Operations (15 Jan. 1980) [hereinafter cited as AR 500–2].

[4] Dep't of Army, Reg. No. 28–19, Department of the Army Domestic Action Program (1 May 1975) (C1, 30 Sep. 1976) [hereinafter cited as AR 28–19 (C1 1976)

[5] Dep't of Army, Reg. No. 360–61, Community Relations (15 Nov. 1980) (C1, 1 Mar. 1984) [hereinafter cited as AR 360–61 (C1 1984)].

[6] AR 500–60, para. 2–1*b*.

[7] For disaster relief purposes, "domestic" refers to the United States, its territories, and possessions. DOD Dir. 3025.1, para. C1 and AR 500–60, para. A–8. The scope of this paper is limited to domestic community services that the Army can provide. The provision of foreign disaster relief is addressed in AR 500–60, Chapter 7, and Dep't of Defense Directive No. 5100.46, Foreign Disaster Relief (Dec. 4, 1975).

[8] AR 500–60, paras. 2–1*b*, 2–10*b*.

[9] AR 500–60, paras 2–1*f*, 2–10.

[10] AR 500–60, para. A–11. A major disaster is
> [a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which, as determined by the President, causes severe and widespread damage sufficient to warrant major disaster assistance under the Disaster Relief Act of 1974.

[11] *Id.* 42 U.S.C. §§ 5121–5189 (1982) [hereinafter cited as the Disaster Relief Act].

[12] AR 500–60, para. A–4. An emergency is any of the occurrences noted in the definition of major disaster "which requires Federal emergency assistance to supplement State and local efforts to save lives and protect property, and public health and safety or to avert or lessen the threat of a disaster." *Id.*

lives and protect property, public health and safety, or to reduce or avoid the threat of a disaster.

Under the Disaster Relief Act, it is national policy to provide supplemental assistance to state and local governments "to alleviate the suffering and damage that result from civil emergencies."[13] To accomplish this, a national network has been established to respond to such emergencies. It is controlled by the Director of the Federal Emergency Management Agency (FEMA), who directs and coordinates Federal involvement in emergency or disaster relief.[14] When the President declares a major disaster or emergency, the FEMA Director has the authority to direct any Federal agency to provide assistance to state and local governments.[15] This assistance can include personnel, equipment, supplies, facilities, or other resources.[16]

Military assistance will normally be provided only under the following conditions: when the situation is so severe and widespread that it exceeds the response capacity of state and local governments; when the required support is not commercially available; and when a reimbursement commitment is made by the requesting authorities.[17] An important restriction on the support that can be rendered is that "use of military resources in civil emergency relief operations will be limited to those resources that are not immediately required for the execution of the primary military mission."[18] Finally, commanders must ensure that military personnel participating in "disaster relief do not enforce or execute civil law in violation of the Posse Commitatus Act."[19]

The key to reviewing assistance requests where there is a presidentially declared emergency or major disaster is that it will be provided "only as directed by higher authority."[20] *The decision to provide such support cannot be made locally.* A presidentially declared emergency or major disaster does not constitute a blanket authorization to respond to local requests for assistance. Relief may be provided only when directed through proper command channels.[21]

Where an emergency requires an immediate response, the decision to provide relief is made locally. When "a serious emergency or major disaster is so imminent that waiting for instructions from higher authority would preclude effective response,"[22] the local commander may do what is required "to save human life, prevent immediate human suffering, or lessen major property damage or destruction."[23] The commander is required to report the action being taken to higher authority as soon as practicable. If it is necessary to provide continued support or the support requirement is beyond the local commander's resources and capabilities, guidance will be requested through command channels.[24] Due to the need to act quickly, support will not be denied (or delayed) pending execution of a reimbursement commitment by the requestor.[25] Where disaster relief requests do not meet these criteria, the requestor should be advised to send the request through state or federal authorities to the Department of Defense.[26]

To determine whether there is an imminent serious condition, consider the probable impact of a delayed response. If delay will result in an increased threat to the safety of human lives (or increased suffering) or in great destruction or damage to property which could have been prevented or reduced by an immediate response, then providing relief under this exception is authorized. Each request is fact specific. Based on the humanitarian intent of this exception, close calls should be resolved in favor of providing relief where mission requirements permit.

Other Emergency Programs

A small group of programs authorize *specific* types of emergency services. They can be loosely categorized as "other emergency programs." These include medical assistance, fire protection assistance, and emergency search assistance. Separate Army regulations govern each of these programs.[27]

Military Assistance to Safety and Traffic (MAST). The MAST program is a federal interagency effort to provide Department of Defense (DOD) personnel, equipment, and supplies to respond to serious medical emergencies in designated civilian communities.[28] Support may be provided for the evacuation of accident victims, the interhospital transfer of patients, the transport of key medical personnel, or blood

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[13] DOD Dir. 3025.1, para. D1.

[14] AR 500–60, para. 1–5*b* (1).

[15] *Id.*

[16] AR 500–60, para. 2–12*a*.

[17] AR 500–60, para. 2–1*b*.

[18] AR 500–60, para. 2–1*c*.

[19] AR 500–60, para. 2–1*e*. In certain situations, the Army may provide limited civil law enforcement assistance. For information concerning such support, *see* Dep't of Army, Reg. No. 500–51, Support to Civilian Law Enforcement (1 Aug. 1983).

[20] AR 500–60, para. 2–10.

[21] In the Continental United States (CONUS), the Commanding General, United States Forces Command (CG, FORSCOM) has been delegated the authority to act as the DOD Executive Agent for the conduct of disaster relief. AR 500–60, para. 2–11*b*. Orders to provide disaster relief should originate from FORSCOM Headquarters.

[22] AR 500–60, para. 2–1*f*.

[23] *Id.*

[24] *Id.*

[25] AR 500–60, para. 2–1*f*. The Army will not ultimately "pick up the tab" in these situations. Disaster relief is not part of the Army's normal mission, nor are disaster relief funds programmed into the Army's budget. When the cost of Army assistance exceeds normal operating costs, the Army "will bill the recipient of the military assistance directly." AR 500–60, para. 5–10*a*. For guidance on billing procedures, *see* AR 500–60, chapter 5.

[26] AR 500–60, para. 2–17*b*.

[27] *See* AR 500–4, AR 420–90, and AR 500–2, respectively.

[28] AR 500–4, para. 3*a*.

or human organ transfer. The program is intended to provide interim emergency medical support until civilian services can be established.[29] Units involved in MAST support will provide air medical evacuation crews and equipment (helicopters, crews, and associated medical personnel and equipment).[30]

MAST support is provided as part of an organizational structure that is already in place, normally based on a formal memorandum of understanding or other agreement.[31] Where civil or commercial ground or air ambulance services are operating in a geographic area covered by a MAST program, a letter of agreement must be negotiated between state and/or local officials and those commercial operators; the local military commander must be a signatory to the agreement.[32] Legal review of requests for MAST support should include ensuring that the letter of agreement complies with the MAST regulation.

Fire Protection Assistance. Providing fire protection assistance to local communities is similar to the MAST program in that there will normally be an agreement for furnishing mutual firefighting aid already in place. The fire protection regulation[33] authorizes the installation commander to exercise the Secretary of the Army's statutory authority[34] to enter into reciprocal agreements with firefighting organizations in the vicinity of the installation.[35] The sample Mutual Aid Agreement provided in the regulation meets all statutory requirements regarding reimbursement for services, the respective liability of parties, and so forth.[36] The agreement must be personally executed by the installation commander and an authorized representative of the local firefighting organization.[37] These agreements must be reviewed every two years and updated as required.[38]

Where there is no formal agreement, the installation commander (or his or her designee) may, when deemed to be in the United States' best interests, authorize emergency help to "put out fires and to save life and property from fire in the vicinity of the installation."[39] Additionally, emergency help may be authorized to fight fires outside the immediate vicinity of the installation based on previously discussed disaster relief standards.[40]

In conducting a legal review, ensure that any reciprocal agreement in effect complies with regulatory requirements by comparing it with the sample in the regulation. Each agreement should be properly updated (at least every two years) and executed. If there is no agreement in effect, ensure that the commander's designee is aware of the restrictions on providing emergency assistance. Review the installation planned fire protection program.[41] If it does not include guidance for providing emergency assistance outside the installation, suggest that it be amended to include such guidance.

Search and Rescue Operations. Army equipment and personnel may also be used to assist civil authorities in support of search and rescue (SAR) operations within CONUS during peacetime.[42] In addition to providing SAR support for their own operations, the United States Armed Forces have "traditionally accepted . . . a moral and humanitarian obligation to aid nonmilitary persons and property in distress."[43] Local commanders have the authority to conduct SAR missions in support of *military operations.*[44] Also, where an "imminent serious condition"[45] requires an immediate response, or "Federal Aviation Administration (FAA) air traffic control agencies request in-flight Army aircraft to provide immediate assistance to aircraft in distress,"[46] the local commander may authorize SAR support. Other requests for SAR assistance from civil authorities should be referred to the Air Force Rescue Coordination Center,[47] the single federal agency responsible for coordinating SAR activities in CONUS.[48]

Other SAR assistance cannot be locally authorized; FORSCOM must task the local command.[49] Installation commanders must designate one primary and two alternate

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[29] *Id.*

[30] *Id.*

[31] AR 500–4, para. 4*b*.

[32] AR 500–4, para. 4*f*.

[33] AR 420–90.

[34] AR U.S.C. § 1856*a* (1982).

[35] AR 420–90, para. 2–9*a*.

[36] AR 420–90, fig. 2–1.

[37] AR 420–90, para. 2–9*e*.

[38] *Id.*

[39] AR 420–90, para. 2–10*a*.

[40] AR 420–90 para. 2–10*b*.

[41] Each installation is required to implement a "planned fire protection program." AR 420–90, para. 1–5*c* (2).

[42] AR 500–2, para. 1.

[43] AR 500–2, para. 4*a*.

[44] AR 50–2, para. 4*b*.

[45] "An incident which is of such gravity as to require immediate assistance to save human life, prevent immediate human suffering, or mitigate destruction or damage to property." AR 500–2, para. 3*b*.

[46] AR 500–2, para. 4*c*.

[47] *Id.*

[48] AR 500–2, para. 5*a* (1).

[49] AR 500–2, para. 5*d*(1).

installation SAR coordinators and publish local SAR standing operating procedures (SOP).[50] Army assistance will normally be in the form of aircraft and crew for a wide variety of missions, including the aerial drop of emergency medicine and supplies, the aeromedical evacuation of sick and injured personnel, the rescue of stranded personnel, night operation illumination, and reconnaisance.[51] The recovery of human remains is considered the responsibility of civil authorities. Army assistance in the recovery of human remains will be rendered only with Headquarters, Department of the Army (HQDA) approval.[52] Army SAR assistance will terminate when the SAR object is recovered, the appropriate authority terminates the mission, or military mission requirements preclude further assistance.[53]

The installation practitioner should ensure that the commander has designated a primary and two alternate SAR coordinators and published a local SAR SOP. The SOP should include guidance concerning the conditions wherein a local commander may authorize assistance.

The previous programs involved both humanitarian and emergency considerations. The remaining programs apply to providing support in non-emergency/life-threating situations.

Department of the Army Domestic Action Program (DADAP)

The thrust of this program is to "authorize and encourage the use of the human and physical resources of the Department of the Army for the continued betterment of society."[54] It is geared to support projects which benefit "the disadvantaged of the civilian community."[55] Sponsors of domestic action projects may include local, state, or federal agencies, private associations, or civic organizations.[56] Army participation is prohibited, however, where a project selectively benefits or favors a private individual, group, corporation, commercial venture, or political group.[57]

In reviewing a request for DADAP support, a number of regulatory restrictions must be considered. Because a project may not be undertaken which will "conflict with private enterprise or compete with the civilian labor force,"[58] the sponsor should include in its written request for Army participation documentation of coordination with interested local labor groups and businesses.[59] Although military units and individuals are authorized to advise, assist, and support the planning of these projects,[60] the project sponsor should have primary responsibility for planning, initiating, and sustaining a project.[61] Community participation should normally be a prerequisite to Army participation.[62] Army participation must be "without derogation of the military mission."[63] Participants in the DADAP "may not be used in any manner to enforce local law, statutes, or ordinances."[64]

This program is decentralized,[65] which gives commanders the "widest flexibility" for involvement in light of "mission requirements and community circumstances."[66] Entire units or elements of units may participate if it is in conjunction with unit training, the training contributes to the unit's readiness mission, no funds are expended in excess of programmed training funds, and the project is within the unit's capabilities to perform.[67] Reimbursement must be obtained for costs not attributable to the training function.[68]

Project sponsors should be strongly encouraged to purchase liability insurance and sign a release and hold harmless agreement in favor of the United States.[69] Army participation should not be conditioned on the procurement of insurance or a release agreement, however.[70]

A commander has more flexibility in providing assistance under this program than the others. In assessing a project, four key questions must be answered: (1) Does it aid the disadvantaged? (2) Are the noncompetition requirements met? (3) Will training benefits enhance unit readiness? and

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[50] AR 500–2, paras. 5*d*(2), 5*d*(3).

[51] AR 500–2, para 7.

[52] AR 500–2, para. 6*d*. There are two exceptions: (1) if the recovery of human remains can be accomplished concurrently with, and without jeopardizing, the recovery of survivors, or (2) overriding humanitarian considerations preclude obtaining prior approval. In either event, HQDA must be immediately notified by telephone through Army SAR channels. *Id.*

[53] AR 500–2, para. 6*e*.

[54] AR 28–19, para. 4.

[55] AR 28–19, para. 2*b*.

[56] AR 28–19, para. 2*c*.

[57] AR 28–19, para. 5*j*.

[58] AR 28–19, para. 5*h*.

[59] *Id.*

[60] AR 28–19, para. 5*p*.

[61] AR 28–19, para. 5*e*.

[62] *Id.*

[63] AR 28–19, para. 5.

[64] AR 28–19, para. 5*s*.

[65] AR 28–19, para. 5*a*.

[66] *Id.*

[67] AR 28–19, para. 5*q*.

[68] *Id.* For example, the cost of the fuel expended in operating a bulldozer to level a ballfield for underprivileged children need not be reimbursed; the cost of fuel is directly attributable to the normal bulldozer operator training function. The costs of the materials used in building a fence around the ballfield, however, should be reimbursed. Fencing materials are not directly attributable to the normal combat engineer training function.

[69] AR 28–19, para. 16.

[70] *Id.*

(4) Can it be accomplished within mission requirements? If these questions can be answered yes, most projects will meet this program's criteria. Where assistance is not primarily for the benefit of the disadvantaged, the Army may still be able to provide limited assistance under the Community Relations program.

Community Relations

Whereas the previous programs rely primarily on humanitarian considerations, this program is based on the relationship between the Army and the American public.[71] The Army may use its resources to support "events and activities of common interest and benefit" provided it does not selectively benefit a particular sponsor.[72] The goal is to "increase public awareness of the Army's mission, policies, and programs, . . . inspire patriotism," foster good relations with the public while maintaining the Army's reputation, and support the Army's recruiting mission.[73] In short, the Community Relations program's purpose is to enhance the Army's image and improve community relations.

In making a legal sufficiency determination, consider the objective and purpose of the proposed program and its sponsor, the nature and character of the program site, and the particulars of the support requested.[74] Army support "must not selectively benefit any person, group, or corporation, whether profit or non-profit; religion, sect, religious or sectarian group, or quasi-religious or ideological movement; fraternal organization; political organization; or commercial venture."[75] In addition, Army participation is permitted in programs only "if admission, seating, and other accommodations" associated with the program are available on a non-discriminatory basis.[76] With the exception of programs which are patriotic in nature or are celebrations of national holidays, the Army's participation in an event must be incidental.[77] Army personnel will not be used to perform "demeaning" tasks, such as "ushers, guards, parking lot attendants, runners, baggage handlers, [or] crowd controllers."[78]

Army participation will often be ceremonial in nature. Army musical, ceremonial, and troop unit support is authorized for: official military functions; official civil ceremonies and functions; parades and ceremonies relating to the Armed Forces or veterans organizations; and locally sponsored public parades, rallies, and concerts designed to stimulate interest in patriotism and the Armed Forces, aid in recruiting, or celebrate a national holiday.[79] Local commanders may authorize the use of color guards and musical units for pre-game professional sports events and pre- and post-season non-televised collegiate events. This participation is limited to pre-game or half-time activities associated with "rendering proper honors to the colors."[80] Participation in nationally televised national or international sports events requires the approval of the Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)).[81]

Requests for Army participation in aerial events normally require the approval of OASD(PA).[82] As an exception, Major Army Commands may approve flyovers on national holidays and parachute demonstrations (except for the Golden Knights).[83] Local commanders may authorize a static display of aircraft or rappelling demonstrations in the public domain.[84]

This program also permits the loan of materiel and equipment under certain conditions. Equipment may be loaned if it is not "reasonably available from commercial sources."[85] The following criteria must also be met:

a. It must not interfere with the loaning unit's mission;
b. There must be no potential danger which could result in a claim against the United States;
c. The Army must retain control over the property, including property accountability, reasonable supervision, and the right to immediate repossession; and
d. Government messing and billeting facilities cannot be provided for non-DOD personnel in competition with private enterprise.[86]

In performing a legal review of a request for support under this program, it is imperative that the restrictions regarding selective benefit be rigidly followed. This program is intended to enhance the Army's image. The appearance of favoritism on the part of the Army would detract significantly from this goal.

Conclusion

These programs cover a variety of situations in which the Army is authorized to provide some form of assistance to local communities. Due to the disparate sources of regulatory authority, utilizing a methodology to review these

[71] AR 360–61, para. 1–5*b*.
[72] *Id.*
[73] AR 360–61, para. 1–4.
[74] AR 360–61, para. 2–2.
[75] AR 360–61, para. 2–3*a*.
[76] AR 360–61, para. 2–3*b*.
[77] AR 360–61, para. 2–3*c*.
[78] AR 360–61, para. 2–3*d*.
[79] AR 360–61, para. 6–6.
[80] AR 360–61, para. 6–6*h*.
[81] *Id.*
[82] AR 360–61, para. 7–3.
[83] AR 360–61, para. 7–3*b*.
[84] AR 360–61, paras. 7–4*d*, 7–4*f*.
[85] AR 360–61, para. 11–4*a*.
[86] *Id.* Special provisions apply to veterans and scouting organizations. AR 360–61, para. 11–4*b*.

actions for legal sufficiency will help ensure that no requirements are inadvertently overlooked. Due to the greater degree of flexibility afforded a commander in the emergency and humanitarian programs, this proposed procedure establishes a hierarchy; it begins with Disaster Relief and progresses through the programs in the order discussed. To determine if a particular request for assistance is authorized, start at the top of this hierarchy and check each program until one is found that applies. Then refer to the applicable regulation for specific guidance.

Some general guidelines apply. The following should raise an immediate "red flag": requests that would compete with local labor organizations or businesses; requests involving expenditure of Army funds or materiel; requests for law enforcement support off the installation; or requests which selectively benefit private entities. Additionally, be wary of approval authority levels—for example, local commanders will normally not have approval authority for requests involving aerial activities.

Once a practitioner has worked in this area for a while, it will not be necessary to go through this process for each request. This procedure should help the inexperienced attorney or the attorney who only reviews infrequent requests of this nature.

Computer Assisted Tax Preparation*

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The role of the legal assistance office in the Fort Leonard Wood tax program expanded significantly during the 1985 tax season. This was the second year of an aggressive program to provide comprehensive tax services to all soldiers and family members on the installation. This involved a three-pronged effort: training unit tax advisors; complete tax assistance; and use of the office computer.

Training Unit Tax Advisors

For the 1984 tax year, unit tax advisors (UTAs)[1] had been given the Volunteer Income Tax Assistance (VITA) course by representatives of the St. Louis office of the Internal Revenue Service. The training was presented by individuals who had no knowledge of the unique interests of the soldier. It was therefore largely uninteresting and uninformative.

Beginning with the 1985 tax year, the Fort Leonard Wood legal assistance office (LAO) presented this training. It was structured as a forty hour course that emphasized those things of concern to soldiers and their families. At the conclusion of the training, each person was required to take a comprehensive test to be certified as a unit tax advisor. The UTAs prepared most of the 450 1040A's and 583 1040EZ's that were done on the installation.

Complete Tax Assistance

The LAO played a major part in the actual preparation of returns. Before the tax season began, three attorneys attended a thirteen-week H & R Block course and studied the extensive VITA instructional material. Consequently, when a soldier or family member came into the office, it was unusual if an attorney could not assist in the preparation of even the most difficult federal and state returns. The comprehensiveness of the service also had another dimension. The tax season here replicated the frenetic pace and extended hours of a busy private tax practice. Long hours were the rule, not the exception. In addition, the LAO sponsored "Tax Saturdays." For seven Saturdays throughout the tax season, at least one attorney and from one to three UTAs were available[2] to assist in tax preparation on a walk-in basis. One hundred and thirty-nine people were assisted on Tax Saturdays.

Use of the Office Computer

The computer was first used here for the 1984 tax season. At first there was no hardware, no software, and no experience. In December 1984, the LAO obtained its first computer[3] and in late January 1985 we obtained the CP AIDS tax software. The LAO progressed in less than three months from nothing to a system that could produce a 1040. While volume and capabilities were somewhat limited, that first year provided invaluable experience for the 1985 tax year.

In September 1985, the LAO conducted a survey of the various commercial tax software packages available. Of the sixteen different software companies contacted, twelve were

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

[1] Dep't of Army, Reg. No. 600-14, Personnel—General—Preventive Law Program, para. 4*a*(1)*(f)* (30 Sept. 1965).

[2] The Tax Saturdays began in the Recreation Center but moved to the JAG Office because of scheduling conflicts. The availability of supplies and reference materials made the latter alternative the most workable.

[3] The following computer hardware was purchased to run CP AIDS tax software:

IBM 5150176 Personal Computer (PC), 256KB with 2 360 diskette drives	$1,561.00
4900 Monochrome Display and Printer Adapter	$170.00
5151001 Monochrome Display	$187.00
EPSON FX185 Dot Matrix Printer	$450.00
Total System Price	$2,368.00

rejected as lacking desired capabilities.[4] Based on a comparison of the remaining systems' capabilities, manuals, and support systems,[5] we selected the Arthur Anderson A-Plus Tax 1040 Program because of the large number of forms and schedules it was capable of preparing (forty-seven in all) and because it was easy to use.[6]

When the tax season began, a procedure used to process computer generated returns quickly evolved. Tax returns were prepared both by appointment and on a walk-in basis. Soldiers and family members with complex 1040s were seen on an appointment basis. A paralegal or unit tax advisor first screened the clients. The client was then asked whether he or she usually completed a long or short federal return and whether he or she anticipated filing a long form for 1985. A short questionnaire to indicate the need to file a 1040[7] was developed for the client who was unsure. Additionally, a comprehensive worksheet was available for those desiring to use it to organize their records for the 1040 returns.

When the client was screened and saw an attorney, the attorney would question the client and enter the information on a worksheet. The A-Plus Tax Preparer's Manual which comes with the Arthur Anderson software has numerous worksheets that mirror the screens the computer operator uses to enter the client's information. The preparer merely wrote the appropriate numbers on the worksheet. After the interview, the preparer gave the worksheets to the computer operator for processing.

The operator then entered the information for the returns. Once a value was entered, the computer automatically carried it forward to other forms and schedules[8] where it was needed. A manual override was available if the number was not to be carried forward (for example: out of state military income on the state return). The returns were batch printed twice a day and returned to the preparer for review and preparation of state income tax returns.

After the preparer and operator became familiar with the system, the time required to prepare the computerized returns was about half the time required by an experienced preparer for a traditionally prepared complex return. For the simple returns, a worksheet was developed during the middle of the tax season that allowed a 1040A return to be prepared in less than ten minutes. If the client's records were in good order, a reasonably complex return[9] could be completed with less than thirty minutes of interview time and less than fifteen minutes of computer time.

Quality control in the office mandated that all manual returns be checked by another prepared. During these checks, numerous mathematical errors were found. All the computer generated returns were checked by the preparer. No mathematical errors were found in the computer generated returns, and very few typographical errors were discovered.

The computer greatly assisted the Fort Leonard Wood tax program. Slow procurement of the necessary forms because of last congressional action on tax laws required the office to prepare all returns manually during the early part

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[4] Four were rejected because they could not provide compatible software for Missouri (MICRO VISION, Long Island, New York; AMI-TAX MACHINE, Bellevue, Washington; CREATIVE SOLUTIONS, Ann Arbor, Michigan; and TAX-BYTE, Moline, Illinois), and two were rejected for each of the following reasons: lack of computer generated forms (FAST TAX; CROSSE SOFTWARE, Central, Louisianna), incompatibility with the hardware available (MCS, Atlanta, Georgia; TIMBERLINE), aimed at tax planning/corporate clients (AARDVARK; Program Control Systems, Van Nuys, California), and no update was readily available (ACCOUNT PRO SYSTEMS, Conway, Arkansas; CROSSE SOFTWARE, Central, Louisiana).

[5] A-Plus Tax, Arthur Andersen, Sarasota, Florida—tutorial/manual; telephonic support system; prepares 47 forms and schedules; contains 7 disks; interview worksheets in the same format as input screens. CLR/MICRO TAX, Silver Package, Dallas, Texas—tutorial/manual; telephonic support system; prepares 32 forms and schedules; contains 2 disks. Hanover Software VOLTS II, Anaheim, California—tutorial/manual; telephonic support system; prepares 33 forms and schedules; contains 4 disks; requires the use of a hard disk; Missouri software not available until after start of tax season. CONTEL CATO SUNTAX, New Hampshire—manual only; telephonic support; contains 3 disks; requires the use of hard disk.

[6] To run the Arthur Anderson software, a 10 MB hard disk expansion unit was required. The approximate cost of the expansion unit was $1,100.00.

[7] The questions were as follows:
Did you itemize last year?
Did you receive or pay any alimony?
Did you buy or sell any stocks or bonds?
Did you receive any pensions or money from your IRA?
Did you win any money or other items?
Did you PCS in 1985?
Did you lose any money on the move?
Did you lose money on TDY?
Did you take any job related civilian education courses?
Do you own a house?
Did you sell a house?
Do you rent the house you own to someone else?
Did you have any income that taxes were not withheld on? (tips, babysitting, bagger, etc.)
Did you pay over $3540 ($2390 if single) in taxes, interest, and charitable contributions?

[8] Schedule A—Itemized Deductions, if excess itemized deductions exceeds the charitable deduction; can be overridden for taxpayers who are claimed as dependents on another taxpayer's return or married filing separately.
Schedule B—Interest and Dividend Income, if either interest or dividends equal or exceed $400.
Schedule G—Income Averaging, if the taxpayer would owe less tax by income averaging.
Schedule SE—Self Employment Tax, if the taxpayer has self employment income or a profit from Schedule C of $400 or more.
Schedule W—Deduction for Married Couples When Both Work, if both the taxpayer and spouse have earned income.
Form 2210—Underpayment of Estimated Tax, if the taxpayer has not paid or had withheld at least 80% of his tax liability and he owes at least $500; the tax program will compute the exceptions to penalties if applicable.
Form 6251—Alternate Minimum Tax, if income is at a level to trigger the necessity of the computation.

[9] A typical return prepared by the legal assistance office included Schedules A, B, D, and W and two of the following forms: 2106, 2119, 2441, or 3903. A complex return would normally contain a Schedule E for rental and/or limited partnership and several of the following forms: 1116, 3468, 4562, 4797, and 6252, in addition to the basics from the average return. Dept. of Army, Reg. No. 27-3, Legal Services—Legal Assistance para 2-4c (1 Mar. 1984), prohibits preparation of tax returns involving, in any substantial measure, private income-producing business activities.

of the tax season. During this period, client appointments were scheduled for one hour blocks and the clients were told they could pick up their returns in a week. When the computer was fully operational, the appointment times were decreased to thirty minutes and returns were ready the next day if no state return was necessary, and within three days if one or more state returns had to be prepared manually.[10]

[10] State returns other than those for Missouri were prepared manually; therefore, the processing time was extended to an average of three days.

Corrections to JAGC Personnel and Activity Directory

COL James A. Badami, CAC Ft Leavenworth KS; COL Harry C. Beans, Ft Huachuca AZ; COL Theodore B. Borek, Army War College; COL James A. Burger, OTJAG (International Law Div); COL Bartlett J. Carroll, Ft Bliss TX; COL Robert F. Comeau, WRAMC Wash DC; COL Norman G. Cooper, GAD; COL Dennis M. Corrigan, 21st SUPCOM; COL Thomas R. Cuthbert, VII Corps; COL Ronald W. Davis, HQ 3d Army Ft McPherson GA; COL Maurice H. DeFord Jr, ACMR; COL Joseph A. Dudzik, LABCOM Adelphi MD; COL Leroy F. Foreman, HQ FORSCOM Ft McPherson GA; COL Fred K. Green, OSD; COL William P. Greene Jr, SJA USMA West Point NY; COL Robert D. Hamel, HSC Fort Sam Houston TX; COL Robert C. Handcox, USMA Law Faculty West Point NY; COL Jeremy R. Johnson, CENTCOM MacDill AFB FL; COL James Kucera, CAD; COL Jack F. Lane Jr, Clms Svc Ft Meade MD; COL Earle F. Lasseter, Ft Benning GA; COL William J. Lehman, Ft Knox KY; COL Malcolm S. Magers, HQ TRADOC Ft Monroe VA; COL William R. Mullins, Clms Svc Ft Meade MD; COL John F. Naughton, TJ Ft Sill OK; COL Maurice J. O'Brien, ICAF; COL Richard P. Scheff, DJA USAREUR; COL Daniel W. Shimek, 4th Army Ft Sheridan IL; COL Benjamin A. Sims, TJAGSA Guard & Reserve Affairs; COL Peter M. Smith, ACMR; COL Barry P. Steinberg, OTJAG (Lit Div); COL Thomas M. Strassberg, National War College; COL John J. Tiedemann III, Army Council of Review Boards; COL Tonu Toomepuu, NATO Mil Com Legal Advisor; COL Albert E. Vernon III, Army War College; COL Anthony L. Wagner, HQ AMC; COL Jerry V. Witt, TDS HQ; COL Pedar C. Wold, TJ Sco Bks HI; COL Joe L. Woodward, TJ Ft Hood TX; COL Malcolm T. Yawn, TJ Ft Carson CO.

LTC John B. Adams, AMC HQ; LTC Joel R. Alvarey, 1st AD; LTC Edward M. Anderson, FORSCOM Ft McPherson GA; LTC James R. Baker, Ft Sill OK; LTC Thomas E. Behuniak, Ft Hamilton NY; LTC Julia A. Belt, DAD; LTC Clifford D. Brooks, USA ISSS CMD Ft Belvoir VA; LTC Patrick P. Brown, TJ Korea; LTC Michael A. Burke, Ft McCoy WI; LTC Charles A. Byler, PACOM HI; LTC Demmon F. Canner, OTJAG (Crim Law Div); LTC John E. Caulking, WRAMC Wash DC; LTC Phillip D. Chiminello, Brook AMC Ft Sam Houston TX; LTC Joseph F. Cirelli, Jr, Redstone Arsenal AL; LTC Gerald C. Coleman, XVIII ABN Corps Ft Bragg NC; LTC Francis A. Cooch, Ft Detrick MD; LTC Dayton M. Cramer, RDC Ft Benning GA; LTC David C. Davies, I Corps Ft Lewis WA; LTC Larry R. Dean, MDW; LTC Thomas P. DeBarry, Clms Svc Europe; LTC Michael C. Denny, RDC Ft Leavenworth KS; LTC David R. Dowell, Ft Ben Harrison, IN; LTC Lawrence D. Galehouse, MP School Ft McClellan AL; LTC Peter W. Garretson, MEPCOM Ft Sheridan IL; LTC Steven P. Gibb, Clms Svc Ft Meade MD; LTC Robert F. Gonzales, DIA Pentagon; LTC David E. Graham, TJAGSA (International Law); LTC Adrian J. Gravelle, CFA Korea; LTC Joseph L. Graves Jr, Ft Campbell KY; LTC Brent P. Green, 8th Army Korea; LTC Michael A. Haas, AFIP; LTC Patrick K. Hargus, Redstone Arsenal AL; LTC Stephen J. Harper, TJAGSA (DDL); Dewey E. Helmcamp III, JCS/Joint Special Opns Agy; LTC David L. Hennessey, TJ Ft Lewis WA; LTC Richard J. Hough, RDC Frankfurt; LTC John R. Howell, TJ HQ; LTC Arthur L. Hunt, Ft Polk LA; LTC Robert H. Jackson, Ft Gordon GA; LTC Robert B. Kirby, XO USALSA; LTC William C. Kirk, OTJAG (Lit Div); LTC Jerome L. Lemberger, Ft Carson CO; LTC Dan B. Limbaugh, DSJA USMA West Point NY; LTC James L. Linebarger, HQ FORSCOM Ft McPherson GA; LTC John W. Long, Proving Ground AZ; LTC John P. McLaurin, 2d Inf Div Casey Korea; LTC Carl F. Meyer Jr, HQ INSCOM Arlington VA; LTC Joe D. Miller, TDS HQ; LTC Vahan Moushegian Jr, OTJAG (Ad Law Div); LTC Robert D. Newberry, TJ Stuttgart; LTC James L. Osgard, Tripler AMC HI; LTC Robert M. Ott, RDC Ft Hood TX; LTC Joyce E. Peters, Ft Lee VA; LTC Steven M. Porter, CAD; LTC Joseph A. Rehyansky, Ft Huachuca AZ; LTC Nicholas P. Retson, OJA USAREUR Contract Law Div; LTC Robert C. Rhodes, USAG Vint Hill Farms Station; LTC John W. Richardson, ACMR; LTC Joseph R. Rivest, Ft Jackson SC; LTC James H. Rosenblatt, CGSC; LTC Lee D. Schinasi, 21st SUPCOM Manheim Law Ctr; LTC Charles L. Schwabe, FORSCOM Ft McPherson GA; LTC Robert J. Short, HSC Ft Sam Houston TX; LTC Malcolm H. Squires Jr, V Corps; LTC Daniel E. Taylor, Berlin; LTC Allan A. Toomey, III Corps Ft Hood TX; LTC Thomas N. Tromey, Ft Devens MA; LTC John P. Tyrell, TJ Nuernberg; LTC Carlos A. Vallecillo, Nat'l Guard Bureau Pentagon; LTC Michael J. Wentink, CAD; LTC Riggs L. Wilks Jr, Ft Eustis VA; LTC William B. Woodward Jr, Ft Jackson SC; LTC David C. Zucker, TJAGSA (Contract Law Div).

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USALSA Report

U.S. Army Legal Services Agency

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Trial Counsel Forum

The Role of the Prosecutor in Government Appeals

Captain Howard G. Cooley
Government Appellate Division
&
Bettye P. Scott
Attorney-at-Law

The combined trial and appellate litigation process known as a government appeal from an adverse trial court ruling has been in effect since August 1984. Congress created this process to ensure that certain erroneous trial court rulings do not immunize an accused from criminal sanction. Accompanying this unique opportunity, however, are some of the most demanding procedural, substantive, and logistical requirements in courts-martial practice.

The litigation experience reveals that the trial prosecutor is the most important person involved in the government appeals process. The prosecutor serves as both a trial team member and as a de facto member of the appellate litigation team. The prosecutor conducts research in the law of government appeals, identifies appropriate areas of litigation, and executes tactical maneuvers that ripen and preserve the issue for the appeal. The prosecutor initiates coordination with other litigation components such as the Trial Counsel Assistance Program and the Government Appellate Division, transfers jurisdiction over the subject matter of the appeal from the trial to the appellate court, and prepares and transmits the record for purposes of appellate review. Additionally, the prosecutor provides advice to appellate counsel during the litigation of the case on appeal, provides facts for the government's opposition to any defense motion for a stay of the trial after an adverse ruling at the Court of Military Review, provides appellate personnel with continuous updates of the case status, maintains a readiness to proceed to trial, and completes the trial mission if the case is returned to the trial level for prosecution.

While the law decides the merits of the appeal, the litigation and administrative skills displayed by the trial counsel are keys to the development of procedural and substantive aspects of government appeals law. The purpose of this article is to assist trial counsel in the execution of the prosecutorial function during the government appeals process.

The Heritage

An appreciation of the value of the government appellate process, and an understanding of the policies underlying some of its procedural requirements, may be derived from an examination of its history. In 1892, the Supreme Court, in *United States v. Sanges,*[1] regarded the concept of a government appeal as "a serious and far reaching . . . innovation in the criminal jurisprudence of the United States."[2] The *Sanges* Court declined to allow a government appeal in the absence of an authorizing statute by Congress. That same year, Attorney General Miller expressed frustration over the power of a single trial judge "to defeat any criminal prosecution instituted by the Government."[3] For the next fifteen years, various Attorneys General recommended passage of legislation providing for appeals of trial court decisions adverse to the government.[4] Congress declined to act.

Then, in 1906, the "Beef Trust" case of *United States v. Armour & Co.,*[5] was decided. There, over government objection, trial Judge Humphrey ruled that individuals of the Armour Packing Company, who furnished information about their violations of the Sherman Antitrust Act to the Commerce and Labor Department during an investigation directed by Congress, were immunized from criminal prosecution for illegally controlling domestic and international beef prices. The government had argued to Judge Humphrey that such immunization would encourage "guilty persons" to "rush" to Commerce and Labor Department investigators, and to reveal their wrong deeds to nullify criminal sanction.[6] The government had also argued that because the issue was of "great public interest," and because the government had no right of appeal from an adverse ruling, Judge Humphrey should allow the trial to proceed, whereupon any conviction could be reviewed by the Supreme Court.[7] Judge Humphrey was unpersuaded. President Theodore Roosevelt was "outraged" by Judge Humphrey's decision in the "Beef Trust" case.[8] He made the issue of government appeals in criminal cases "into a 'major political issue' and demanded the enactment of legislation in his 1906 annual message to Congress."[9]

On March 2, 1907, Congress passed the first Criminal Appeals Act.[10] During the drafting of the Act, there was "a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the incumbent possibility of multiple trials."[11] Consequently, Congress rejected the government's right to an expansive appeal which was co-extensive with a criminal defendant's right of appeal.[12] Under the Act, Congress limited the right of government appeal to three statutorily defined categories,[13] and then primarily to cases of public importance.[14] The Act required the government to appeal within thirty days of the trial court's decision and to prosecute the case with diligence[15] —requirements that are similar to those currently in use in both the federal and military government appeals processes. The Act foreclosed government appeal of a verdict in favor of the defendant, no matter how erroneous the legal theory upon which it might be based, and of cases in which jeopardy attached by the impaneling of the jury.[16]

From 1907 to 1970, the Criminal Appeals Act remained essentially unchanged in substance.[17] During this period, the Supreme Court characterized a government appeal as "something unusual, exceptional, not favored."[18] In 1970, however, in *United States v. Sisson,*[19] the Supreme Court expressed its "dissatisfaction" with "a most unruly child that has not improved with age," and characterized the Act as one which was confusing, "awkward and ancient," and lacking in the "coherent allocation of appellate responsibility."[20] Congress amended the Criminal Appeals Act through Title III of the Omnibus Crime Control Act of

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[1] 144 U.S. 310 (1892).

[2] *Id.* at 326.

[3] *See* United States v. Sisson, 399 U.S. 267, 293 (1970). In *Sisson,* a thorough discussion of the history of government appeals is provided by Justice Harlan, writing for the majority, and by Chief Justice Burger, in his dissenting opinion.

[4] *Id.*

[5] 142 F. 808 (N.D. Ill. 1906).

[6] *Id.* at 826.

[7] *Id.* at 826–27.

[8] *See Sisson,* 399 U.S. at 293–94.

[9] *Id.* at 294.

[10] 34 Stat. 1246 (1907).

[11] *Sisson,* 399 U.S. at 298.

[12] *Id.* at 294. Interestingly, the right of appeal of criminal defendants was created in 1889. *See,* Carroll v. United States, 354 U.S. 394, 400–01 (1957).

[13] *See* Note, *Government Appeals of "Dismissals" in Criminal Cases,* 87 Harv. L. Rev. 1822, 1825 (1974).

[14] *Sisson,* 399 U.S. at 296.

[15] *Id.* at 295.

[16] *Id.* at 295–96.

[17] *Id.* at 291–92.

[18] Carroll v. United States, 354 U.S. 394, 400 (1957); United States v. Keitel, 211 U.S. 370, 399 (1908).

[19] 399 U.S. 267 (1970).

[20] *Id.* at 307–08.

1970.[21] The Act was effective on January 2, 1971, but it is occasionally referred to as the Criminal Appeals Act of 1970.[22] The Act, contained in Title 18 U.S.C. § 3731, allows the appeal of interlocutory orders suppressing or excluding evidence or requiring the return of property, and from any orders dismissing an indictment, except where prohibited by double jeopardy.[23]

In 1975, the Supreme Court ruled in *United States v. Wilson*[24] that a district court judge's dismissal of a jury's verdict of guilty was appealable under the amended Criminal Appeals Act, although appeal of the ruling was problematic under the statutory limitations of the former Criminal Appeals Act. Justice Marshall stated that legislative history of the 1970 Act revealed that "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit."[25]

In 1976, in *United States v. Rowel,*[26] the Chief Judge of the Court of Military Appeals characterized the absence of a government appeals process as a "void" that was "unhealthy from a judicial administration standpoint."[27] Citing the amended Criminal Appeals Act, the Chief Judge stated "the immediate need for Congressional action . . . should be obvious."[28]

In the Military Justice Act of 1983,[29] Congress authorized the government to appeal an adverse military trial court ruling, in a forum in which a punitive discharge could be adjudged, which either "terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding."[30] The legislative history of Article 62 reveals that Congress intended to allow appeals by the government from courts-martial rulings in a manner that parallels federal prosecution appeals of adverse federal district court decisions pursuant to 18 U.S.C. § 3731.[31] The President implemented Article 62 through the provisions of Rule for Courts-Martial 908.[32] Thus, military practitioners commonly refer to a government appeal as an "Article 62" or a "908" appeal.

Substantive Matters

The developing case law is identifying those situations in which the trial court can and cannot be reversed in an expanding range of areas. The prosecutor has a special duty to be familiar with these cases before trial, and to evaluate them critically, as part of the prosecution function.

The Frontline Requirements

R.C.M. 908(b)(1) provides that after a trial court ruling which may be appealable, if the prosecutor requests a delay to determine whether to file an appeal, the trial may not proceed, except as to matters unaffected by the ruling. Through this provision, the President has vested a major responsibility in the position of the trial counsel. As envisioned by the President, the trial counsel's request for a delay on behalf of the United States Government interrupts the trial by operation of law. Senior Judge Wold's opinion in the Army Court of Military Review's decision in *United States v. Browers*[33] contains an illustrative discussion of the manner in which the trial counsel should discharge this R.C.M. 908 delay function, and of possible sanctions for abuse of that trust. Indeed, the legislative history of the Military Justice Act of 1983 reveals that Congress contemplated criminal sanction, fines, reports to an appropriate disciplinary committee, and denial of the right to practice before the courts, as sanctions for frivolous or dilatory motions in government appeals practice.[34] Senior Judge Wold observed that the military justice system presumes that the prosecutor will exercise "good judgement," a "responsible attitude," and "good faith."[35]

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[21] Pub. L. No. 91–644, 84 Stat. 1880, 1890 § 14 (1971).

[22] 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3919 (1976).

[23] *Id.*

[24] 420 U.S. 332 (1975).

[25] *Id.* at 337.

As Professor Edward Cooper pointed out at the Eighth Annual Homer Ferguson Conference of the Court of Military Appeals, however, the Supreme Court's language that Congress intended "to remove all statutory barriers to appeals by the government" is "a bit of hyperbole that must be taken with a grain of salt." Cooper, *Extraordinary Writ Practice in Criminal Cases: Analysis for the Military Court,* 98 F.R.D. 593, 600 (1983). Congress has maintained controls on government appeals. Nevertheless, the new Act removes undue statutory barriers in relationship to the stringent limitations of the former Criminal Appeals Act. This probably accounts, in part, for the dramatic "no statutory barrier" language in *Wilson* and in federal and military cases such as United States v. Humphries, 636 F.2d 1172, 1175 (9th Cir, 1980), *cert. denied,* 451 U.S. 988 (1981), and United States v. Browers, 20 M.J. 542, 547 (A.C.M.R.), *rev'd on other grounds,* 20 M.J. 356 (C.M.A. 1985).

[26] 1 M.J. 289, 290 (C.M.A. 1976) (Fletcher, C.J. concurring).

[27] *Id.*

[28] *Id.* Several weeks before the Chief Judge's comments in *Rowel,* the Court of Military Appeals rejected the notion that a right of government appeal existed in the military. United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

[29] Pub. L. No. 98–209, 97 Stat. 1393 (1983).

[30] Uniform Code of Military Justice art. 62(a)(1), 10 U.S.C. § 862(a)(1) (Supp II 1984) [hereinafter cited as UCMJ].

[31] S. Rep. No. 53, 98th Cong., 1st Sess. 23 (1983); United States v. Tucker, 20 M.J. 52, 53 (C.M.A. 1985).

[32] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 908 [hereinafter cited as MCM, 1984, and R.C.M. respectively].

[33] 20 M.J. 542, 552 (A.C.M.R.), *rev'd,* 20 M.J. 356 (C.M.A. 1985).

[34] 18 U.S.C. § 3162 contains sanctions for the filing of frivolous or dilatory motions. The Senate Armed Services Committee directed that those "same standards" apply to an evaluation of appeals under Article 62. S. Rep. No. 53, 98th Cong., 1st Sess. 23 (1983). The substance of 18 U.S.C. § 3162 is reprinted in a previous edition of this publication. *See* Galligan, *Government Appeals: Winning the First Cases,* The Army Lawyer, Mar. 1985, at 38, 48.

[35] *Browers* (A.C.M.R.), 20 M.J. at 552. Senior Judge Wold's opinion is discussed in a previous edition of this publication. *See Trial Counsel's Emergency Brake,* The Army Lawyer, June 1985, at 63. Additionally, Senior Judge Wold discussed the military justice training of judge advocates in *United States v. Davis,* 22 M.J. 651 (A.C.M.R. 1986). Note, however, that if the trial judge decides the order is nonappealable, he or she may proceed with the trial. *See, e.g., Browers,* (C.M.A.), 20 M.J. at 360. This situation and the prosecutor's alternatives are discussed in detail *infra* notes 114–130 and accompanying test.

Prosecutorial staffs can execute this mandate by thorough pretrial preparation, which routinely anticipates unexpected trial court rulings and which incorporates appropriate contingency plans. Further, counsel can meet the mandate by having a working knowledge of the relevant substantive law, procedures, and issues, and by performing research in the area of government appeals under both Article 62 and 18 U.S.C. § 3731. As a result, the prosecutor will be prepared to develop a ripe opportunity for a government appeal, and to perfect and preserve the strongest possible position for the government during the appellate process.

Case Law Digest

In the two years since the government appeals process has been in effect, thirty-nine cases have been decided.[36] These cases provide initial guideposts to prosecutors regarding the determination of appealable issues.

Speedy trial. Approximately thirty percent of government appeals have been generated by speedy trial rulings. Service-wide, the government has prevailed in over sixty percent of its speedy trial appeals. Most of the cases have involved interpretations of the provisions of R.C.M. 707 (the 90 and 120 day speedy trial rules), which are triggered by cases in which restriction, confinement or preferral of charges occurred on or after 1 August 1984.[37]

A Navy trial court has been reversed for its errors in the computation of a period of restriction that resulted in the dismissal of charges.[38] Another Navy trial court has been reversed for requiring the prosecution to demonstrate that it would have proceeded to trial within the 120 day period "but for" the accountability exemptions the prosecution raised under R.C.M. 707(c).[39] In *United States v. Lilly,*[40] a Navy trial court's dismissal of drug charges was reversed where the trial court applied the incorrect test for evaluating good cause under R.C.M. 707(c)(8). In *Lilly,* the Navy-Marine Corps Court of Military Review adopted the good cause balancing test enunciated by the Army Court of Military Review in *United States v. Durr,*[41] tailored the test to the facts, and remanded the case to the trial court with an order to apply the correct standard. Additionally, a Navy trial court has been reversed for incorrectly applying a speedy trial test rather than a due process standard, where the accused was not under any form of restraint and where the charges were preferred only two weeks before trial.[42]

On the other hand, trial courts have been upheld in ruling that the prosecution was not entitled to an exemption from accountability when it delays a trial: to obtain checks from the United States Treasury Department;[43] to negotiate a pretrial agreement;[44] and because of the mistaken belief that the defense was requesting a delay when, in fact, the defense was placing the prosecution on notice that it did not intend to share in accountability for any delay.[45]

In the past, it had been accepted for prosecutors to include "defense delay" periods as part of the "window" available for the setting of a trial date. Speedy trial problems arise when the trial court rules that what the prosecutor believed was a defense delay is a period of government accountability, and when the day of the trial court's ruling is beyond the 120 or 90 day R.C.M. 707 limitation. Judge Cox, writing for the Court of Military Appeals in *United States v. Burris,*[46] called for a halt to that practice. He made it clear that the court wants prosecutors in court before the expiration of the applicable time limits under R.C.M. 707.[47] Thus, if the defense or the government believes that the other party is accountable for a delay, the trial judge can rule on the matter without having to dismiss any offenses. Application of this procedure should decrease the need for litigation by the government in the area of speedy trial.

Jurisdiction. Approximately twenty percent of government appeals have been generated by jurisdictional rulings. Service-wide, the government has prevailed on eighty-six percent of these cases.

Perhaps the most widely known government appeals jurisdiction case is *United States v. Solorio.*[48] There, the Court of Military Appeals upheld the Coast Guard Court of Military Review's reversal of a trial court's ruling that off-base sexual abuse of female children of a fellow Coast Guardsman was not service connected. In *United States v.*

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[36] This figure does not include cases decided after June 26, 1986. Of the thirty-nine cases addressed at the Courts of Military Review, twenty-eight cases have been decided by the Navy-Marine Corps court, seven by the Army court, three by the Air Force court, and one case by the Coast Guard court. At least three new government appeals were pending at the courts of military review as of July 7, 1986: United States v. Yates, NMCM 85–0016 (corroboration of confession under Mil. R. Evid. 304); United States v. Ivester, NMCM 86–04 (speedy trial); and United States v. Hutchins, Misc. Dkt. No. 1986/5 (jurisdiction) (Army).

[37] United States v. Harrison, 22 M.J. 535, (N.M.C.M.R. 1986); United States v. Leonard, 20 M.J. 589 (N.M.C.M.R.), *aff'd,* 21 M.J. 67 (C.M.A. 1985).

[38] United States v. Webb, Misc, Dkt. No. 85–0016 (N.M.C.M.R. 11 October 1985) (memo. op.).

[39] United States v. Jones, 21 M.J. 819 (N.M.C.M.R. 1985). Whether the prosecution was able to proceed to trial within the required speedy trial limit absent any defense delay period was a matter of concern to the Court of Military Appeals in United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985).

[40] 22 M.J. 620 (1986). Additionally, the Navy Court addressed good cause, as well as unauthorized absence by the accused, in United States v. Turk, Misc. Dkt. No. 86–03 (N.M.C.M.R. 29 May 1986).

[41] 21 M.J. 576 (A.C.M.R. 1985).

[42] United States v. Tucker, Misc. Dkt. No. 84–07 (N.M.C.M.R. 31 December 1984) (memo. op.), *government motion to dismiss defense appeal denied,* 20 M.J. 52 (C.M.A.), *petition for reconsideration of motion denied,* 20 M.J. 260 (C.M.A.), *petition denied,* 20 M.J. 292 (C.M.A. 1985).

[43] United States v. Kuelker, 20 M.J. 715 (N.M.C.M.R. 1985). The *Kuelker* decision is explained in United States v. Lilly, 22 M.J. at 624 n.1.

[44] United States v. Harris, 20 M.J. 795 (N.M.C.M.R. 1985). The *Harris* decision is explained in United States v. Lilly, 22 M.J. at 624 n.1.

[45] United States v. Burris, 21 M.J. 140 (C.M.A. 1985).

[46] 21 M.J. 140 (C.M.A. 1985).

[47] 21 M.J. at 145. In addition, the Navy-Marine Corps Court of Military Review suggests that prosecutors resolve speedy trial accountability prior to the tolling of the speedy trial limitations through a motion for appropriate relief. *Lilly,* 22 M.J. at 629 n.6. The Army has addressed this matter through memoranda to staff judge advocates. *See* Wittmayer, *Appellate Courts Address Speedy Trial Issues,* The Army Lawyer, Mar. 1986, at 63, 64 n.21.

[48] 21 M.J. 512 (C.G.C.M.R. 1985), *aff'd,* 21 M.J. 251 (C.M.A. 1986), *cert. granted,* 54 U.S.L.W. 3823 (U.S. 16 June 1986) (No. 85–1581).

Abell,[49] the Army Court of Military Review applied *Solorio* in reversing a trial court's dismissal of an accused's sex abuse of minor children of other soldiers which occurred in a trailer park adjacent to Fort Rucker, Alabama.

Prior to *Solorio,* in *United States v. Wilson,*[50] a Navy trial court was reversed for finding no jurisdiction over a "domestic dispute" involving sodomy and assault occurring five miles from Fort Polk, Louisiana, between a Navy boatswain's mate third class, who was on leave, and his wife, an Army private. The Navy-Marine Corps Court of Military Review ruled that the civilian authorities' declination to investigate and prosecute, in conjunction with the military status of the victims, conferred military jurisdiction.[51]

A Navy trial court was reversed for ruling that an accused's off-base drug usage, detected through urinalysis, was not service connected.[52] A Navy trial court's dismissal of sex offenses on the grounds that the offenses occurred during a prior enlistment was reversed, where the accused was discharged for the purpose of reenlistment and the accused's military status remained uninterrupted.[53] Another Navy trial court's dismissal of sex offenses, on the grounds that the accused's enlistment had expired, was reversed when the trial court did not determine whether the accused objected to continued service and whether the government had acted with a view toward prosecution within a reasonable period of time.[54]

In contrast, the Court of Military Appeals, in *United States v. Howard,*[55] upheld a trial court's decision that military *in personam* jurisdiction over a soldier was lost upon delivery of the discharge certificate, notwithstanding an Army regulation that purported to establish the moment of discharge at a point subsequent to the delivery of the certificate.

Urinalysis. Approximately twenty percent of government appeals have been generated by urinalysis rulings. Servicewide, the government has prevailed in approximately fifty-seven percent of these cases.

Trial courts have been reversed for suppressing urinalysis test results on the grounds that the government: did not follow its own regulations regarding urinalysis testing procedures;[56] allowed a non-Department of Defense certified laboratory to conduct a re-test of a urinalysis sample;[57] and conducted a urinalysis examination that was given routinely to personnel checking into a new squadron.[58]

Trial courts have been upheld in challenges to rulings suppressing urinalysis test results: when the test was found to be, as a matter of fact, motivated primarily for disciplinary purposes as opposed to security purposes;[59] when the government failed to demonstrate by "clear and convincing evidence," to the satisfaction of the trial court, that urinalysis sampling of a "correctee" checking into a correctional custody facility was an inspection;[60] and because of defects in the chain of custody.[61]

Other Searches and Seizures. In *United States v. Postle,*[62] the trial court's exclusion of the fruits of a command authorized search of Airman Recruit Postle's rack locker for drugs was reversed on the grounds that the trial court erred in failing to apply the totality of the circumstances test as required by *Illinois v. Gates.*[63] The *Postle* court also ruled that the "good faith" exception to the exclusionary rule should be analyzed by trial judges when resolving fourth amendment questions.[64]

Confessions/Mil. R. Evid. 304. In *United States v. St. Clair,*[65] the trial court suppressed St. Clair's confession on the grounds that the special agent's promise to assist in getting St. Clair "off restriction" constituted improper inducement. The Navy-Marine Corps Court of Military Review ruled that the agent's remarks, although some inducement, did not constitute unlawful inducement, and reversed the trial court's decision. In *United States v. Poduszczak,*[66] the Army Court of Military Review reversed the trial court's suppression of a redacted confession because it was sufficiently corroborated under the requirements of Mil. R. Evid. 304(g)(1) by the testimony of four witnesses. The *Poduszczak* court upheld the trial

[49] Misc. Dkt. No. 1986/1 (A.C.M.R. 11 March 1986) (memo. op.), *petition filed,* 22 M.J. 114 (C.M.A. 13 March 1986). The Court of Military Appeals heard oral argument in this case on 26 June 1986. Interestingly, this government appeal was still pending, although the Court of Military Appeals denied Abell's petition for a stay of the trial proceedings, *see* United States v. Abell, 22 M.J. 183 (C.M.A. 1 April 1986) (order), and Abell was subsequently convicted at trial on 11 April 1986, following the Army Court of Military Review's remand of the case to the trial level for further proceedings.

[50] Misc. Dkt. No. 85–08 (N.M.C.M.R. 20 August 1985) (memo. op.).

[51] *Id.*

[52] United States v. Pearson, Misc. Dkt. No. 84–10 (N.M.C.M.R. 17 January 1985) (memo. op.).

[53] United States v. Moore, 22 M.J. 523 (N.M.C.M.R. 1986).

[54] United States v. Carter, Misc. Dkt. No. 85–14 (N.M.C.M.R. 25 November 1985) (memo. op.).

[55] 20 M.J. 353 (C.M.A. 1985).

[56] United States v. Hilbert, 22 M.J. 527 (N.M.C.M.R. 1986); United States v. Johnston, Misc. Dkt. No. 85–24 (N.M.C.M.R. 25 February 1986) (memo. op.).

[57] United States v. Scholz, 19 M.J. 837 (N.M.C.M.R. 1984).

[58] United States v. Cuervo, Misc. Dkt. No. 85–12 (N.M.C.M.R. 29 November 1985) (memo. op.), *petition denied,* 22 M.J. 235 (C.M.A. 1986).

[59] United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985).

[60] United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985).

[61] United States v. Brice, Misc. Dkt. No. 86–21 (N.M.C.M.R. 26 June 1986) (memo. op.); United States v. Lewis, 19 M.J. 869 (A.F.C.M.R. 1985).

[62] 20 M.J. 632 (N.M.C.M.R. 1985).

[63] 492 U.S. 213 (1983).

[64] 20 M.J. at 643–47. *But see* United States v. Johnson, 21 M.J. 553 (A.F.C.M.R.) (good faith exception does not apply to military), *certified for review,* 21 M.J. 300 (C.M.A. 1985).

[65] 19 M.J. 933 (N.M.C.M.R. 1984).

[66] 20 M.J. 627 (A.C.M.R. 1985).

court's suppression of Puduszczak's admissions to his co-workers, however.

Immunized Testimony. In *United States v. Tucker,*[67] the trial court's dismissal of charges on the grounds that the prosecution failed to meet its heavy burden of demonstrating that no derivative use had been made of Tucker's immunized testimony was upheld, where the essence of the issue was a factual one and where the trial court applied the proper legal standards.

Jencks Act.[68] In *United States v. Derrick,*[69] the trial court suppressed testimony of key prosecution witnesses on the grounds that Derrick was prejudiced by the loss of tape recordings of the challenged witnesses' testimony. The Navy-Marine Corps Court of Military Review reversed the trial court because Derrick failed to demonstrate that the loss of the tapes impaired the defense. In *United States v. Ostrander,*[70] the trial court suppressed a pretrial oral statement when the Naval Investigative Service failed to produce the investigator's case notes. The Navy-Marine Corps Court of Military Review reversed the trial court's decision because there was no evidence that the notes sought actually existed and because the trial court erroneously concluded that the government's actions constituted bad faith.

Uncharged Misconduct/Mil. R. Evid. 403 and 404. In *United States v. Peterson,*[71] the trial court suppressed evidence of two uncharged sexual assaults as not sufficiently similar to the rape and sodomy charges in issue, and on the grounds that the prejudical impact outweighed the probative value. The Navy-Marine Corps Court of Military Review reversed the trial court's ruling on the grounds that it applied too stringent a standard regarding the degree of similarity in determining the admissibility of other crimes, wrongs, or acts under Mil. R. Evid. 404(b), and did not conduct a proper balancing under the test for prejudice under Mil. R. Evid. 403. On the other hand, in *United States v. Mayer,*[72] the trial court's exclusion of uncharged acts of misconduct on the grounds of prejudical impact was upheld.

Hearsay/Mil. R. Evid. 803 and 804. In *United States v. Mayer,*[73] the trial court's exclusion of two sworn statements on the grounds that the exhibits did not contain the guarantees of trustworthiness under Mil. R. Evid. 803(24) and Mil. R. Evid. 804(b)(5) was upheld.

Attorney Conflict of Interest. In *United States v. McArthur,*[74] the trial defense counsel discussed McArthur's defense with the senior trial defense counsel. Subsequently, the senior trial defense counsel was assigned as the prosecutor from "the earliest" stages of McArthur's case. At trial, the judge granted the defense motion to dismiss the charges because of conflict of interest. On appeal, the Navy-Marine Corps Court of Military Review reversed the trial court on the grounds that the conflict of interest was not "egregious" and noted that dismissal was a "draconian remedy" that constituted an abuse of discretion. The *McArthur* court remanded the case to the convening authority who could either dismiss the charges as a matter of judicial economy or forward the case to a new convening authority to make an independent determination regarding the disposition of the case in accordance with a series of stringent stipulations designed by the *McArthur* court to ensure that the prosecutor's influence in the case was nullified.

Statute of Limitations/R.C.M. 603. In *United States v. Blair,*[75] a trial court's dismissal of desertion charges on the basis of the statute of limitations was reversed where the challenged amendment to the charge sheet was a minor change under R.C.M. 603, did not raise a statute of limitations question, and did not mislead the accused.

Failure to State Offense. In *United States v. Ermitano,*[76] the trial court dismissed desertion charges on the grounds that the absence of the allegation that the desertion was "without authority" meant that no offense was stated. The Navy-Marine Corps Court of Military Review ruled that the alleged phrase "absent in desertion" implied that the absence was without authority, and reversed the trial court's ruling.

Constitutionality of Offense. In *United States v. Byers,*[77] Byers engaged in consensual sodomy with a female soldier. The trial court dismissed the sodomy offense on the grounds that the UCMJ could not constitutionally impose criminal sanctions against an adult for private heterosexual consensual "foreplay" which was of a deviant nature. The Army Court of Military Review, relying on authority such as *United States v. Jones,*[78] reversed the trial court's decision.

Remand for a New Pretrial Investigation. In *United States v. Penn,*[79] the Navy-Marine Corps Court of Military Review ruled that a trial court's ordering of a new pretrial investigation on the grounds that the original investigating officer lacked impartiality was not a ruling that could be appealed by the government because it neither excluded evidence nor terminated the proceedings.

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[67] 20 M.J. 602 (N.M.C.M.R. 1985).

[68] 18 U.S.C. § 3500 (1982), incorporated into R.C.M. 914.

[69] 21 M.J. 908 (N.M.C.M.R. 1986).

[70] Misc. Dkt. No. 84–06 (N.M.C.M.R. 19 December 1984) (memo. op).

[71] 20 M.J. 806 (N.M.C.M.R. 1985).

[72] 21 M.J. 504 (A.F.C.M.R. 1985).

[73] *Id.*

[74] Misc. Dkt. No. 85–11 (N.M.C.M.R. 29 November 1985) (memo. op.).

[75] 21 M.J. 981 (N.M.C.M.R. 1986).

[76] 19 M.J. 626 (N.M.C.M.R. 1984).

[77] Misc. Dkt. No. 1985/6 (A.C.M.R. 14 June 1985) (memo. op.), *petition denied,* 21 M.J. 85 (C.M.A. 1985).

[78] 14 M.J. 1008 (A.C.M.R. 1982), *petition denied,* 15 M.J. 456 (C.M.A. 1983).

[79] 21 M.J. 907 (N.M.C.M.R. 1986).

Denial of a Continuance. In *United States v. Browers,*[80] the Court of Military Appeals ruled that a trial court's denial of a government request to secure witnesses was not an appealable issue because it neither terminated the proceedings nor excluded evidence.

Federal Cases. Independent research will yield a multitude of federal cases interpreting various aspects of 18 U.S.C. § 3731. Digests of some of these cases may be found in: Annot., 30 A.L.R. Fed. 655 (1976); 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3919 (1976); and 18 U.S.C.A. § 3731 (Notes of Decisions section)

Summation. The military appellate courts have decided government appeals in a variety of areas. The government has, however, focused primarily on speedy trial, jurisdiction, and urinalysis issues. The approximate percentage of government appeals cases, by service, is as follows: Navy-Marine Corps, 70%; Army, 19%; Air Force, 8%; and Coast Guard, 3%.

The Challenge of the Cases

One of the challenges facing prosecutors as a result of the developing military case law is to distinguish the gray appealable areas from the unappealable areas. There is a risk that if the military holdings are applied too expansively, and research is stalled as a result, then prosecutors might decline to initiate appeals that are winnable, or at least seriously arguable and worthy of exploration. The nature of this risk may be examined in greater detail by using *United States v. Browers*[81] as a model for analysis.

In *Browers,* during a pretrial session, the trial counsel represented that the prosecution was prepared to proceed with the trial on the merits, and a trial date was set. On the day before trial, the prosecutor learned that one witness had, on that day, absented himself without authority and that the second witness was already on emergency leave. On the day of trial, the trial counsel notified the court that the prosecution's sole two witnesses were unavailable, and sought a sixteen-day continuance. The trial judge denied the continuance. Subsequently, the government appealed the trial court's ruling on the theory, *inter alia,* that the denial of the continuance had the effect of excluding evidence. The Court of Military Appeals ruled that the trial judge's denial of the continuance did not have the effect of excluding evidence, and therefore, the issue was not appealable.[82]

Consider, however, a similar but modified factual pattern. Assume that the prosecutor reasonably relied upon a detective to furnish hearsay knowledge during a suppression hearing, and as a result, the informant witness with personal knowledge of the matter to be asserted was not called as a witness. Assume further that because the trial judge was unconvinced by the hearsay nature of the detective's testimony, the prosecutor moved for a continuance to obtain the informant, and the trial court denied the motion for a continuance and dismissed the charge. Is the issue appealable? While at first blush *Browers* may tend to discourage appealing the issue, it is fully appealable. In fact, in *United States v. Clinger,*[83] the Fourth Circuit Court of Appeals reversed the trial court in such a scenario. The critical distinction between the two cases is that there was a dismissal of the charges or termination of the proceedings in *Clinger* but not in *Browers.* Once a termination of the proceedings or exclusion of evidence occurs, it appears that virtually any ruling adverse to the government in relation thereto, including the denial of a continuance, is appealable.

Moreover, despite the facial requirement in Article 62, UCMJ for a termination of the proceedings or exclusion of evidence as a prerequisite for a government appeal, there is dictum in at least one federal case that reveals a more expansive view of the government's right to appeal under 18 U.S.C. § 3731. In *United States v. Wayte,*[84] a case involving a prosecution for failure to register for the draft, the district court ordered the government to furnish Wayte with certain documents that were related to his claim of selective prosecution. The government declined to comply with the court order on the grounds of executive privilege. The district court offered to resolve the impasse between it and the government by allowing the government to appeal the issue to the Ninth Circuit Court of Appeals. The government took the position that appeal was available only if the district court dismissed the indictment against Wayte and refused the court's offer to appeal.[85] Prior to the dismissal of the indictment, the district court noted that Congress directed that the provisions of 18 U.S.C. § 3731 be interpreted "liberally" to "effectuate its purposes" and observed that the government "could have pursued an avenue of appeal which would have fallen far short of calling for dismissal of the indictment."[86]

Regardless of whether the district court's observation in *Wayte* is correct, the point here is that probes into the application of 18 U.S.C. § 3731 yield avenues of approach that are important to policy considerations underlying the initiation of the appeal. Indeed, until the government challenges the boundaries of Article 62, appellate courts cannot define those boundaries. In this regard, the district court's comments in *Wayte* give pause to consider the breadth of the meaning of a "liberal construction" of the government's right to appeal.

Furthermore, although the *Browers* court ruled that the denial of a continuance to secure essential witnesses did not have the effect of excluding evidence, *Browers* does not stand for the proposition that the "effects test," as explained in the Army Court of Military Review's decision, is in the emergency room in danger of expiring, as the Navy-Marine Corps Court of Military Review appears to indicate

[80] 20 M.J. 356 (C.M.A. 1985).

[81] *Id.*

[82] *Id.* at 360.

[83] 681 F.2d 221 (4th Cir.), *cert. denied,* 459 U.S. 912 (1982). *See also* United States v. Robinson, 593 F.2d 573 (4th Cir. 1979).

[84] 549 F.Supp. 1376 (C.D. Cal. 1982), *rev'd,* 710 F.2d 1385 (9th Cir. 1983).

[85] *Id.* at 1379.

[86] *Id.*

in *Penn.*[87] Rather, the "effects test" is still functional in the military. It is simply triggered by a ruling that is closer to an evidentiary base, for example, as in *In re Colluci,*[88] where it was held that a district court's quashing of a grand jury subpoena for records had the practical effect of excluding evidence.

Trial Tactics for Development of the Record

In his 1846 treatise, Army Lieutenant John O'Brien noted that "[i]t is the first and most significant rule of evidence, that the best evidence of which the case is capable shall be given," for otherwise "the party neglecting to produce it" shall not be heard to complain.[89] This sage advice is applicable today. R.C.M. 905(d) requires a trial judge to state "essential findings on the record" where factual issues are involved in resolving a motion.[90] If the trial court resolves facts adversely to the government, during the government appellate process, the military appellate courts will not, in the words of Judge Cox, "launch a rescue mission"[91] regarding the facts.

Familiarity With Appellate Review Standards. Thus, one subtle tactic that prosecutors could incorporate is to become familiar with the standard of appellate review during the government appellate review process. Article 62 restricts appellate courts to a review of matters of law. The meaning of this standard, and its relationship to the facts in a case, are discussed in most of the military government appeals decisions. In *Burris,* Judge Cox set forth a number of cases that discuss these issues.[92] Familiarity with these cases should assist the trial counsel in framing a presentation that will both convince the trial judge of the prosecution's position and convince the appellate authorities that any adverse trial court ruling is wrongly decided.

Moreover, prosecutors should learn from the constructive criticism contained in cases where the government has lost on appeal, and should make an effort to correct any problematic practices that prior trial counsel encountered.

Provide Analytical Tools for Courts. A second tactic is to furnish analytical tools for the trial and appellate authorities, particularly in detailed factual or legal disputes. At trial and during reconsideration,[93] the broadest number of theories reasonably possible, including recent doctrinal developments in the law, should be advocated. This practice is suggested not only to persuade the trial court, but also to provide an alternative and possibly winning basis for attack on appeal in the event the government's primary theory at trial fails. For example, during litigation of a speedy trial motion, if the prosecution's position is that it is exempt from a disputed delay period because the defense requested or consented to a delay under R.C.M. 707(c)(3), consider whether any of the other exclusionary provisions, such as the good cause exemption in R.C.M. 707(c)(8), are applicable. If so, each exclusionary provision should be argued.

To the extent that time and administrative support allow, the prosecutor should furnish the trial court with a succinct trial brief that identifies the factual matters in dispute, outlines the government's position regarding the facts, and states the applicable principles of law and case law upon which the government relies. This will assist the trial court in its resolution of the issues. At trial, prior to the presentation of evidence on motions, the prosecutor should briefly outline for the judge and appellate authorities the evidence to be adduced and its purpose, if the trial court will allow it. During any hearings in reconsideration of a ruling adverse to the government, the prosecution should again submit a trial brief that states the government's objections to any specific findings of facts or the legal principles utilized by the trial court, and the reasons for these objections.

Marshal the Evidence. A third tactic for establishing the groundwork for a government appeal is to present all reasonably available live and documentary evidence which supports prosecution offers of proof that are disputed by the defense. This approach should reduce the probability that a trial court will arrive at factual findings adverse to the government. Moreover, a developed factual record will provide a substantial basis for appellate courts which are inclined to find a legal error based on the trial judge's assessment of the facts. This is particularly true if the government invokes the fact finding powers of the Army Court of Military Review through an extraordinary writ in conjunction with a government appeal.

This approach requires an aggressive litigation stance. For example, during a factual dispute regarding delay accountability in a speedy trial motion, if a defense counsel has central involvement in the facts,[94] a neutral prosecutor should consider calling the defense counsel to the witness stand for the revelation of points important to the prosecution's case. Further, in speedy trial cases, if the defense contests the trial counsel's assertion that the prosecution was prepared to try a case within the 120 or 90 day time limit, the prosecution should prove the assertion with evidence such as the testimony of legal clerks, verification of witness interviews, and documentary evidence.

[87] In ruling that a trial court order for a new pretrial investigation was not an appealable order, the *Penn* court stated, "We need not rule in this case that the practical effects test is inapplicable to all Article 62 appeals." *Penn,* 21 M.J. at 908.

[88] 597 F.2d 851 (3d Cir. 1979). *See also In re* Kent, 646 F.2d 963 (5th Cir. 1981). This does not mean that Article 62(a) was meant to create parity between the government and the accused on appeal. Both Chief Judge Everett and Judge Cox have continuously warned against its overuse. *See, e.g., Browers,* 20 M.J. at 360.

[89] J. O'Brien, Treatise on American Military Courts and the Practice of Courts Martial; With Suggestions for Their Improvement 169 (Philadelphia 1846).

[90] The Navy-Marine Corps Court of Military Review construes R.C.M. 905(d) as requiring the trial court to set forth specific facts found, the legal basis for a ruling, and any other statement which would clarify the ruling. *Postle,* 20 M.J. at 640.

[91] *Burris,* 21 M.J. at 145.

[92] *Id.* at 143 n.7.

[93] In asking for reconsideration, the prosecutor should consider requesting the court for a delay before any new hearing is held. If the delay is granted, the prosecutor should utilize either notes or the taped record of proceedings as a basis upon which to address specific findings by the court. In cases where a government appeal is under consideration, trial counsel should consult the Trial Counsel Assistance Program for input before litigating in reconsideration. This consultation should provide any information that could strengthen the government's position on appeal.

[94] In *Burris,* Judge Cox reminds counsel that practitioners should not place themselves in the position of being a potential witness. 20 M.J. at 142 n.5.

If, in the midst of a motion hearing, the defense counsel presents documentary evidence such as a sworn statement as a substitute for live testimony, a practice which allows for defense containment of damaging information, the prosecutor should not accept it in the heat of battle. Instead, the prosecutor should ask for a recess in the proceedings to interview the witness and should present that witness' testimony if it supports the government's position or nullifies the defense position. In any event, the prosecutor should ensure that the underlying facts contained in appellate exhibits offered by the defense are thoroughly rebutted or explained by convincing evidence, if possible.

Procedure

After having probed aspects of the preparatory work which undergirds an Article 62 appeal, the next step is an examination of the procedural aspects of the appeal.

Mechanics of the Process

The procedural rules governing government appeals are contained in R.C.M. 908, case law, and the rules of the appellate courts.

Trial Level. At trial, the judge either terminates the proceedings relative to an offense, usually through dismissal of a specification or abatement, or excludes substantial evidence of a material fact. Regardless of the stage in the proceedings, including reconsideration[95] of a pretrial motion ruling and litigation of the trial on the merits,[96] the government has the right to seek relief on appeal, as long as a valid finding of not guilty has not been entered.[97]

If the trial counsel believes that the trial judge's ruling is improper and warrants review on appeal, immediate coordination with other litigation components is required.[98] The prosecutor must consult with the staff judge advocate and his or her staff as to whether an appeal is appropriate. As soon as practicable, the prosecutorial staff should consult with the Trial Counsel Assistance Program and then with the Writs and Appeals Branch of the Government Appellate Division regarding the merits of the appeal. The prosecutor's input at these stages should, at a minimum, objectively describe the facts, the legal issues in dispute, the positions of the litigants, and the precise nature of the trial judge's factual and legal rulings. The prosecutor's input should give special attention to any proposed challenges to rulings involving mixed questions of fact and law, which are problematic to the success of a government appeal.

Upon authorization from either the general court-martial convening authority or the staff judge advocate,[99] the trial counsel lodges a notice of appeal, pursuant to R.C.M. 908(b)(3), with the trial judge. The notice of appeal must be filed with the trial court not later than seventy-two hours after its ruling.[100] The filing of this notice is important because it transfers jurisdiction over the subject matter of the appeal from the trial court to the appellate court.[101] A trial counsel's failure to file this notice in a timely manner is fatal to the government's right to appeal.[102]

Although R.C.M. 908(b)(1) and (b)(4) state that the trial court may not proceed with the case as to matters affected by the appeal, the Court of Military Appeals has determined that under Article 62, the trial court has concurrent jurisdiction with the appellate courts to act on matters "in aid of the appeal."[103] Therefore, even after giving notice of the appeal, the prosecution should be prepared to determine whether any additional trial court proceeding is in aid of the appeal.[104]

Court of Military Review. R.C.M. 908(b)(2) and revised Rule 21(d)(1), Rules of Practice and Procedure of the Courts of Military Review,[105] charge the trial counsel with the responsibility of preparing and transmitting the original record and three copies of the record to the Clerk of Court of the Army Court of Military Review, via the Government Appellate Division. R.C.M. 908(b)(5) allows the trial counsel to submit relevant parts of the record, and also

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[95] *See* United States v. Humphries, 636 F.2d 1172, 1174–75 (9th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981); United States v. Burris, 21 M.J. 140, 141 (C.M.A. 1985); United States v. Cuervo, Misc. Dkt. No. 85–12 (N.M.C.M.R. 29 November 1985) (memo. op.), *petition denied*, 22 M.J. 235 (C.M.A. 1986).

[96] United States v. Poduszczak, 20 M.J. 627, 630 (A.C.M.R. 1985), *petition filed*, 20 M.J. 201 (C.M.A. 1985), *petition withdrawn*, 20 M.J. 328 (C.M.A. 1985). The federal government appeals procedure under 18 U.S.C. § 3731 precludes an appeal if a retrial would violate the defendant's double jeopardy rights and if an appeal would interrupt an ongoing trial. United States v. Harshaw, 705 F.2d 317, 319 (8th Cir. 1983). Article 62 also precludes a violation of an accused's double jeopardy rights. Article 62 does not, on its face, however, preclude a government appeal during the course of a trial on the merits. Furthermore, because an appeal of evidence during the merits is not a termination of the proceedings by the government, the former jeopardy provisions of Article 44(c) are not triggered. Thus, it appears that the ruling in *Poduszczak* that the government may appeal during the course of a trial under Article 62 is sound. This interpretation remains to be reviewed by the Court of Military Appeals, however. *See* Sullivan, *Army Government Appeals Round Two*, The Army Lawyer, Dec. 1985, at 30, 31 n.37 [hereinafter cited as Sullivan]. Judge Cox appears to have stated, in effect, that the government should not appeal if jeopardy has attached. *Browers*, 20 M.J. at 360 (Cox, J., concurring). If so, this interpretation appears to have the practical effect of narrowing the breadth of Article 62 by reading into it a ban on appeals that would interrupt the course of the trial on the merits. Chief Judge Everett's observation, however, that exclusion of evidence under Article 62 means, in part, a ruling made "at" trial, supports the proposition that the government may appeal during the merits. *See Burris*, 20 M.J. at 360. Additionally, the Analysis to R.C.M. 908(b)(4) states that "It is expected that in most cases" government appeals will arise from pretrial rulings. MCM, 1984, app. 21. The corollary to this analysis indicates that the drafters contemplated instances in which a ruling during the merits would give rise to a government appeal.

[97] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977); United States v. Browers, 20 M.J. 542 (A.C.M.R.), *rev'd*, 20 M.J. 356 (C.M.A. 1986).

[98] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 13–3 (1 July 1984) [hereinafter cited as AR 27–10].

[99] *Id.* at para. 13–3*a*.

[100] UCMJ 62(a)(2).

[101] United States v. Browers, 20 M.J. 356, 359 (C.M.A. 1985).

[102] United States v. Mayer, 21 M.J. 504, 505–06 (A.F.C.M.R. 1985).

[103] *Browers*, 20 M.J. at 359.

[104] *See United States v. Cuervo.*

[105] Dep't of Army, Reg. No. 27–13, Military Justice—Courts of Military Review Rules of Practice and Procedure, Rule 21(d)(1) (12 July 1985) (C1 29 May 1986) [hereinafter cited as Rule 21(d)(1)].

authorizes the court of military review to require the submission of all or any part of the record. The court of military review has activated its authority under R.C.M. 908(b)(5), and has, through Rule 21(d)(1), required the submission of the entire record. Rule 21(d)(1) and paragraph 13–3c. AR 27–10, require the trial counsel to submit four records of trial to the Government Appellate Division no later than twenty days after the filing of the notice of appeal with the trial court. Whenever practicable, the trial counsel should keep the Government Appellate Division informed of the status of the preparation and transmittal of the record.

Upon receipt of the records of trial, the Government Appellate Division, under Rule 21(d)(1), is required to file the records immediately with the court of military review, and the appeal and supporting brief within twenty days. Prior to filing the appeal, the Government Appellate Division conducts research on the issues and reevaluates the initial decision to proceed with the appeal in light of the research, contents of the record of trial, doctrinal considerations, and workload requirements. The division also drafts, types, reviews, and edits any brief that may be filed.

During this process, the attorney preparing the brief may require the assistance of the trial counsel regarding insight into the issues, including record and non-record matters. Additionally, these contacts may assist the government appellate counsel to respond to occasional appellate court inquiries regarding record matters that are unclear or non-record matters.

After the government files its appeal, under Court of Military Review Rule 21(d)(2), the appellee has twenty days to respond. There may or may not be an oral argument in the case. Thereafter, the Army Court of Military Review, which is required to expedite the case under R.C.M. 908(c)(2), will issue a decision.

While the case is before the Army Court of Military Review, the trial counsel should be prepared to proceed quickly to trial in the event the government prevails. Additionally, the trial counsel should prepare a factual basis, if any, for opposing the defense's anticipated request to the Court of Military Appeals[106] for a stay of the trial proceedings after a government victory at the Army court, and transmit those matters to the Government Appellate Division. Matters pertinent to the opposition of a stay of the proceedings include harm to the public interest[107] and harm to other parties,[108] such as prolonged psychological trauma to a teenage rape victim if the proceedings continue much longer. The trial counsel should assemble persuasive documentary evidence, such as the analysis of a treating psychiatrist, to support specific factual claims of harm to individuals. Other matters relevant to the resolution of a stay motion include any decision not to prosecute the case if it is remanded for further proceedings.

Court of Military Appeals. Under Rule 19, Rules of Practice and Procedure of the Court of Military Appeals, if the government loses at the court of military review and certifies the case to the Court of Military Appeals upon direction of The Judge Advocate General, the government must file the certificate for review within thirty days after the Court of Military Review's decision. Upon issuance of a docketing notice by the court, the government is allowed thirty days to file its brief, and the defense is allowed thirty days to respond.

Under R.C.M. 908(c)(3) and Court of Military Appeals Rule 19, if the accused is the losing litigant before the court of military review, the defense may file a petition for grant of review before the Court of Military Appeals within sixty days after notification of the decision of the court of military review. After the Court of Military Appeals issues a docketing notice, the defense has thirty days to file its brief or supplement to the petition for grant of review. The government is allowed thirty days to respond. Thereafter, the court usually hears oral argument prior to issuing a decision.

During the government's preparation of the brief and oral argument to the Court of Military Appeals, the trial counsel should be prepared to assist the appellate counsel who may have questions regarding issues that arise as a result of further analysis.

In those cases where the accused is appealing an adverse court of military review decision, and the prosecution is prepared to proceed with trial, the defense routinely attempts to prevent trial before the Court of Military Appeals decides the case, by requesting a stay of the proceedings. Under Rule 30, Rules of Practice and Procedure of the Court of Military Appeals, the government is allotted five days to respond to a defense motion for a stay. The Government Appellate Division, previously armed by the trial counsel with any factual basis upon which to oppose the stay, makes factual and legal arguments in opposition to the stay, if warranted.

In this regard, it is essential that the trial counsel keep the Government Appellate Division informed as to all changes in the trial date. The government has a duty to inform the Court of Military Appeals, in advance, of any proposed trial date and all changes thereto. As a result, the court will be fully informed regarding the last possible moment at which it could issue an effective stay of the proceedings and balance its priorities accordingly. If the court denies the stay application or declines to act on the stay by the scheduled trial date, then the trial counsel should proceed with the trial. On the other hand, if the court stays the proceedings, the Government Appellate Division will immediately notify the trial counsel, and the prosecution is postponed until the Court of Military Appeals decides the case. In the meantime, the trial counsel should maintain the prosecution's readiness to proceed to trial in the event the government prevails on appeal. If the Court of Military Appeals decides the case, the losing litigant may appeal by writ of certiorari to the Supreme Court under R.C.M. 1205.

During the appellate proceedings, if the prosecution decides not to prosecute the accused, for reasons such as the

[106] The Court of Military Appeals resolved any question regarding its authority to review government appeals when it denied the Navy's motion to dismiss for lack of jurisdiction in United States v. Tucker, 20 M.J. 52 (C.M.A. 1985).

[107] *See* Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

[108] *Id.*

dismissal of charges or the issuance of a discharge in lieu of court-martial, the Government Appellate Division should be notified immediately. The trial counsel should transmit evidence documenting the occurrence of such a decision to the Government Appellate Division. For example, in *Burris*, Judge Cox stated that when the accused had been discharged from the service, and hence no longer subject to court-martial jurisdiction, before completion of appellate review, the government should furnish appellate courts with a "certified" copy of the discharge certificate.[109]

The government's post-appeal decision not to prosecute the case, while having no impact on an appellate court's power to hear the case, or jurisdiction,[110] is a factor that may have a bearing on the justiciability of the case.[111] Additionally, in Article 62(b), Congress stipulated that government appeals should have priority over other proceedings in the appellate courts "whenever practicable." The congressional mandate to expedite the appeal is predicated upon an ongoing attempt to prosecute. Consequently, dynamics that may adversely affect the parties' ability to litigate at trial, such as the loss of witnesses, and the concern for hardship on the accused in existence since the Criminal Appeals Act of 1907, place a premium on resolving the appeal as soon as possible.

Where the appellate decision will have no bearing on the prosecution of the case, because of the government's prior decision not to prosecute, it is no longer "practicable" to expedite such a case. Moreover, the court could exercise its discretion in the area of justiciability,[112] and make an informed decision regarding the conservation of judicial resources. For example, the court could decide not to grant review of the case or decline to decide the case because of mootness.

In the two years since government appeals have been litigated, however, the court has indicated a preference for deciding appeals within its jurisdiction, regardless of justiciability concerns, where the accused, even if discharged, requests review or where significant doctrinal issues exist.[113] Nevertheless, the trial counsel's continual updates regarding the status of a case are important.

Statistical Data

Statistical data from Army government appeals reveal that on the average, it takes approximately eighty days from the time of the trial court's ruling to the issuance of a decision by the Army Court of Military Review. This time includes periods consumed by the government's decision to file the notice of appeal, record preparation and transmittal, drafting of the appeal, response time by the appellee, any oral arguments, and appellate review.

Statistical data from ten cases, including four Army appeals, reveals that the Court of Military Appeals decides cases approximately 178 days after a decision has been rendered by a court of military review. This period includes a regularly scheduled allotment of at least three months before all pleadings are usually filed before the court, and additional time consumed for the resolution of motions, hearing of oral arguments, research, and opinion drafting and printing.

Based on the foregoing, it appears that, to date, it takes an average of 258 total days to resolve a government appeal. This figure does not include an appeal to the Supreme Court. Note, however, that if the Court of Military Appeals does not stay the proceedings after a decision by the court of military review that is adverse to the defense, the trial will be over before the completion of appellate review. As a general rule, prosecutors should maintain a readiness both to proceed to trial and to assist appellate counsel with the appeal for up to nine months after the filing of the notice of the appeal with the trial court.

Procedural Complications: The Impasse

When the trial judge dismisses a specification, it is clear to all parties that the government has a right to appeal. When the trial court makes a ruling in the area of exclusion of evidence,[114] however, questions may arise as to whether the ruling had the effect of excluding evidence,[115] and, as a result, is an appealable issue. Furthermore, even if there is no disagreement that the ruling excluded evidence, questions may arise as to whether the evidence is "substantial proof of a fact material in the proceeding"[116]—another prerequisite for appeal under Article 62(a) and R.C.M. 908(a). In the rare circumstances where the trial court disagrees with the prosecution's position that the court's ruling is appealable, the prosecution may face practical problems. The court might decline to allow the trial counsel to delay the proceedings under R.C.M. 908(b)(1) for the purpose of ascertaining whether to appeal. Further, the trial court might not give the trial counsel the opportunity to obtain the necessary permission to file a notice of appeal, and might require the government to go to trial.

In *Browers*, the trial judge made a ruling that the trial counsel believed had the effect of excluding evidence. The trial counsel invoked the government's right to delay the

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[109] 21 M.J. at 141 n.2.

[110] *Browers*, 20 M.J. at 358.

[111] *See generally* R. Everett, Military Justice in the Armed Forces of the United States 294–95 (1956).

[112] *See Browers*, 20 M.J. at 358.

[113] *See Burris*, 21 M.J. at 141 n.2.

[114] Chief Judge Everett defined "exclusion of evidence" as a "ruling made at or before trial that certain testimony, documentary evidence, or real evidence is inadmissible." *Browers*, 20 M.J. at 360.

[115] Evidence is excluded if the effect of the ruling or order is to exclude evidence. *See* United States v. Humphries, 636 F.2d at 1175.

[116] Judge Cox has stated that a government appeal is appropriate if the excluded or suppressed evidence "is necessary to prove an essential element of the offense." *Browers*, 20 M.J. at 360 (Cox, J., concurring). He also stated that "a mere weakening of the Government's case" does not warrant an appeal. *Id.* In contrast, the Navy-Marine Corps Court of Military Review stated in response to an accused's challenge to a government's appeal on the grounds that the excluded evidence in question was cumulative, and therefore not substantial proof of a fact material to the proceedings:

> In an interlocutory appeal, it is beyond the scope of this Court to speculate as to what weight or importance a particular piece of evidence might have at trial. It is sufficient that the petitioner [government] believes that the evidence is significant enough to seek reversal of a military judge's exclusionary ruling rather than continue at trial with whatever evidence that might be available.

United States v. Scholz, 19 M.J. at 841.

proceedings for up to 24 of the 72 hours allowed under the provisions of R.C.M. 908(b)(1) to consider whether to appeal. The trial counsel expected the trial judge to halt the proceedings. Instead, the trial court determined that its challenged ruling was not appealable within the meaning of Article 62. Therefore, the trial court reasoned, the government was not entitled to a delay under R.C.M. 908(b)(1). The Court of Military Appeals upheld the trial court's ruling.[117] The Court of Military Appeals' decision in *Browers* signals the court's discomfort with a literal application of the terms of the delay procedure under R.C.M. 908(b)(1), which would give the trial counsel absolute power to delay part of the proceedings.[118] The *Browers* court ruled, in effect, that the trial counsel's power to delay the proceedings was subject to review, challenge, and divestment by the trial court, in the exercise of its supervisory control over the proceedings.

The record of trial in *Browers* reveals that after the trial court denied the prosecution a delay in the proceedings under R.C.M. 908(b)(1), the court denied the prosecution's request for a brief recess and ordered the case to proceed. This scenario, in which the court divests the prosecution of its delay powers and does not allow the trial counsel to research the issue or to consult with superiors for advice regarding the next step, is a procedural complication. The trial counsel is alone, and is confronted with the task of explaining to the trial court why the issue is appealable. The reasons articulated may be reviewed by the appellate courts; and thus, the argument is directed to them as well as to the trial court.

The statistical data reveals that the incidence of an impasse between the prosecutor and the trial court regarding the propriety of a government appeal is very low, less than 3% of all cases (1 out of 39). Nevertheless, prosecutors should not be taken by surprise if such an event occurs. There are five possible remedies to the impasse. These remedies illustrate the need for long-range planning regarding the government appeals process.

Persuasion. First, the prosecution should employ the art of persuasion. The trial counsel with a working knowledge of government appeals case law should be able to cite cogent reasons supporting the government's theory of appeal. For this reason, the trial counsel's research of the law, and ready access to that information, may be an important factor in persuading the trial court to allow the government to exercise its appellate rights, including the delay provisions.

Further, trial counsel should argue policy considerations. In R.C.M. 908(b)(1) the President provided that the government is entitled to a delay when the trial courts' ruling or order "*may be*" subject to an appeal. By using the terms "may be subject" to an appeal rather than "is subject" to an appeal, the President, by implication, directed that the rules be construed to give the government the opportunity to delay the proceedings, even if it is mistaken and the issue is not subject to appeal. The President and the drafters of R.C.M. 908 (b)(1) contemplated that the trial court's granting of the delay would provide the government with the opportunity to review the matter. During this time, the prosecutorial staff will have an opportunity to seek a preliminary opinion regarding the merits of the appeal from the Trial Counsel Assistance Program and from the Government Appellate Division.

Thus, there is no need for the trial court to exercise its supervisory powers when the trial counsel requests a delay under R.C.M. 908(b)(1), even if the trial court believes that the issue is nonappealable. The trial court should defer to the President's directive under R.C.M. 908(b)(1) that the trial be halted temporarily.

If the government actually files the notice of appeal regarding an issue that the trial court regards as nonappealable, then it can consider utilizing its supervisory powers to continue the trial under the authority of *Browers* and *United States v. Hitchmon*,[119] a main basis of the *Browers* decision. Even so, the trial court should be loath to invoke its powers to obstruct the government's filing of the appeal. The government will audit itself even further, as the appeal is assessed objectively by authorities at the appellate level. By order of the Secretary of the Army, through AR 27–10, paragraph 13–3*a*, a government appeal will be filed with the appellate courts only after it is approved by the Chief, Government Appellate Division, in coordination with The Assistant Judge Advocate General for Military Law. This process is designed to prevent any abuse of government appeals by trial counsel, and to preclude any unfair injury to an accused. Further, this review process will ensure that government appeals address legitimate substantive and procedural issues worthy of exploration at the appellate level. Under such circumstances the President has, through R.C.M. 908(b)(4), directed that the trial proceedings affected by the subject matter of the appeal come to a halt, pending appellate disposition.

Prosecutors should argue further that the trial court should not return to the pre-government appeals era. The 1892 ruling by the Supreme Court in *Sanges* is no longer the law. Today, Congress does not intend for a trial judge to deny the government the opportunity to litigate before the appellate courts, in contrast to congressional views during the time of Judge Humphrey's 1906 decision in the "Beef Trust" case. Congress has established a procedure for the review of trial court rulings, and the trial court should not hamper the government's execution of its public responsibilities. A trial court should attempt to promote the growth of the law of government appeals as did the trial court in *Wayte*.[120]

The underlying theme in any government appeal is whether good order in the armed forces is eroded if a trial court erroneously exempts a violator of the law in the military from discipline through criminal sanction. As Brevet Major General Fry stated in his 1889 treatise, in the absence of discipline "the military service would not only fail in the purpose for which it is maintained, but would become a vexation to the community, a danger to the

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[117] *Browers*, 20 M.J. at 360.

[118] *Browers*, 20 M.J. at 361 (Cox, J., concurring).

[119] 602 F.2d 689, 692 (5th Cir. 1979) (en banc).

[120] 549 F. Supp. at 1379.

Government, and a menace to freedom." [121] Thus, the development of government appeals law falls squarely within the realm of public interest.

In view of these policies, a trial court should exercise its power to proceed with the trial after receipt of a notice of appeal only in the most egregious circumstances, where a miscarriage of justice is manifest. In *Hitchmon*, the Fifth Circuit Court of Appeals stated that the trial courts' invocation of it supervisory powers to proceed with trial after the filing of a notice of appeal should occur only to "prevent intentional dilatory tactics," and to control government action that "inhibits the smooth and efficient functioning of the judicial process." [122]

File Notice of Appeal. If the trial court denies the government a delay under R.C.M. 908(b)(1), one response could be for the trial counsel to file a notice of appeal. As previously stated, the trial counsel must be authorized by higher authority to file a notice of appeal. Convening authorities and staff judge advocates may wish to consider authorizing the trial counsel to file a notice of appeal without prior consultation in limited circumstances in which: the trial court denies the government its right to exercise its delay powers under R.C.M. 908(b)(1) for the purpose of evaluating whether to file an appeal; the trial counsel has studied the law of government appeals in both the federal and military systems, and has a good faith belief that the issue is appealable; consultation with the staff judge advocate is unfeasible; there is no reasonable likelihood that the trial court will delay or recess the proceedings for other reasons; and the continuation of the trial proceedings on the merits is imminent.

The filing of the notice of appeal would transfer jurisdiction over the subject matter of an appealable issue from the trial court to the appellate court. This move would ripen the issue before the appellate courts in the event the government sought extraordinary relief. Additionally, the question would then be: can and should the trial court usurp the authority of the appellate courts to rule on the question? Hopefully, the trial court would then stop the proceedings affected by the appeal. This result would ensure that the government appellate process does not conflict with an accused's double jeopardy rights.

Extraordinary Writ. If the art of persuasion does not convince the trial court to delay the proceedings, or if the trial court declines to delay the trial after a notice of appeal is filed under R.C.M. 908(b)(3) and (4), the trial counsel should consider a third avenue of approach, an extraordinary writ which seeks relief based on advisory and supervisory mandamus. [123] Indeed, under such circumstances, the *Hitchmon* court suggests that the government apply for a writ of prohibition. [124]

Under the provisions of AR 27–10, para. 13–2, the Government Appellate Division is responsible for representing the government in all petitions for extraordinary relief before the appellate courts. Thus, the process would be rather cumbersome in the midst of trial. Its operation would be as follows, however. During the trial, the trial counsel would have an assistant advise the staff judge advocate's office of the problems at trial. That office would, in turn, contact either the Trial Counsel Assistance Program or the Writs and Appeals Branch of the Government Appellate Division. If the call is made during hours in which the Army Court of Military Review is open for business, and if the appellate authorities approved the filing of a writ, the government Appellate Division could file a writ of prohibition or mandamus, in conjunction with a stay of the proceedings. If the appellate court stayed the proceedings before the end of the trial, and if this ruling were conveyed to the trial court expeditiously, the proceedings would come to a halt. Government personnel could then consider whether to file an Article 62 appeal in conjunction with the writ.

Withdrawal. If the extraordinary writ process is unfeasible, the trial counsel should consider withdrawal of the charges, as was done by the trial counsel in *Satterfield v. Drew*, [125] a non-government appeals case. Although under *Satterfield* a trial counsel can bind the convening authority to a withdrawal through unilateral action at trial, as a matter of practice, prosecutorial staffs may wish to consider having convening authorities authorize prosecutors to withdraw charges under limited exigent circumstances, such as in the scenario under discussion.

Withdrawal should be considered when trial after re-referral of the case would not violate the former jeopardy provisions of Article 44(c) particularly in the absence of certainty that the nullity arguments, discussed below, would allow for a retrial in the face of a former jeopardy argument. Thus, withdrawal is an appropriate action during pretrial hearings. Additionally, when necessary, withdrawal of the charges should be initiated after the introduction of

[121] J. Fry, Military Miscellanies 164–65 (New York 1889).

[122] 602 F.2d at 694. One commentator has stated that *Browers* "established that military judges can safely disregard meritless claims of appealability." Sullivan, *supra* note 96, at 30. The *Browers* court, however, was concerned with establishing that a trial court has the power to continue a trial after the government requests a delay under R.C.M. 908(b)(1) to consider whether to appeal. Standards governing the trial court's use of that power, as set out in *Hitchmon*, suggest that more than nonappealability in the trial court's opinion must be required. The issue must be "clearly unappealable," the government's notice of appeal must be "manifestly ineffective," and the court must be concerned with "intentional dilatory tactics" on behalf of the government. *See Hitchmon*, 602 F.2d at 694.

[123] Supervisory and advisory mandamus are utilized by appellate courts to address issues which are significant to the administration of justice. *See* Schlagenhauf v. Holder, 379 U.S. 104 (1964); Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595 (1973).

[124] 602 F.2d at 694.

[125] 17 M.J. 269 (C.M.A. 1984).

evidence on the merits.[126] It remains to be determined whether the re-referral limitation in R.C.M. 604(b), that re-referral is permissible "if the withdrawal" during the merits "was necessitated by urgent and unforeseen military necessity," is broad enough from a policy perspective to allow prosecution following a withdrawal after the introduction of evidence during the merits for purposes of litigating a government appeal. The rule should allow such a prosecution.[127]

Although it is no panacea, withdrawal would prevent the government appellate review process from conflicting with an accused's double jeopardy rights. At least the government would have time to ponder its next move without allowing an acquittal on the merits or triggering former jeopardy under Article 44(c)—events the accused would use in an attempt to prevent further prosecution. Perhaps after re-referral of the charges, the government could seek relief based on advisory mandamus. Perhaps the government would have a compelling reason to invoke the trial court's suggestion in *Wayte* that the government appeal even though the prerequisites for the appeal were not technically met because of the withdrawal at the prior proceeding. It should be noted, however, that the proposed withdrawal under discussion is experimental, and a test case would be required to evaluate the vitality of the concept.

In this way, the government would exhaust all possible remedies to avoid litigation over double jeopardy. If the appellate courts declined to grant relief because the issue was not technically ripe for review, and if the appellate courts declined to consider any nullity argument[128] because of withdrawal, the government would have no choice but to proceed to trial and attempt to appeal thereafter.

Proceed to Trial. If the extraordinary writ and withdrawal options prove to be unfeasible, the trial counsel's fifth remedy is to proceed to trial. Upon conclusion of the trial, even if a finding of not guilty has been entered, the government may attempt to appeal the trial court's ruling. One theory of appeal would be that the proceedings occurring after the government invoked the delay directive of R.C.M. 908 (b)(1) were a nullity under the reasoning articulated by the Army Court of Military Review in *Browers*.[129] An alternative theory would be that the proceedings that were held after the trial counsel gave notice of appeal, thereby triggering the delay directive of R.C.M. 908 (b)(4), were void for lack of jurisdiction. These arguments pose the risk that a finding of not guilty entered by the trial court may withstand attack because of double jeopardy.[130] Thus, this option should be viewed as a last resort.

Conclusion

Through an appeal under Article 62, the government executes its public duty to ensure that an accused in the military is not exempt from discipline through criminal sanction because of an erroneous legal ruling by a trial court. Congress and the President have, through a procedure that is based on some features of the first Criminal

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[126] UCMJ art. 44(c) states "A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article."

The effect of Article 44(c) on a withdrawal of the case during the merits in a government appeal has not been litigated before the appellate courts. There is a risk that such a withdrawal could foreclose the government's ability to prosecute. In anticipation of this issue, the following comments are offered. To avoid a defense claim of an Article 44(c) bar to re-trial after withdrawal during the merits, trial counsel should, at the time of the withdrawal, state on the record: that the purpose of the withdrawal is not because of the lack of available evidence or witnesses; that the evidence is available at trial, and the only question is one of its admissibility; and one of the government's purposes in withdrawing the charges is to litigate the procedures governing the filing of a government appeal, because the trial court and the government are at an impasse regarding the government's entitlement to be heard before the appellate courts regarding the admissibility of the evidence.

This statement should strengthen any government argument on appeal that prosecution after the withdrawal is not the unfair "beefing up" of the prosecutor's case or the "second bite at the apple" scenario that Article 44(c) was designed to preclude. Of course, to uphold this representation, the prosecution's evidence at any subsequent trial should not be greater than the evidence it intended to use at the original trial. Thus, there appears to be a meritorious argument that the withdrawal under discussion falls outside the purview of Article 44(c). *See generally* United States v. Cook, 12 M.J. 448 (C.M.A. 1982) (discussion of withdrawal of charges).

[127] Although the literal terms in R.C.M. 604(b) allow re-referral after withdrawal during the merits for an "urgent and unforeseen military necessity," a strong argument can be made that the underlying basis of the rule has sufficient breadth to allow re-referral following a withdrawal to pursue a government appeal. The analysis to R.C.M. 604 reveals that the rule is based, *inter alia*, on paragraph 56, Manual for Courts-Martial, United States, 1969 (Rev. ed.). Paragraph 56c provided that after the introduction of evidence, withdrawal of the charges with a view toward further prosecution is permissible only for urgent and unforeseen military necessity or for other good cause in the interest of justice. United States v. Cook, 12 M.J. 448, 453–54 (Chief Judge Everett sets out the text of paragraph 56c, M.C.M., 1969). Arguably, the clause allowing prosecution "for other good cause in the interest of justice" still breathes. Although it is dormant, it would become vibrant in the rare scenario under discussion, where the government sought to continue a prosecution after withdrawal during the merits for purposes of litigating a government appeal.

[128] Application of the nullity argument to a withdrawn case sounds in true legal fiction. Under the nullity theory, proceedings held after the prosecutor requested a delay or filed a notice of appeal would be void as a matter of law. Thus, the government could argue that if the appellate courts decline to review a case after it was withdrawn because of justiciability concerns, the alternative ground for review is that the withdrawal had no legal effect. The basis for this novel position would be that the withdrawal was announced when the proceeding was void. Therefore, it could be argued that the withdrawal was illusory but effective, as it had the same effect as the intent of the delay procedures under R.C.M. 908: it prevented the trial judge from conducting further proceedings.

[129] 20 M.J. at 551.

[130] *See* United States v. Robinson, 593 F.2d 573, 576 (4th Cir. 1979) (After the trial court suppresses evidence, if "the Government goes to trial without the evidence and the defendant is acquitted, then an appellate decision may not be obtained since the defendant is constitutionally protected from another trial.").

The *Robinson* analysis, however, was premised on the assumption that a federal district court had the power to enter a valid finding of not guilty. This assumption is not always operative in courts-martial. The analysis to R.C.M. 908(b)(1) states that the delay to which the government is entitled is "a mechanism to ensure that further proceedings do not make an issue moot before the Government can file an appeal." MCM, 1984, app. 21. This appears to be a signal from the President and the drafters that the trial delay or interruption provisions of R.C.M. 908 were designed to eliminate any possible conflicts between the government appellate review process and double jeopardy: a court-martial is without power to proceed regarding matters related to the appeal if the government invokes the interruption procedure. The *Browers* court appears to have modified this rule. Apparently, *Browers* has rendered a court-martial without authority to proceed if the issue is appealable. Chief Judge Everett, in effect, noted that if the issue is appealable, and if the trial counsel invokes the trial interruption procedures under R.C.M. 908, there would be an "automatic stay in the proceedings." *Browers*, 20 M.J. at 360. It appears that an automatic stay would preclude a double jeopardy problem.

Appeals Act in 1907, mandated that a government appeal be expedited at both the trial and appellate levels. An appeal is a serious commitment by the government, at the trial and appellate levels, to complex criminal litigation for over a nine month period. The prosecutor's responsibilities in this process span from a pretrial anticipation of issues that may generate an appeal through the trial level to appellate related duties. The proper execution of the prosecution function in the government appeals process is critical to the initiation of the appeal from a procedural standpoint, and to the government's opportunity to prevail on the substantive issues in dispute.

The pattern of the cases thus far suggests that appeals are most likely to be generated in the areas of speedy trial, jurisdiction, and search and seizure, particularly in urinalysis cases. The status of the case law reveals that a number of substantive and procedural issues under Article 62 have been resolved. The process is relatively new, however, and is still under development. There are a number of issues that await definition, clarification, and refinement.

For the avant-garde prosecutor, the Article 62 appeals process constitutes an opportunity to ensure that the military trial courts employ the most recent doctrinal developments in the resolution of legal issues that could lead to the dismissal of criminal charges or the exclusion of material evidence. As a result, trial counsel can initiate important changes to the growth of military criminal jurisprudence. For example, in *Solorio,* the Court of Military Appeals expanded the jurisdictional analysis to accommodate the effects of family disruption on good order and discipline in the armed forces, including the menace of child sexual abuse. In Burris, the court clarified the standard of review regarding the facts that should be applied by the Courts of Military Review, and set forth procedural requirements for both trial and defense counsel in speedy trial issues. In *Browers,* the court enunciated procedural rules governing Article 62 appeals. In *Postle,* the Navy-Marine Corps of Military Review interpreted the trial court's duty to articulate certain findings on the record during motion hearings and applied the "good faith" exception to the exclusionary rule.

In sum, government appeals are infrequent procedures. Nevertheless, the trial counsel is charged with the responsibility to remain vigilant in identifying appealable issues, and ever ready to confront the challenge.

The Advocate for Military Defense Counsel

Ineffective Assistance of Counsel During Trial

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Introduction

This article is the third in a series on ineffective assistance of counsel and discusses errors and omissions by defense counsel during the trail through findings.[1] While trial defense attorneys often see defense appellate counsel as "the bad guys" when ineffective assistance of counsel is claimed, both defense bars have a mutual interest in seeing that the soldier accused before a court-martial receives adequate representation and a fair trial. This article attempts to highlight some potential traps for the unwary.[2]

In *Strickland v. Washington,*[3] the Supreme Court addressed a claim of ineffective assistance of counsel in a criminal trial and ruled that, for a claim of ineffective assistance to prevail, the defendant must establish, first, that the defense counsel's performance was deficient, and second, that this deficient performance prejudiced the defense. Prejudice results, in the Court's view, when error is so serious that a conviction would be insufficiently reliable to satisfy the Constitution. The Court established the standard for counsel's performance as being "reasonably effective assistance"[4] and then, citing *McMann v. Richardson,*[5] defined "reasonably effective assistance" as assistance "within the range of competence demanded of attorneys in criminal cases."[6] Once deficient performance is demonstrated, the defendant must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[7] The Court made clear that it would not second guess defense tactical decisions. Tactical decisions "made after thorough investigation of law and facts relevant to plausible

[1] The series began in the April 1986 edition of *The Army Lawyer* and has presented an overview and discussions of conflicts of interest and pretrial duty to investigate. Later articles will discuss ineffective assistance of counsel during sentencing and post-trial representation.

[2] The author makes no claim at being a trial tactic expert. It is hoped, however, that this work will be useful to practicing defense counsel.

[3] 104 S. Ct. 2052 (1984); *see also* Hill v. Lockhart, 106 S. Ct. 366 (1985). For a further discussion of *Strickland,* see Schaefer, *Current Effective Assistance of Counsel Standards,* The Army Lawyer, June 1986, at 7.

[4] 104 S. Ct. at 2064.

[5] 397 U.S. 759 (1970).

[6] 104 S. Ct. at 2065.

[7] 104 S. Ct. at 2068

options are virtually unchallengeable."[8] The Court also stressed that appellate court after-the-fact scrutiny of defense counsel must be "highly deferential," because of a concern that "the distorting effects of hindsight" might cause a perfectly proper trial strategy to seem wrong when viewed months later. The Court went on to state that it did not favor "intrusive post-trial inquiry" into attorney performance for fear of dampening the fervor and independence of defense counsel.

In decisions predating *Strickland,* the Court of Military Appeals adopted essentially the same standard for cases involving claims of ineffective assistance.[9] Like the Supreme Court, the Court of Military Appeals "will not second-guess the strategic or tactical decisions made at trial by defense counsel."[10] In those instances, however, when a "defense counsel remains silent where there is no realistic strategic or tactical decision to make but to speak up, then the accused has been denied the exercise of the customary skill and knowledge which normally prevails within the range of competence demanded of attorneys in criminal cases."[11] The issue of whether the defense counsel's act or omission is ineffective assistance will generally turn on whether the alleged error was a reasoned tactical decision and whether it meets the prejudice requirement of *Strickland's* second prong.[12] The appellate courts recognize that there can be few hard and fast rules in this area.[13]

While the appellate courts will generally look to the entire course of representation in deciding whether the accused was provided effective assistance,[14] "[s]ometimes a single action can be sufficient to show ineffective representation."[15] This, coupled with the ambiguity of the standard,[16] leaves trial defense counsel unsure of what is and is not ineffective assistance. The purpose of the remainder of this article is to discuss acts or omissions that could be the basis for a claim of ineffective assistance, although a defendant would still have to show that the act or omission was outside a *wide* range of attorney competence and that the act or omission reasonably prejudiced the outcome.

Pretrial Preparation

Plea Negotiations

While there is not a wealth of cases in this area, the potential exists for prejudicial ineffective assistance to be present during pretrial negotiations. In *Hill v. Lockhart,*[17] the accused was misadvised by his defense counsel concerning potential parole eligibility during pretrial negotiations. While no prejudice was found, the Court recognized the potential for ineffective assistance during pretrial negotiation. It said that to satisfy the "prejudice" requirement, the accused would have to show a reasonable probability that, but for the Counsel's misadvice, he would not have pleaded guilty and would have insisted on going to trial. In *United States v. Gilliam,*[18] the defense counsel also misadvised the accused during pretrial negotiations. In *Gilliam,* the erroneous advice to the accused was that he would continue to be paid while in pretrial confinement, although his enlistment had expired. Based on this misadvice, the accused agreed to make restitution as part of a negotiated plea. As the accused was not paid, he was unable to make restitution and lost the benefit of his bargain. Prejudice was thus established and the misadvice constituted ineffective assistance.

Because the right to effective assistance of counsel attaches during the pretrial negotiation stage,[19] the argument can also be made that the failure of a defense counsel to attempt to negotiate a plea bargain could conceivably amount to ineffective assistance given the right fact situation. But, it will be difficult to meet the prejudice test. Counsel may be able to establish, based on past practice in the jurisdiction, that the accused could have negotiated a plea for a lesser included offense. Whether the difference in the sentence would meet the second *Strickland* prong remains open.

Failure to Seek Discovery

If a trial defense counsel failed to attempt to make discovery of the government case and was surprised by the government evidence, the issue of ineffective assistance would be present. If the defense counsel was then unable to respond or minimize the damage done by this evidence, as would have been possible had discovery been made, prejudice could then be established. It is difficult to conceive of a valid tactical reason for not making discovery

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[8] *Id.* at 2066.

[9] United States v. Rivas, 3 M.J. 282 (C.M.A. 1977); *see also* United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982).

[10] 3 M.J. at 289.

[11] *Id.*

[12] *See, e.g.,* United States v. Matthews, 16 M.J. 354 (C.M.A. 1983); United States v. Stephens, 21 M.J. 784 (A.C.M.R. 1986); United States v. Pegg, 16 M.J. 796 (C.G.C.M.R. 1983); United States v. Black, 16 M.J. 507 (A.F.C.M.R. 1983); United States v. Watson, 15 M.J. 784 (A.C.M.R. 1983); United States v. Reynolds, 15 M.J. 1021 (A.F.C.M.R. 1983); United States v. Combest, 14 M.J. 927 (A.C.M.R 1982); United States v. Jones, 14 M.J. 700 (N.M.C.M.R. 1982); United States v. Pack, 9 M.J. 752 (N.C.M.R. 1980); United States v. Brown, 6 M.J. 902 (A.C.M.R. 1979); United States v. Cooper, 5 M.J. 850 (A.C.M.R. 1978); United States v. Sifuentes, 5 M.J. 649 (A.F.C.M.R. 1978); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976); United States v. Harmack, 48 C.M.R. 809 (A.C.M.R. 1974).

[13] As the Supreme Court stated in Hill v. Lockhart, 106 S. Ct. at 370, "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."

[14] *See, e.g.,* United States v. Green, 2 M.J. 823 (A.C.M.R. 1976).

[15] United States v. Jefferson, 18 M.J. 1, 8 (C.M.A. 1982) (Everett, C.J., dissenting) (citing United States v. Walker, 3 C.M.A. 355, 12 C.M.R. 111 (1953)).

[16] "To tell lawyers . . . that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonable competent attorney' . . . is to tell them almost nothing." Strickland v. Washington 104 S. Ct. at 2075 (Marshall, J., dissenting).

[17] 106 S. Ct. 366 (1985).

[18] NMCM 85 2332 (N.M.C.M.R. 30 Dec 1985).

[19] *Hill v. Lockhart; United States v. Gilliam. See also* United States *ex. rel.* Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982).

requests in the normal case. One reason may be the broad disclosure requirements placed on the prosecution under the 1984 Manual or to avoid the reciprocal requirements of the Manual. A defense counsel who fails to make discovery attempts runs the risk of not meeting the first prong of *Strickland.*[20]

Failure to Investigate the Facts

The right to effective assistance "includes the right to the effective assistance of counsel by an attorney who carefully investigates the facts and circumstances which give rise to criminal charges, the marshalling of evidence favorable to the accused and the rendering of competent and informed advice to his client with respect to the evidence and available options."[21] It is difficult to imagine a situation where no investigation into the facts surrounding the case or into potential favorable evidence would be a sound trial tactical decision.[22] Even where a potential witness may prove unhelpful or more damaging than favorable, the counsel should interview the witness in order to have sufficient evidence to make that decision.[23]

Failure to Conduct Legal Research

A defense counsel who fails to research legal issues impacting on the case may not meet the competency standard of *Strickland.* Counsel cannot give informed advice concerning the client's available options if counsel is unaware or unsure of the law regarding the decision.[24]

Failure to Seek a Delay

In cases where a trial defense counsel has had insufficient time to prepare a complex case for trial, it could well be ineffective assistance not to seek a delay.[25] If a defense counsel determines that a motion for delay would not be a wise tactical decision, however, the appellate courts will not look behind such a decision if it is reasoned and informed.[26]

Failure to Seek a Change of Venue

The decision whether to seek a change of venue would almost always be a tactical decision made by counsel and as such not subject to attack on grounds of ineffective assistance. The potential for such a claim exists,[27] however, and defense counsel should ensure that he or she has made a reasoned decision in the appropriate case.

Rule for Courts-Martial 905(b)[28]

Defenses, objections, and requests which must be made before entering pleas are listed in R.C.M. 905(b). If one of the listed matters is not raised before pleas are entered, that failure will effect a waiver.[29] If a trial defense counsel fails to make a timely motion, objection, or request as required before pleas, and the accused is prejudiced by the waiver, the potential for a successful claim of ineffective assistance is present. For example, a defense counsel who fails to make a potentially successful motion for suppression of illegally obtained evidence or of an improperly obtained confession in a timely fashion has almost certainly been deficient as counsel unless there is a sound tactical basis for the decision.[30] Like the failure to negotiate a pretrial agreement, the impact on the reliability of the trial may be difficult to establish.

Rule for Courts-Martial 907(b)(2)

Grounds for a motion to dismiss which are waived by failure to object before final adjournment of the court-martial are listed in R.C.M. 907(b)(2). They include speedy trial, statute of limitations, and double jeopardy.

If a defense counsel does not make a motion for dismissal based upon a failure of the government to provide a speedy trial, when applicable, the accused could be found guilty of an offense which should have been dismissed. As failure to raise the issue at trial constitutes waiver, this may be the unreliable conviction the Court sought to prevent. It is difficult to imagine a tactical reason for not making a motion to dismiss. The appellate courts are likely, therefore, find such a failure to be ineffective assistance.[31]

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[20] *See, e.g.,* Morrison v. Kimmelman, 752 F.2d 918 (3d Cir. 1985); *but see* United States Johnson, 751 F.2d 291 (8 Cir. 1984).

[21] United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).

[22] House v. Balkcom, 725 F.2d 608 (11th Cir. 1984) (failure to investigate facts of case was "unconscionable"); United States v. Jefferson, 13 M.J. 1, 7 (C.M.A. 1982) (Everett, C.J., dissenting). *But see* Langston v. Wyrick, 698 F.2d 926 (8th Cir. 1982) (failure to interview government witness not ineffective assistance where defense counsel "correctly estimated" that there was no effective response to witness' testimony).

[23] United States v. Thompson, NMCM 84 8413 (N.M.C.M.R. 28 Jun. 1985); *but see* United States v. Kelly, 19 M.J. 946 (A.C.M.R. 1985).

[24] *See generally* McGee v. Crist, 739 F.2d 505 (10th Cir. 1984) (finding of no prejudice to accused resulting from failure to discover applicable statute).

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

[26] United States v. Sifuentes, 5 M.J. 649 (A.F.C.M.R. 1978).

[27] United States v. Huxhold, 20 M.J. 990 (N.M.C.M.R. 1985).

[28] Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 905(b) [hereinafter cited as R.C.M.].

[29] R.C.M. 905(e).

[30] Failure of defense counsel to make a pretrial motion regarding the voluntariness of a confession raises the question of whether appellant received effective assistance of counsel. United States v. Nakamura, 21 M.J. 741 (N.M.C.M.R. 1985); *but see* United States v. Yarborough, 18 M.J. 452 (C.M.A. 1984); United States v. Huxhold, 20 M.J. 990 (N.M.C.M.R. 1985); United States v. Pegg, 16 M.J. 796 (C.G.C.M.R. 1983); United States v. Jones, 14 M.J. 700 (N.M.C.M.R. 1982); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976). *See also* United States v. Mortimer, 20 M.J. 964 (A.C.M.R. 1985), where defense counsel failed, to the apparent prejudice of the accused, to make a pretrial motion for suppression of a confession. Inexplicably, the issue of ineffective assistance was not discussed.

[31] *See generally* United States v. Scarborough, 49 C.M.R. 902 (A.C.M.R. 1974).

In *United States v. Jackson,*[32] the Army Court of Military Review found the failure of a trial defense counsel to raise the statute of limitations[33] as a bar to further proceedings to be an instance of ineffective assistance. Given the fact that failure to raise the issue at trial generally constitutes waiver and given the remote likelihood of a sound tactical reason for waiving the bar to prosecution, a failure to raise the statute of limitations should be found to demonstrate ineffective assistance.

While there is an absence of military cases on point, failure of a trial defense counsel to raise double jeopardy as a bar, in the appropriate case, will not meet the competency standard. As with the statute of limitations and speedy trial, double jeopardy is waived by failure to raise the objection prior to adjournment. Therefore, unless the issue is not raised because of a tactical consideration, the failure would raise the issue of ineffective assistance.[34]

Voir Dire and Challenges

How and when to conduct voir dire of prospective court members is a tactical decision left to the experience of trial defense counsel. Notwithstanding this fact, the Court of Military Appeals has found that a total failure to conduct voir dire in a case involving a serious charge to be ineffective assistance of counsel.[35] Thus, the decision not to conduct voir dire should only be made upon an articulable basis and after discussion with the accused. Even if the failure to voir dire fell below the reasonable competency standard, it would be difficult for an accused to show a reasonable probability that the outcome would have been different had voir dire been conducted.

There appear to be no military cases that find the failure of a trial defense counsel to challenge a member to be ineffective assistance. To the contrary, the Army Court of Military Review has found the failure to strike an enlisted member out of the same unit as the accused to be an acceptable trial tactic.[36]

The Government Case

Military appellate courts have occasionally been asked to find a defense counsel's failure to object to prosecution evidence or testimony to be ineffective assistance. The claimed failure is routinely found to have been either not prejudicial[37] or part of a valid defense tactic.[38] Defense counsel should be aware, however, that the potential still remains.[39]

Appellants will often complain that their defense counsel failed to cross-examine a government witness or did not cross-examine extensively enough for the appellant's satisfaction. When and how to cross-examine is a tactical decision best left in the hands of defense counsel.[40] Like other tactical decisions, however, it must be a reasoned and informed decision.

Should a government witness invoke his or her right against self-incrimination during cross-examination into an area which is germane to the direct examination or which relates to his or her credibility, the defense remedy is to have the witness' testimony stricken from the record.[41] If that direct testimony is essential to the government's proof and the defense counsel fails to move to strike, this failure alone meets the first *Strickland* test and prejudice might be established.[42]

The Defense Case

Failure to Make an Opening Statement

While the decision not to make an opening statement is clearly a tactical decision that is appropriate in some cases, if that decision is the result of simple inaction or lack of preparation, it could be ineffective assistance.[43]

Conceding Guilt

While it is often a good trial tactic in a contested case to concede guilt to a lesser offense or of some uncharged offense of lesser criminality in hopes of avoiding a conviction of a more serious offense,[44] it would seem obvious that a concession of guilt to a serious or main charge is contrary to the responsibilities of defense counsel and a denial of the

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[32] 18 M.J. 753 (A.C.M.R. 1984). The court of review found the defense counsel's failure to raise the statute of limitations to be prejudicial despite the convening authority's disapproval of the finding of guilty. The prejudice existed because evidence offered in aggravation of the disapproved conviction would not have been admissible for sentencing purposes.

[33] Uniform Code of Military Justice art. 43, 10 U.S.C. § 843 (1982).

[34] *See generally* United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978) Gardner v. Griggs, 541 F.2d 881 (9th Cir. 1976).

[35] United States v. McMahan, 6 C.M.A. 709, 21 C.M.R. 31 (1956). The decision in *McMahan* that a failure to conduct voir dire was ineffective assistance is probably limited to the facts of the case. The defense counsel in *McMahan* was guilty of several omissions during the trial.

[36] United States v. Stephens, 21 M.J. 784 (A.C.M.R. 1986).

[37] United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984) (prejudice of improper prosecution testimony "neutralized" by effective cross-examination.)

[38] United States v. Huxhold, 20 M.J. 990 (N.M.C.R. 1985); United States v. Kurz, 20 M.J. 857 (C.G.C.M.R. 1985); United States v. Means, 20 M.J. 522 (A.C.M.R. 1985); United States v. Black, 16 M.J. 507 (A.F.C.M.R. 1983); United States v. Cooper, 5 M.J. 850 (A.C.M.R. 1978).

[39] *See* United States v. Howes, SPCM 20963 (A.C.M.R. 29 May 1986) (failure of trial defense counsel to object to government evidence concerning earlier enrollment in the Army's Alcohol and Drug Abuse Prevention and Control Program in violation of the confidentiality requirement of Dep't of Army, Re. No. 600–85 found to be ineffective assistance). *See also United States v.* Merriweather, 22 M.J. 657 (A.C.M.R. 1986) (Wold, S.J., dissenting) (failure to object to uncharged misconduct dealing with a pattern of child abuse under Military Rules of Evidence 403 and 404 constituted ineffective assistance).

[40] United States v. Jones, 14 M.J. 700 (N.M.C.M.R. 1982); United States v. Pack, 9 M.J. 752 (N.M.C.M.R. 1980); *see also* United States v. Dukes, 727 F.2d 34 (2d Cir. 1984).

[41] United States v. Colon-Atienza, 22 C.M.A. 399, 47 C.M.R. 336 (1973).

[42] United States v. Rivas, 3 M.J. 282 (C.M.A. 1977).

[43] United States v. McMahan, 6 C.M.A. 709, 21 C.M.R. 31 (C.M.A. 1956). As was mentioned *supra* note 35, the defense counsel in *McMahan* made many professional errors. *McMahan* cannot be read as precedent for the proposition that failure to make an opening statement alone is sufficient basis for a finding of ineffective assistance.

[44] United States v. Matthews, 16 M.J. 354 (C.M.A. 1983); United States v. Reynolds, 15 M.J. 1021 (A.F.C.M.R. 1983).

effective assistance of counsel.[45] The difficult question comes with cases in the gray area. Once again, the rule is that the decision to concede some degree of guilt must be informed, reasoned, and discussed with the client.

Failure to Raise Affirmative Defenses

In *United States v. Horne,*[46] trial defense counsel decided not to raise a possible entrapment defense after deciding that the defense would be frivolous. The Court of Military Appeals examined the facts upon which the defense counsel had made his decision and found the counsel's conclusion to indicate "at least such negligence as to constitute ineffective assistance."[47] *Horne* points out the necessity of making a thorough examination of the facts and law applicable to the case before deciding not to raise an affirmative defense. Of course, a failure to raise an affirmative defense because of inaction or lack of preparation will be indefensible and will be ineffective assistance of counsel if there is a reasonable probability of a different outcome had the defense been raised.[48]

Failure to Call Witnesses

The decision whether to call potential defense witnesses is a tactical one that must be made by counsel after thorough investigation and discussion with the client. A decision not to call a potential witness that appears unsound in light of "the factual setting which confronts the counsel"[49] and results in prejudice to the defense case will raise the issue of ineffective assistance.[50]

The decision whether to have the accused testify on the merits is a tactical decision subject to the same scrutiny. The risks of having the accused testify are different, however, and larger than those of having any other witness testify. These risks must also be factored into the decision whether to have the accused testify.[51]

Argument on the Merits

The decision whether to object to improper government argument is tactical and must be made by defense counsel based upon his or her strategy in the case.[52] As long as this tactical decision is sound in light of the situation confronting counsel, the decision will not later be condemned.

In *United States v. McMahan,*[53] the Court of Military Appeals was faced with a defense counsel who, among other failings, made no argument before the court deliberated on findings. The court found itself faced with the "difficult task" of "trying to find a reason why defending counsel failed to support the cause of his client to the fullest extent of his forensic ability."[54] The court found the closing argument to be as important to effective representation as preparing a case, consulting with the client, examining and cross-examining witnesses, and producing evidence. The court found that "[e]xcept in unusual circumstances, a failure to [make closing argument] is for all practical purposes an admission of guilt. Certainly, the presentation of a 'jury argument' is a virtual cornerstone of the universal right to assistance of counsel."[55] This case also raises the specter of a claim of ineffective assistance based upon a completely inadequate attempt at making a closing argument.[56]

Summary

The courts have, through the years, found that many different acts and omissions of defense counsel raise the issue of competency of counsel.[57] Counsel will not be held to be ineffective counsel unless both prongs of *Strickland* are satisfied. The rule seems clear, however, that a reasonably competent defense counsel who thoroughly prepares his or her case and zealously represents the client has little to fear. Trial defense counsel can make tactical decisions he or she believes appropriate without fear of the appellate courts' second-guessing.

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[45] United States v. Hampton, 16 C.M.A. 304, 36 C.M.R. 460 (1966); United States v. Walker, 3 C.M.A. 355, 12 C.M.R. 111 (1953).

[46] 9 C.M.A. 601, 26 C.M.R. 381 (1958).

[47] *Id.* at 385–86.

[48] *See* United States v. Babbitt, 22 M.J. 672 (A.C.M.R. 1986) (Failure to raise the issue of mental responsibility found to be a reasonable tactical decision. The trial defense counsel was of the opinion that the risk of the defense outweighed its potential for assistance. This decision was based upon the character of the case as a credibility contest between the accused and her victim and the opinion by "a distinguished forensic psychiatrist" that appellant's disorder made her a "pathological liar.").

[49] United States v. Sadler, 16 M.J. 982, 983 (A.C.M.R. 1983).

[50] *Id; see also* United States v. Jefferson, 13 M.J. 1, 7 (C.M.A. 1982) (Everett, C.J., dissenting); *but see* United States v. Babbitt, 22 M.J. 672 (A.C.M.R. 1986) (Failure to present corroboration witnesses found not to be ineffective assistance. Trial defense counsel's decision not to call the witnesses was a reasonable tactical judgment especially as the testimony, if presented, would have been cumulative.).

[51] United States v. Brown, 6 M.J. 902 (A.C.M.R. 1979) (decision not to have accused testify found to be a sound tactical decision). *See also* United States v. Babbitt, 22 M.J. 672 (A.C.M.R. 1986) (Appellant contended that her trial defense counsel committed an act of ineffective assistance by eliciting from her testimony that she was being blackmailed by her victim. The Army court noted that the appellant had told the trial defense counsel the story was true. Further, as the appellant had repeatedly told this story, it would doubtlessly come out on cross-examination. The trial defense counsel was therefore put to an election of either building his case around this story or foregoing her testimony).

[52] United States v. Black, 16 M.J. 507 (A.F.C.M.R. 1983); United States v. Cooper, 5 M.J. 850 (A.C.M.R. 1978).

[53] 6 C.M.A. 709, 21 C.M.R. 31 (1956).

[54] *Id.* at 720–21, 21 C.M.R. at 42–43.

[55] *Id.* at 721, 21 C.M.R. at 43. *See also* United States v. Sadler, 16 M.J. 982 (A.C.M.R. 1983).

[56] *But see* United States v. Harmack, 48 C.M.R 809 (A.C.M.R. 1974), where the defense counsel in closing argument on findings commented on the accused's criminal record and characterized him as a criminal who should receive a punitive discharge. This was held not to be ineffective assistance of counsel because the defense theory was that the accused was not qualified to be a soldier and never had become a soldier, thereby depriving the court-martial of jurisdiction.

[57] For a discussion of an unusual claim of ineffective assistance see United States v. Babbitt, 22 M.J. 672 (A.C.M.R. 1986). The appellant claimed that her defense counsel was laboring under a conflict of interest caused by the defense counsel becoming enamored with her. The Army court found no interest which was in conflict with the defense counsel's duty. In fact, the court found that the defense counsel's preparation and presentation "was, if anything, spurred on by his relationship with appellant." *Id.* at 678 The court noted that it was "not prepared to say that the Sixth Amendment and the Sixth Commandment are coextensive." *Id.* at 677 (footnote omitted).

Defense Strategies and Perspectives Concerning the Assimilative Crimes Act

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Introduction

The Uniform Code of Military Justice[1] acts as a criminal code for most common offenses.[2] Article 134, however, permits charging a soldier for violations of a state offense under the Assimilative Crimes Act[3] for crimes not specifically enumerated under the UCMJ.

The Act adopts state criminal law as federal criminal law, providing a comprehensive federal criminal code for military installations. There are thirteen common law crimes enumerated under federal law.[4] Other state crimes can be assimilated. Normally, the overwhelming majority of offenses committed are less serious in nature than the thirteen federal crimes enumerated, and so they, as will as more serious crimes such as carrying a concealed weapon and embezzlement, can be prosecuted under the Act.[5] Thus, the Act functions as a "gap filler" to provide the federal enclave with a complete criminal code.

The need for a federal law to act as a "gap filler" was first noticed in 1823 by Congressman James Buchanan.[6] Buchanan realized that the courts of the United States had no power to punish any act, no matter how serious its nature, unless Congress had declared it to be a crime and assigned a punishment.[7] Congress had made punishable very few crimes and all were of an aggravated nature.[8] Thus, a great number of acts to which a high degree of moral guilt attached and which were punishable as crimes at common law and by every state in the Union could be committed with impunity on the high seas and in any place where Congress had exclusive jurisdiction.[9]

In the original Act, sponsored in the House of Representatives by Daniel Webster in 1825, Congress expressly adopted the fundamental policy of conformity to those laws in force at the time of enactment.[10] There have been six major revisions of the Act, with the latest being in 1948.[11] The principal change in the Act in 1948 was the adoption of state criminal laws as they exist at *any* time when a crime is committed, and therefore reflects every addition, repeal or amendment of state law.[12]

Can the State Law Be Assimilated?

The Supreme Court in *Johnson v. Yellow Cab Transit Company*[13] discussed what portions of a state criminal law are actually adopted and made federal law under the provisions of the Act. The initial framework for analysis was provided by the Court in the form of three questions about particular state laws which must be answered before that law may be considered assimilated.[14]

1. Is the law not in conflict with federal policies as expressed by other acts of Congress or by valid administrative regulations which have the force of law?

2. Is the statute or law so designed that it can be adopted under the act?

3. Does such law make penal the transaction alleged to have taken place?

The first question is one of preemption.[15] Certain crimes have been specifically prohibited by Congress and therefore cannot be charged under the Act.[16] If an accused is charged with one of these "preempted" crimes, a motion for appropriate relief should be filed by defense counsel citing the Supreme Court case of *Williams v. United States*[17] for the proposition that a state criminal law denouncing the same or a similar offense cannot be assimilated.

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[1] 10 U.S.C. §§ 801–940 (1982) [hereinafter cited as UCMJ].

[2] Dep't of Army, Pamphlet No. 27–21, Legal Services—Military Administrative Law, para. 2–19c at 65 (1 Oct. 1985) [hereinafter cited as DA–Pam. 27–21]; and 21 Am. Jur. 2d *Federal Assimilative Crimes Act* § 356 (1964).

[3] 18 U.S.C. § 13 (1982) [hereinafter cited as the Act].

[4] The thirteen enumerated offenses are: arson (18 U.S.C. § 81 (1982)), assault (18 U.S.C. § 113 (1982)), maiming (18 U.S.C. § 114 (1982)), theft (18 U.S.C. § 661 (1982)), receiving stolen property (18 U.S.C. § 662 (1982)), murder (18 U.S.C. § 1111 (1982)), manslaughter (18 U.S.C. § 1112 (1982)), attempt to commit murder or manslaughter (18 U.S.C. § 1113 (1982)), kidnapping (18 U.S.C. § 1201 (1982)), destruction of property (18 U.S.C. § 1363 (1982)), rape (18 U.S.C. § 2031 (1982)), carnal knowledge (18 U.S.C. § 2032 (1982)), and robbery (18 U.S.C. § 2111 (1982)).

[5] DA–Pam. 27–21, *supra* note 2, para. 2–19c at 65 n.928.

[6] Annals of Congress, 17th Cong. 2d Sess. (1822, 1823) 929.

[7] *The Assimilative Crimes Act,* A.F. JAG Bull., Sept. 1961, at 21, 22.

[8] *Id.*

[9] *Id.*

[10] Act of March 3, 1825, 4 Stat. 115, c. 65, and 1 Gales and Seaton, Register of Debates in Congress, 152–58, 335–41, 348–55, 363–65.

[11] 18 U.S.C. § 13.

[12] DA–Pam. 27–21, *supra* note 2. The constitutionality of the 1948 revision of the Act was upheld in the Supreme Court case of United States v. Sharpnack, 355 U.S. 286 (1958), and further tested and upheld by the Court of Military Appeals in United States v. Rowe, 13 C.M.A. 302, 32 C.M.R. 302 (1962).

[13] 321 U.S. 383 (1944).

[14] Comment, *Assimilative Crimes Act,* 2 Mil. L. Rev. 107 (1958).

[15] In United States v. Wright, 5 M.J. 106 (C.M.A. 1978), a two part test for federal preemption was established. First, did Congress intend to limit prosecution within a particular area or field to offenses defined in specific articles of the UCMJ? Second, is the offense charged a residuum of elements of a specific offense and asserted to be a violation of Art. 133 or 134? If the answer is yes to either question, preemption applies.

[16] *See supra* note 4.

[17] 327 U.S. 711 (1946).

Another aspect of preemption exists when the state law conflicts with federal law. Classic examples of state criminal laws contrary to federal law and therefore not assimilatable are found in *Nash v. Air Terminal Services Inc.*[18] and *Air Terminal Services Inc. v. Rentzel.*[19] In *Nash*, the Court held that the Virginia state segregation laws were adopted at Washington National Airport in the absence of any expression of federal policy on the subject.[20] Subsequently, the Federal Civil Aeronautics Authority issued regulations prohibiting segregation in federal airports. After the promulgation of these regulations, the same court that decided *Nash* held in *Rentzel* that the Virginia law could no longer be assimilated.[21]

The second question under the *Yellow Cab* analysis is whether the law or statute is so designed that it can be adopted under the Act. Two recent Court of Military Appeals opinions have shed further light on this question. In *United States v. Irvin,*[22] Gloria Irvin, an airman who resided at Lowry Air Force Base with her airman husband, adopted a two year old child. Two months later the child was dead, and Gloria Irvin was charged with murder, assault, and child abuse. The child abuse was alleged to contravene the Colorado state statutes as assimilated by the Act, and so chargeable under of Article 134, UCMJ. Irvin was found guilty involuntary manslaughter by exceptions and substitutions and otherwise found to be guilty as charged. The Court of Military Appeals granted review to determine whether the applicability of the Act could be established without evidence or judicial notice either at trial or on appeal.[23] The court held that the applicability of the Act could not be established without evidence of exclusive concurrent federal jurisdiction at trial or by judicial notice on appeal; furthermore, the government's failure to establish exclusive or concurrent federal jurisdiction could not be rectified by a *DuBay*[24] hearing.[25] The court further held that, even if the government proved at trial that exclusive or concurrent federal jurisdiction existed over the place where the child abuse occurred, the accused could not be convicted pursuant to the Act where the child abuse consisted of only assaults, *i.e.,* an offense already prohibited by Congress.[26]

There are several noteworthy factors in *Irvin. Irvin* makes it clear that defense counsel should know the jurisdictional status of the situs of the crime. Defense counsel must ensure that the situs is an area under the exclusive or concurrent jurisdiction of the United States and that at the creation of such jurisdiction the state not only ceded jurisdiction, but also that the United States accepted cession.[27]

The second point which defense counsel can learn from *Irvin* is that the preemption doctrine found in *Yellow Cab* is still valid. The Act's history shows that it was intended "to cover crimes on which Congress had not legislated and did not suggest that the Act was to enlarge or otherwise amend definitions of crimes already contained in the Federal Code."[28] In *Irvin,* the Court of Military Appeals recognized the vitality of the Supreme Court case *Williams v. United States*[29] regarding federal preemption and its application to cases tried by court-martial. The Court of Military Appeals further clarified the preemption doctrine when it held that, because the child abuse consisted of assaults, the Act could not be utilized to create new federal offenses or to enlarge the punishments for them. In *Irvin,* the question was not whether the Colorado statute could be adopted under the Act, but whether the facts allowed its adoption because of the federal preemption doctrine. Defense counsel must be vigilant in presenting motions on preemption and the inability of state law's adoption because of the unique facts of each case.

In another recent Court of Military Appeals case, *United States v. Kline,*[30] the Court dealt with the Act in a case involving a guilty plea. The accused in *Kline* was driving the wrong way on a one way street at Ft. Meade, Maryland, and was observed by a military policeman who initiated pursuit. Kline attempted to elude the military policeman and a chase ensued. At an intersection, Kline's car skidded and hit a sign and the curb. The impact injured his passenger and Kline fled the scene.

At his special court-martial, Kline pled guilty to reckless driving, in violation of Article III of the UCMJ, wrongfully leaving the scene of the accident under Article 134 of the UCMJ, and eluding a police officer in violation of the Maryland Code as assimilated by the Act.[31] Defense counsel argued that the offense charged under the Act, fleeing a police officer, was preempted by Article 95, UCMJ, which prohibits resisting apprehension.[32] The Court of Military Appeals denied review of that issue but specified an issue concerning whether the military policeman who pursued Kline qualified as a "police officer" for purposes of prosecution under the Maryland Vehicle Law, as incorporated by

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[18] 85 F. Supp. 545 (E.D. Va. 1949)

[19] 81 F. Supp. 611 (E.D. Va. 1949).

[20] DA-Pam. 27-21, *supra* note 2, para 2-19c at 67.

[21] *Id.*

[22] 21 M.J. 184 (C.M.A. 1986), *sentence aff'd upon further review,* 22 M.J. 559 (A.F.C.M.R. 1986).

[23] *Id.* at 185.

[24] 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[25] 21 M.J. at 187.

[26] *Id.* at 189.

[27] United States v. Williams, 17 M.J. 207, 212 (C.M.A. 1984). This case should not be confused with the Supreme Court case of Williams v. United States, 321 U.S. 383 (1944).

[28] *Irvin,* 21 M.J. at 188. The Act's gapfilling function also is discussed in United States v. Picotte, 12 C.M.A. 196, 30 C.M.R. 196 (1961).

[29] 327 U.S. 711 (1946).

[30] 21 M.J. 366 (C.M.A. 1986).

[31] *Id.* at 367.

[32] *Id.*

the Act, a question the court answered in the affirmative.[33] The court noted an interesting point in *dicta*, however. At the trial in *Kline*, trial counsel represented that there was exclusive federal jurisdiction at the situs and trial defense counsel concurred.[34] While this was all that was necessary to prove jurisdiction under the facts in *Kline*, the court indicated that if Kline had pled not guilty, this colloquy between trial counsel and trial defense counsel might have been inadequate to sustain the government's burden of establishing federal jurisdiction over the situs of the crime.[35]

This *dicta* highlights a trap for unwary trial defense counsel. Where the situs of the crime is in question, defense counsel should be ready to make the government prove the federal jurisdiction over the situs of the crime. A possible strategy in such a case would be to have the client plead guilty to a crime charged under the Act but preserve the issue for appellate review of federal jurisdiction pursuant to the Act by means of Rule for Courts-Martial 910(a)(2).[36]

Finally, the third question *Yellow Cab* presents is whether a law to be assimilated is criminal or penal in nature. An unreported decision of the Army Court of Military Review illustrates this aspect of the Act. In *United States v. Cosby*,[37] Sergeant Cosby was charged with usury in violation of state statutes as assimilated by the Act. The statute in question, however, consisted of Uniform Commercial Code provisions[38] which had no *criminal* sanctions and therefore could not be assimilated.

There are other factors to be considered when litigating under the Act. First, is the state statute being assimilated constitutional under its own state constitution? To answer this question, defense counsel must carefully research current state law to include recent state supreme court opinions, attorney general opinions, and applicable state regulations. In civil cases, the rule is that federal courts are bound by a state court's interpretation.[39] In other words, in a civil case, the federal courts may even be bound by a state trial court's interpretation of state law.[40] Unfortunately, the rule in criminal cases in federal courts is different. In *Yellow Cab*, Justice Black, speaking for the Court, stated

> that broad question, though some parts of it involve a consideration of the proper scope of the state law adopted by the federal government, is in the final analysis a question of the correct interpretation of a federal criminal statute, and therefore an issue upon which federal courts are not bound by the rulings of state courts.[41]

Even though there may be an adverse federal ruling on an issue, defense counsel should not completely despair if they have found an advantageous *state* ruling because, where state courts have been called upon to rule on constitutional or other federal matters, the United States courts have frequently stated that, while the decisions of state courts are not conclusive, they are entitled to great weight.[42]

Second, do state defenses to statutory and common law crimes which would be assimilated apply? Here a strong argument can be made by defense counsel for a state defense to a crime to be applied as a matter of military due process.[43] Defense counsel should argue as a matter of fundamental fairness that these defenses apply as at least one federal case holds that state common law crimes are assimilated.[44]

Third, do state statute of limitations and sentencing limitations apply to the Act? The general federal statute of limitations, and not that of the state, generally applies because Congress, pursuant to its power to prescribe procedure for federal criminal cases, has determined what constitutes stale evidence or harassment of defendants.[45] Although the Act makes punishable acts that "would be punishable" within the state, thus seeming to require application of the state statute of limitations, the application of the federal statute has been upheld on the basis that the time within which prosecution may be brought is not an element of the offense.[46] In terms of sentencing provisions, the general rule for punishment provisions of laws assimilated by the Act is that the state penalty provision applies.[47] An important exception, however, is in the area of inchoate or attempted crimes. The punishment provided by state law for an attempt should not be applied when it is greater than the punishment provided by federal law for the completed act, notwithstanding the fact that the Act on its face seems to require the adoption of the full state penalty.[48] The maximum imprisonment for the completed federal crime must be the upper limit for the "attempted"

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[33] *Id.*

[34] *Id.*

[35] *Id.* The case of United States v. Perry, 12 M.J. 112 (C.M.A. 1981) (summary disposition), gave a different result from *Kline* in a guilty plea situation. In *Perry*, there was neither stipulation nor effort to gain judicial notice to establish federal jurisdiction as to the Air Force base where the offense occurred. In receiving the guilty plea, the military judge did not ask appellant or his counsel about their understanding as to the court-martial's jurisdiction over the assimilated state crime.

[36] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910(a)(2). While it is elementary that jurisdiction can never be waived, such a strategy would alert appellate counsel of this issue.

[37] CM 446376 (A.C.M.R. 23 May 1985). This decision is incorrectly dated as 23 May 1984.

[38] Okla. Stat. Ann. tit. 14A §§ 3–605 and 5–107(2) (West 1984).

[39] Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

[40] Fidelity Union Trust Company v. Field, 311 U.S. 585 (1940).

[41] 321 U.S. 383, 391 (1944).

[42] Puerto Rico v. Shell Co., 302 U.S. 253, 266 (1937).

[43] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982).

[44] United States v. Wright, 28 F. Cas. 791 No. 16,774 (Mass. 1871).

[45] Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 697 (1957) [hereinafter cited as Note].

[46] United States v. Andem, 158 Fed. 996 (D.N.J. 1908).

[47] The Act provides that one who violates an assimilated state law "shall be guilty of a like offense and subject to a like punishment," 18 U.S.C. § 13 (1982).

[48] Note, *supra* note 52, at 692.

state crime which is assimilated, because it would be anomalous to reward the successful criminal with a less severe penalty.[49]

Fourth, does the possibility of double prosecution arise either because both state and federal governments have concurrent jurisdiction or because a criminal act has contacts with both state and federal jurisdictional areas. Double prosecution in such circumstances has been held to be constitutional.[50] In *United States v. Mason*,[51] however, the Supreme Court held that Congress, in passing a criminal statute which, like the Act adopted the state law, did not intend to permit the prosecution of a defendant who had been acquitted by the state.[52] The Court in *Mason* further held that the statute in question only intended to provide prosecution of a defendant who had not yet been tried. The *Mason* decision then may provide defense counsel with grounds for a motion that, at least in cases which the criminal conduct occurs on an enclave over which the federal and state governments exercise concurrent jurisdiction, the Act also prohibits a federal prosecution subsequent to prosecution in a state court.[53]

Finally, what about multiplicity of assimilated crimes and other crimes? Recent case law has been replete with the problem of multiple charges, with *United States v. Baker*[54] being the leading case. When litigating the Act, defense counsel should not lose sight of the state criminal statute in the possible forest of multiple charges. A recent case from the Army Court of Military Review case illustrates the multiplicity issue.[55] The accused had destroyed his motorcycle with an intent to defraud his insurance carrier. The assimilated state statute was one designed to prevent fraud on insurance companies. The accused was also charged with larceny of the monies from the insurance company. On appeal, the accused argued the unitary nature of fraud. The Army court affirmed the findings and sentence in an opinion which did not discuss the issue.[56] These same principles, applied to the proper case on a trial level, however, could very possibly gain a client meaningful relief.

Developing Area of Assimilative Crimes

The background against which most defense counsel can expect to see the Act litigated lies in offenses involving driving while intoxicated (DWI). The definitive federal case dealing with a federal court's power to try a DWI offense under an assimilated state law is *United States v. Walker*[57] *Walker* held that a Virginia state statute could be assimilated and become federal law under the Act for the offense of drunk driving on a military reservation, thus ruling that a federal district court had jurisdiction to try a member of the armed forces for drunk driving.[58] Of course, this ruling presupposes that the crime is committed in an area of exclusive federal jurisdiction or concurrent jurisdiction. If the crime is committed in an area of exclusive state jurisdiction, the Act would not apply. While this proposition is self-evident, it is nonetheless worth careful investigation in each individual case in view of the mobility involved in DWI offenses.

Conclusion

In summary, while the interplay between the federal criminal code, the Act, the UCMJ, and the state code may be a complicated one, it provides scope for creative litigation by trial defense counsel. There are enough pitfalls in a prosecution under the Act that there is a significant possibility that the prepared defense counsel can find opportunities for relief.

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[49] *Id.*

[50] *See* United States v. Lanza, 260 U.S. 377 (1922), which upheld a federal prosecution for violation of the National Prohibition Act subsequent to a state conviction for a similar violation on the ground that prosecution for the same conduct did not violate constitutional guarantees. *See* also Note, *supra* note 52, at 697.

[51] 213 U.S. 115 (1909).

[52] *Id.*

[53] Note, *supra* note 52, at 697.

[54] 14 M.J. 361, 366 (C.M.A. 1983).

[55] United States v. Thompson, CM 447107 (A.C.M.R. 29 Oct. 1985).

[56] *Id.*

[57] 552 F.2d 566 (4th Cir. 1977).

[58] *Id.* A similar ruling was reached in United States v. Smith, No. 85-1770 (1st Cir. June 27, 1986).

Service Connection—Down But Not Out

It appears that, in *United States v. Solorio,* the Court of Military Appeals has drastically altered the standard for "service connection" in determining the subject matter jurisdiction over off-post offenses.[1] Based on recent developments, however, it would be premature to discard completely the old standard as formulated by the United States Supreme Court in *O'Callahan v. Parker*[2] and *Relford v. Commandant.*[3]

The first point to note is that the Supreme Court has granted review in *Solorio,* which leaves open the decision's future as precedent.

Second, there are limitations on *Solorio's* reach. The Air Force Court of Military Review held in *United States v. Bolser*[4] that no subject matter jurisdiction existed over indecent liberties committed off-post by an accused against his dependent step-daughter. The court applied both *O'Callahan* and *Relford* as well as *Schlesinger v. Councilman,*[5] in addition to *Solorio.* In *Bolser,* the court held that the military had no greater interest in the case than its civilian counterparts; that civilian courts were available despite letters to the contrary from officials of the respective jurisdictions involved; that the indecent liberties had no impact on the discipline and effectiveness of the military; that, absent unusual circumstances, social scorn or fear of a crime does little to determine service connection; and that, in the absence of significant impact on the military, jurisdiction cannot attach simply because the military retained jurisdiction over other unrelated offenses committed by the accused.[6] The court stated that no bright line rule exists for determining subject matter jurisdiction in cases involving sexual offenses.[7] The Court also noted that the military justice system has not yet defined the outer limits of subject matter jurisdiction.[8]

In a separate post-*Solorio* opinion, *United States v. Barideaux,*[9] the Court of Military Appeals utilized *O'Callahan* and *Relford* to hold that subject matter jurisdiction was lacking over an off-post drug distribution case where the accused was on terminal leave, the purchase was arranged by a civilian, and the marijuana was distributed to a Criminal Investigation Division agent who appeared to be a civilian. This reliance on *O'Callahan* and *Relford* illustrates the continued vitality of the old "service connection" standard in spite of the decision in *Solorio.*

In future subject-matter jurisdiction disputes, defense counsel should continue citing *O'Callahan* and *Relford* and emphasize the limitations on *Solorio* that have been recognized. As in *Bolser,* counsel should attempt to distinguish *Solorio* upon its facts and argue that the decision is fact specific. In cases involving off-post sexual crimes, counsel should certainly argue that *Solorio* does not establish a bright line rule. Captain John J. Ryan.

Army Court Meets a Regulation It Does Not Like

If your client is charged with violating a regulation that seems extreme or unreasonable, but you are not sure how to attack it, you can quickly become an expert on the law of invalid regulations by perusing *United States v. Green,*[10] a recent Army Court of Military Review opinion. *Green* is the Army court's first published opinion to overturn a local regulation, and the court exhaustively analyzed the relevant case law. The client, who arrived at formation in a drunken stupor with a glass of liquor in his hand, was charged with violating a Fort Stewart regulation that prohibited soldiers from "[having any alcohol in their system or on their breath during duty hours]."[11] The court first noted that, subject only to the Constitution, acts of Congress, and lawful orders of superiors, commanders have near plenary power over all activities which relate to their soldiers' "morale, discipline and usefulness."[12] However, "[o]rders and directives which only tangentially further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right are subject to close judicial scrutiny and may be invalid and unenforceable."[13] The court was offended by two features of the challenged regulation: the absolute prohibition against alcohol in one's "system," and the similar proscription of alcohol on one's breath.[14] The first provision not only

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[1] United States v. Solorio, 21 M.J. 251 (C.M.A. 1986), *cert. granted,* 54 U.S.L.W. 3823 (U.S. 16 June 1986) (No. 85-1581). For a discussion of *Solorio, see* Curry, *O'Callahan Revisited: Jurisdiction over Off-Post Offenses,* The Army Lawyer, May 1986, at 38.

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

[3] 401 U.S. 355 (1971).

[4] 22 M.J. 564 (A.F.C.M.R. 1986).

[5] 420 U.S. 738 (1975).

[6] 22 M.J. at 568–70.

[7] *Id.* at 570.

[8] *Id.*

[9] 22 M.J. 60 (C.M.A. 1986).

[10] SPCM 20199 (A.C.M.R. 30 May 1986). *See also* United States v. Mason, SPCM 18559 (A.C.M.R. 30 May 1986).

[11] *Id.*, slip op. at 5.

[12] *Id.*, slip op. at 6.

[13] *Id.*, slip op. at 7 (citations omitted).

[14] *Id.*, slip op. at 11–13. The court in Green distinguished the Fort Stewart regulation in question from Dep't of Army, Reg. No. 600–85, Personnel-General-Alcohol and Drug Abuse Prevention and Control Program, para. 3–20 (1 Dec. 1981) (I03) 29 Apr. 1983). AR 600–85 contains a threshold blood-alcohol level of .05 percent, below which impairment and intoxication are subject to traditional modes of pleading and proof. The Fort Stewart regulation made criminally punishable the fact that alcohol was in the "system" of a soldier, irrespective of whether the quantity involved was so small that its physical presence could scarcely be detected. *Id.* at 11.

swept so broadly as to encompass all sorts of innocent conduct, *e.g.*, using mouthwash, it provided a much harsher penalty for having any miniscule amount of alcohol in one's body than Congress saw fit to impose for being drunk on duty or drunk in quarters. Further, the regulation had none of the due-process safeguards found in Department of the Army regulations.[15] Moreover, the court pointed out because alcohol is virtually odorless, an "alcohol-on-the-breath" test is essentially standardless.[16] Thus, if a local regulation imposes absolute restrictions, provides harsher punishments than analogous offenses, has no scienter requirement, and is based on faulty factual assumptions, it may well be held to be "essentially standardless, arbitrary, and unreasonable, and [serving] no corresponding military need not better satisfied by statutes and regulations of greater legal dignity.[17] Captain David L. Carrier.

An "ARF" Is More Than A Bark in The Dark—Post-Trial Responsibilities of Trial Defense Counsel in Its Preparation

In reviewing Appellate Representation Forms (ARFs) which are forwarded with the record of trial, a number of recurring deficiencies have been noted. Many ARFs contain no specific reference to errors at trial. Certainly, defense counsel are not encouraged to note spurious issues nor to mislead their clients into believing that minor errors will result in significant relief. But when the ARF provides neither space for listing perceived errors nor explains the right to list those errors, it is difficult to verify that counsel have adequately performed all of their post-trial responsibilities.[18] Similarly, some ARFs contain standard printing that simply states: "Any assigned errors are contained in the post-trial submissions." The absence of any post-trial submissions leaves considerable doubt as to whether the accused's personally asserted errors have actually been communicated by counsel. Even when submissions have been made by trial defense counsel (*i.e.*, clemency petitions), the question may remain as to whether issues specifically asserted by the accused have been accurately reported.

The ARF is often the only means that the accused will use to communicate his or her personal assignment of errors. Errors specified by the accused must be presented to the military appellate courts.[19] Moreover, the ARF notice of errors permits appellate defense counsel to place special emphasis on researching and reviewing issues that are important to the appellant.

Another administrative problem that creates further time delays in representing the individual soldier is the inability to contact that soldier. Incomplete or missing mailing addresses on the ARF often mean that the appellate defense attorney has no practical way of communicating with his or her client. This is especially true where minimal confinement is received by soldiers given punitive discharges. By the time the convening authority acts and the record of trial arrives at Defense Appellate Division, confinement has been served and the appellant is on excess leave. Although the appellant has the obligation to keep the staff judge advocate (SJA) notified of his or her current location, it may be several weeks before the defense appellate attorney can obtain this information (especially where the SJA is located overseas). Every ARF should have a forwarding or permanent address (and a telephone number, if possible) clearly indicating where mail can be received. Trial defense counsel's attention to these details can assure that the accused receives the best possible appellate representation. Major Marion E. Winter.

What Can an Accused Submit on Appeal?

In *United States v. Williams*,[20] the Army Court of Military Review addressed the issue of the appellate defense counsel's responsibility to raise matters for consideration by the court under the rule adopted in *United States v. Grostefon*.[21] Appellate defense counsel in *Williams*, at the insistence of the appellant,[22] sought to introduce Defense Exhibit A, a thirty page typed, sworn document personally prepared by the appellant.[23] The Army court had previously ordered appellate defense counsel to redact portions of the exhibit leaving "only those portions relevant to appellant's assignment of error,"[24] which attacked effectiveness of counsel and sentence appropriateness. Defense Exhibit A, however, contained a wide range of extraneous matter, including a description of the armor-piercing capabilities of various anti-tank weapons, the facts surrounding the accused's adoption of his step-children, and the fact that he had videotapes of all of Muhammed Ali and Sugar Ray Leonard fights.[25] The court held that these portions of the exhibit were irrelevant to the assigned errors and therefore inadmissible. Citing the Court of Military Appeals decision in *Grostefon* and its progeny, the court noted that counsel had made no distinction between submitting evidence to the court and raising appellate issues. *Grostefon* contained no commands about what *evidence* a court may consider. Thus the fact that a counsel must identify all issues urged by the client does not mean that the counsel must present all evidence urged by the client.[26] Accordingly, the court ordered

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[15] *Id.*, slip op. at 10 n.7.

[16] *Id.*, slip op. at 12–13.

[17] *Id.*, slip op. at 13.

[18] *See* United States v. Palenius, 2 M.J. 86 (C.M.A. 1977), and Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 502(d)(6) discussion.

[19] United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[20] United States v. Williams, 22 M.J. 584 (A.C.M.R. 1986).

[21] 12 M.J. 431 (C.M.A. 1982).

[22] 22 M.J. at 586.

[23] *Id.* at 585.

[24] *Id.* at 586.

[25] *Id.*

[26] *Id.* at 588.

appellate defense counsel to submit only those portions of Defense Exhibit A which, in his professional judgment, he could make a colorable claim of relevance and admissibility, and which, in counsel's opinion, best advanced the interests of his client. The tension between the attorney's responsibility to the court and to the client becomes especially severe when, as in this case, the client flatly refuses to permit counsel to redact portions of Defense Exhibit A as directed by the court.

One potential avenue that can be pursued to put matters before the appellate court lies with trial defense counsel. If an accused has matters of concern to him, he, either on his own behalf or through counsel, can submit those matters to the convening authority in a timely fashion[27] and they will then become part of the Allied Papers in the Record of Trial and available for presentation to the appellate court. While this mechanism will not work for all matters, it is available for the presentation of issues within, at a minimum, the first month of the trial,[28] and can potentially be used to a far greater extent. Captain Clayton Aarons.

Government Peremptory Challenges

The Supreme Court recently modified *Swain v. Alabama,*[29] which held that the presumption of legitimacy in the exercise of peremptory challenges against black veniremen could be overcome by a showing that, *over time,* the prosecution had consistently excluded blacks. In *Batson v. Kentucky,*[30] the Court ruled that the presumption of legitimacy could be overcome and a prima facie case of purposeful discrimination made *solely* on evidence concerning the prosecutor's use of peremptory challenges at *this* defendant's trial. At Batson's trial, his defense counsel moved to discharge the jury after all four black veniremen were peremptorily challenged by the prosecutor. The trial judge denied the motion, but the Court reversed and remanded, creating a test for determining a prima facie case of racially motivated government peremptories.

> To establish such a case, the defendant must first show that he is a member of a cognizable racial group. . . . and that the prosecutor has exercised peremptory challenges to remove the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate. . . ." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.[31]

The first two prongs of the test are easy; the challenge will be meeting the third prong's standard. The Court gives two examples of "relevant circumstances." The first, a pattern of strikes against black veniremen in a particular case, is highly unlikely in courts-martial. Because the government has only one peremptory challenge, a "pattern," such as in the *Batson* four, cannot be shown. Also, if any blacks remain on the panel or if the defense uses its peremptory challenge against a black member, the issue would appear to be moot. The second example provides some guidance, however. "[T]he prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory practice."[32] Once the defendant meets the test and makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors.[33]

When a trial counsel peremptorily challenges a member of the accused's race, and there was nothing elicited during voir dire to indicate why, it is suggested that defense counsel raise *Batson* and articulate all relevant circumstances that would shift the burden to the trial counsel, forcing an explanation of the challenge. If the trial judge rules that the burden did not shift to the government, the issue is preserved for appellate review. Captain Peter M. Cardillo.

A Matter of Conscience

The trial defense counsel knows that the client intends to lie in court. Counsel attempts to withdraw from the case pursuant to a pretrial motion. The motion is denied by the military judge who later sits in the not-guilty plea case as the sole trier of fact. The trial judge listens to the accused testify in narrative form, notes that the accused's testimony is not argued on findings, and finds the soldier guilty. The above situation was presented in *United States v. Elzy,*[34] a recent case before the Army Court of Military Review.

The Army court held that under *Nix v. Whiteside,*[35] *Strickland v. Washington,*[36] and the proposed ABA Model Rules of Professional Conduct,[37] trial defense counsel's actions did not constitute ineffective assistance of counsel. The court said that defense counsel may refuse to participate in the submission of evidence to the court when counsel reasonably believes the client's testimony will be false.[38]

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[27] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105. While there are limits on matters that can be submitted, the rule does appear to be broader than those matters which can be submitted under the *Williams* rule.

[28] *Id.*

[29] 380 U.S. 202 (1965).

[30] 106 S. Ct. 1712 (1986).

[31] 106 S. Ct. at 1723 (citations omitted).

[32] *Id.*

[33] *Id.*

[34] CM 445163 (A.C.M.R. 22 May 1986).

[35] 106 S. Ct. 988 (1986).

[36] 466 U.S. 668 (1984).

[37] Model Rules of Professional Conduct (Proposed Final Draft 1981).

[38] *Elzy,* slip. op. at 2.

The issue to which the court devoted most of its opinion was whether the trial judge erred by continuing to serve as the finder of fact under the circumstances of the *Elzy* case. First, the court rejected the Ninth Circuit's leading decision of *Lowery v. Cardwell*[39] that distinguished passive non-participation by the defense from the clear statements or actions of defense counsel, with only the latter disqualifying the judge. The *Elzy* court stated that "(i)f a reasonable judge or juror can be expected to draw the conclusion that a counsel disbelieves his client, then the result should be the same whether the message is delivered directly or by implication."[40]

Further, *Elzy*, gives the trial judge considerable discretion to determine the impact on the fact-finder of actions by the defense counsel which may communicate a comment on the accused's credibility. The Army court relied on the military judge to disregard counsel's beliefs concerning client credibility, or, in the alternative, to resort to mistrial, recusal, or a trial with members.[41] Thus, even if defense counsel states to the judge a belief the client is lying, the judge is not required to abort a judge-alone trial.

While rejecting *Lowery*, *Elzy* nevertheless provides assurance that another recent Army court case, *United States v. Roberts*,[42] is still good law.[43] Under the particular facts in *Roberts*, a judge may not continue to sit as the trier of fact. In *Roberts*, the trial defense counsel had explained "in compelling terms" why he believed the accused intended to lie under oath. Defense counsel presented a written motion stating that he believed his client was guilty and that his client's testimony would be different from what the client had originally told him when discussing the possibility of a guilty plea. In addition, the accused himself had informed the judge that, if he testified, "most" of his testimony would not be false.[44] In *Roberts*, then, the trial judge was faced with blatantly obvious indicators, not just from trial defense counsel, but also from the accused, that the accused surely intended to commit perjury.[45]

Elzy did not change the standard of review for a military judge's decision to sit as the fact-finder from "clear abuse of discretion."[46] What *Elzy* leaves us with, however, is the fact that military judges have broad options when faced with almost certain knowledge of perjury on the part of the accused. Unless trial defense counsel relates to the judge "in compelling terms" just what the accused's false testimony will concern, or the accused tells the judge he will not be telling the complete truth, the latter an unlikely scenario, the trial judge has no obligation to withdraw as the trier of fact unless his or her conscience dictates that he or she must take action to rectify the situation. First Lieutenant Lida A. Stout.

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[39] 575 F.2d 727 (9th Cir. 1978). In *Lowery*, the defense counsel made no statement on the record of his belief that his client was lying. The court, nevertheless, held that action by the defense counsel inevitably leading the trial judge to an awareness of defense counsel's belief in his client's deception requires removal of the judge as the fact-finder. In *Lowery*, The defense counsel immediately ceased questioning his client when she denied shooting the murder victim, requested a recess, and in a sworn statement in chambers made a motion to withdraw, refusing to state his reasons. The Ninth Circuit held this action, combined with counsel's failure to argue his client did not shoot the murder victim, was tantamount to an "unequivocal announcement" counsel believed his client was lying.

[40] *Elzy*, slip op. at 3.

[41] *Id.* at 4.

[42] 20 M.J. 689 (A.C.M.R. 1985).

[43] *Elzy*, slip. op. at 4.

[44] *Roberts*, 20 M.J. at 690–91.

[45] *See* Holland, *Recusal and Disqualification of the Military Judge*, The Army Lawyer, Apr. 1986, at 48, on *Roberts* and impartiality concerns.

[46] *See* United States v. Montgomery, 16 M.J. 516 (A.C.M.R. 1983); United States v. Stewart, 2 M.J. 423 (A.C.M.R. 1975).

Clerk of Court Note

Typographic Quality of Records of Trial

The Court of Military Review lately has encountered some unusual records of trial. Some transcripts have been submitted for appellate review single-spaced; a few others have been produced with a dot-matrix printer. In neither situation is the record satisfactory for appellate review. Perhaps only the court's belief that these defects would not be repeated has prevented the records from being returned to the trial jurisdiction to be redone. Rather than testing the court's patience in this regard, it would be well to resume double-spacing the transcript and to follow the same rule used by the court in preparing its own opinions:

> Standard pica, courier 10-pitch, or similarly large type style with a solid imprint will be used. The Clerk will not accept opinions without uniform, solid imprint and clear contrast or which do not otherwise meet standards for reproduction in matters to be filed with the Supreme Court.

Similar standards should be adhered to for the accompanying papers, motions, briefs, and exhibits especially prepared for the trial.

Bribery and Graft

Lieutenant Colonel Charles H. Giuntini
Military Judge, Fort Polk, Louisiana

"Bribery and Graft. Graft and Bribery. Now which one is it that requires. . . ."

We see bribery and graft offenses only occasionally in courts-martial. Both are proscribed offenses that violate Article 134 of the Uniform Code of Military Justice.[1] Each time one of them shows up on a charge sheet, most of us start all over again trying to distinguish it from the other. This note is intended to provide a quick read-in to the difference between bribery and its lesser included offense of graft. I suggest it be posted with (or referenced in) the instructions on bribery and graft in Chapter 3, "Instructions on Elements of Offenses," Dep't of Army, Pam. No. 27–9, Military Judges' Benchbook (1 May 1982).

The difference between bribery and graft is that bribery requires as an essential element an intent to (be) influence(d); graft does not.[2] Graft involves "compensation for services" where no compensation is due.[3] One who asks for a bribe says: "If you want what I have, then give me something I want and you will get it." One who asks for graft says: "I am going to give you something you want (without any influence from you); your 'thanks' to me would be appreciated."

The following example contrasts bribery and graft most directly. A soldier submits a request for favorable personnel action to his first sergeant, who is in an official position to act on it.[4] A bribe occurs if the first sergeant says, "I will give you a favorable recommendation if you will give me $100.00." A request for graft occurs if the first sergeant says, "I sent your request forward last week with my favorable recommendation; your $100.00 'thanks' to me sure would be nice." In the former, the first sergeant's intent to have his action influenced (to be bribed) is stated. In the latter, because the recommendation already had been forwarded, an intent to be influenced could not be a factor; rather, a request for compensation when it is not due (to obtain graft) is involved.

Changing the scenario just slightly can make the case much more complicated. If the "100.00 conversation" takes place just before the first sergeant adds his recommendation on the request, then his intent to be influenced, if unrebutted, is clear enough so that an instruction by the military judge on graft probably would not be appropriate. If other evidence shows that prior to the "100.00 conversation" the first sergeant had already told another soldier of his intent (at least at that time) to send a favorable recommendation, however, then his intent to be influenced later, at the time of the "100.00 conversation," is not so clear. Under these circumstances, the military judge should instruct on both bribery and graft. Then, the members will have to decide whether the first sergeant intended to have his action influenced (to be bribed) or whether he was going to take certain action regardless of influence but was seeking compensation (to obtain graft) when it was not due.

This note should provide a quick read-in to the basic difference between bribery ("influence me") and graft ("thank me"). It should quicken your preparation and give you more time to devote to the harder questions in this area of the law.

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[1] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982). *See also* Manual for Courts-Martial, United States, 1984, Part IV, para. 66.

[2] Dep't of Army, Pam. No. 27–9, Military Judges' Benchbook, para. 3–131 (1 May 1982).

[3] United States v. Eslow, 1 M.J. 620 (A.C.M.R. 1975).

[4] *See generally* United States v. Eckert, 8 M.J. 835 (A.C.M.R. 1980); United States v. Kulp, 5 M.J. 678 (A.C.M.R. 1978).

Defense Counsel Strategies for Dealing With a Client's Prior Conviction at Trial

Captain George B. Thompson, Jr.
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Introduction

Successful introduction by government counsel of an accused's prior conviction at trial is arguably the most devastating type of impeachment evidence available in an already considerable prosecution arsenal. The spectre of a client being cross-examined about a conviction admissible under the Military Rules of Evidence can cause sleepless nights for any trial defense counsel. The response of a court-martial panel to evidence of a prior conviction is always emotional and rarely favorable. Military judges are expected to take a more analytical approach but are certainly prey to a similar, albeit tempered, response. Common law recognized the inflammatory effect of introducing a prior conviction and specifically precluded the use of such evidence to prove that an accused was more likely to commit the crime charged because he had committed a crime in the past. This article will focus on the impact that Military Rule of Evidence 609 and the case law construing it have had on tactical decisions by trial defense counsel when dealing with prior convictions. The article will not comment on Mil. R. Evid. 403 because of its general application to any witness, rather than being focused on the criminal defendant as much of Mil. R. Evid. 609 is,[1] in order to limit the scope of this examination. Defense counsel must consider the dictates of Rules 103, 403, 404, 608 and 609 together in preparing any case involving a prior conviction.

The Law

The starting point for the defense counsel faced with a prior conviction is a determination of whether the conviction meets the admissibility criteria set out in Rule 609. It should be noted for research purposes that Rule 609 differs only slightly from the federal rule with the changes made referring to the peculiarities of military practice.[2] Rule 609(a) sets out two standards for impeachment. First, convictions punishable by death, dishonorable discharge or a prison term in excess of one year are admissible for impeachment purposes provided the military judge rules that the probative value of admitting the conviction outweighs the prejudice to the accused. Second, any conviction which involves dishonesty or a false statement may be used to impeach, regardless of the permissible maximum punishment. Counsel must rely on the law of the jurisdiction in which the accused was convicted in order to determine if the offense meets the punishment criteria of Rule 609(a)(1). State court convictions must be checked against state penal codes. Contacting the state public defender's office is an excellent source of such information and will often yield a certified copy of the penal code which may be offered during hearing on a motion in limine to exclude a conviction that does not pass muster. Punishment authorized for a federal conviction is set out in the United States Code. Counsel should also satisfy themselves that the proceeding does in fact amount to a conviction in the jurisdiction under examination. Military convictions should be checked closely against the Manual for Courts-Martial edition in force at the time of the prior conviction to ensure compliance with Rule 609(a)(1).[3]

Even if the conviction meets the requirements of Rule 609(a)(1), the rule's balancing test requires that the conviction may only be used to impeach if the military judge determines that the probative value of the evidence outweighs its prejudicial effect to the accused.[4] The five factors to be considered in applying the balancing test were set out by the Court of Military Appeals in *United States v. Weaver.*[5] These include: the nature of the conviction itself in terms of its bearing on veracity; the age of the conviction; its propensity to influence the minds of the jury improperly; the necessity for the testimony of the accused in the interests of justice; and the centrality of the credibility question.[6] This rule's balancing test does not anticipate considering the potential prejudice to any witness except the accused.[7] Thus, trial counsel should not be permitted to argue that defense impeachment of government witnesses is controlled by Rule 609(a)(1). Defense counsel should always request special findings of fact by the military judge for appellate review of the application of the balancing test and the *Weaver* factors.

Rule 609(a)(2) sets out an absolute standard of admissibility for *crimen falsi* convictions, provided the conviction meets the timeliness requirement of Rule 609(b). This portion of the rule dispenses with a balancing test and admits any conviction involving perjury, false statement, criminal

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[1] *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 365–66 (3d ed. 1982) [hereinafter cited as Saltzburg & Redden].

[2] Manual for Courts-Martial, United States, 1984, app. 22, at A22–42 [hereinafter cited as MCM, 1984].

[3] The central consideration in determining the maximum punishment revolves around the prescriptions of Article 56 of the Uniform Code of Military Justice (10 U.S.C. § 856 (1982)) and applies without regard to the level of court that tried the case. *See* United States v. Brenizer, 20 M.J. 78, 80 (C.M.A. 1985).

[4] For an in-depth discussion of how the Rule 609(a)(1) balancing test interacts with the more stringent balancing test of Rule 403, and the applicability of both rules to the accused and other witnesses, see Schinasi & Green, *Impeachment by Prior Conviction: Military Rule of Evidence 609,* The Army Lawyer, Jan. 1981, at 1. An exhaustive study of impeachment and witness credibility may be found in Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence,* 46 Ohio St. L.J. 595 (1985).

[5] 1 M.J. 111, 118 (C.M.A. 1975). *See also* United States v. Bagley, 772 F. 2d. 482 (9th Cir. 1985); United States v. Brenizer, 20 M.J. 78 (C.M.A. 1985).

[6] 1 M.J. 117–18.

[7] United States v. McCray, 15 M.J. 1086 (A.C.M.R. 1983).

fraud, embezzlement or other offenses involving deceit, lying or falsification.[8] As neither the Supreme Court nor the Court of Military Appeals has spoken definitively on which crimes fall under Rule 609(a)(2), defense counsel should seek essential findings of fact from the military judge under Rule 905(d) as to whether, and if so, why a conviction meets the *crimen falsi* standard.[9] Failing to create a detailed record for appeal will handicap appellate defense counsel and may be a factor in determining if waiver of the issue occurred at trial.

Rule 609(b) sets a ten year time limit on the use of prior convictions (figuring from the date of conviction or the release from confinement adjudged for that conviction, whichever is later) unless the military judge determines the probative value of the evidence substantially outweighs its prejudicial effect. Here again, essential findings of fact are critical, and have been suggested in many federal cases interpreting that portion of the rule.[10] *Weaver* cautions that as a general rule "judges should rarely exercise their discretion to admit convictions over ten years old and then only in exceptional circumstances."[11] Defense counsel must ensure that the government complies with the written notice requirement of Rule 609(b) and make prompt objection to any surprise attempt to introduce a state conviction.

Rule 609(c) may be an effective shield in the hands of an imaginative and prepared defense attorney. Prior conviction evidence is clearly inadmissible if a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of rehabilitation is proved (assuming no subsequent felony conviction has occurred), or a pardon, annulment or other equivalent procedure based on a finding of innocence is successfully shown. The drafters of the 1980 amendments to the Rules indicate that completion of the Army's Retraining Brigade program is probably a procedure equivalent to rehabilitation;[12] however, the Army Court of Military Review has disagreed.[13] The Court of Military Appeals has implied that if completion of the Retraining Brigade is proved, the issue may still be open for their review.[14] That court has also dropped the tantalizing hint that although reenlistment after a court-martial conviction is in and of itself not sufficient to show rehabilitation, if coupled with evidence of the processing the soldier went through in order to reenlist (a successful waiver application comes to mind), it may well be sufficient proof to establish the "equivalent procedure" discussed in the rule.[15] Counsel must be able to find and produce the waiver documents; otherwise, a fraudulent reenlistment problem may be signalled. In any event, the current climate of uncertainty demands that a comprehensive record of all rehabilitation indications be made.

Generally, juvenile adjudications are not admissible under Rule 609(d). The rule goes further to indicate that the accused is never subject to impeachment with juvenile convictions.

Appeals in process do not render convictions inadmissible, except that a summary court conviction or a special court conviction without a judge may not be used for impeachment until Article 65(c) or Article 66 review is completed.[16] If such a conviction is introduced, the fact that an appeal is pending is also admissible.[17] A summary court conviction where the accused was not represented by counsel cannot be used for impeachment purposes under Mil. R. Evid. 609(a).[18]

Finally, the military rules have avoided much of the litigation over the similar federal rule by inserting the definition of a conviction. For the purposes of Rule 609, a conviction is admissible in a subsequent court-martial when a sentence is adjudged.[19]

The Motion in Limine

One of the two purposes with which Professor Imwinkelried illustrates the necessity for using a motion in limine is preventing introduction of a criminal defendant's prior conviction.[20] Litigating the issue up front clarifies defense tactical options. The critical decision of whether the accused takes the stand rests in large part on the admissibility of the prior conviction. The panel members are not subject to inadvertent disclosure of the evidence as they would be if objection is reserved until trial counsel's cross-examination of the client. A decision on whether to soften the impact of the evidence by referring to it during opening statement can be made in an informed manner. Preparing the panel by probing their attitudes toward the prior conviction during voir dire is a possibility if counsel knows that the judge intends to admit the evidence. Potential cause or peremptory challenges can be made based on member reactions and stated opinions rather than counsel's gut feelings. When faced with a motion in limine, military judges have three options: they may overrule the defense objection; they

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[8] Saltzburg & Redden, *supra* note 1, at 364, 366; *see also* S. Saltzburg, L. Schinasi and D. Schlueter, Military Rules of Evidence Manual 295, 299 (1981).

[9] A detailed review of which crimes the federal circuits have found to be *crimen falsi* is found at 3 J. Weinstein and M. Berger, Weinstein's Evidence para 609[04] (1981).

[10] *See, e.g.*, United States v. Gilbert, 668 F. 2d 94 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2014 (1982); United States v. Cavender, 578 F. 2d 528 (4th Cir. 1978); United States v. Mahler, 579 F. 2d. 730 (2d Cir. 1978); United States v. Weaver, 1 M.J. 111, 117 (C.M.A. 1975). *But see* United States v. Spero, 625 F. 2d 779 (8th Cir. 1980), requiring only a thorough and thoughtful analysis made on the record by the trial judge.

[11] 1 M.J. at 117.

[12] MCM, 1984, app. 22, at A22–42.

[13] United States v. Rogers, 17 M.J. 990, 992–93 (A.C.M.R. 1984).

[14] United States v. Brenizer, 20 M.J. 78, 81 (C.M.A. 1985).

[15] *Id.* at 81.

[16] Mil. R. Evid. 609(e).

[17] *Id.*

[18] United States v. Rogers, 17 M.J. 990 (A.C.M.R. 1984). *See also* United States v. Cofield, 11 MJ 422, 432 (C.M.A. 1981). This does not apply if the accused affirmatively waives his right to be represented at the summary court. *Rogers*, 17 M.J. at 992 n.1.

[19] Mil. R. Evid. 609(f).

[20] E. Imwinkelried, Evidentiary Foundations 7 (1981).

may grant the motion and prohibit any mention of the evidence; or they may make a preliminary ruling prohibiting mention of the prior conviction and reserve final ruling until enough evidence is presented to allow a rational application of the balancing test.[21] The latter approach may be the least desirable from a defense viewpoint. The tactical flexibility of knowing conclusively that the prior conviction comes in or stays out is lost. Making the ruling as soon as is practicable received strong support from Judge Weinstein in *United States v. Jackson*,[22] where he acknowledged the negative impact of reserving a ruling on opening statement, questioning witnesses, and placing the accused on the stand. The proper construction of a request for special findings may allow counsel to avoid the reservation of a final ruling. Although the author has not found a similar case, it would appear that phrasing the special findings request to include all facts to be elicited from the accused when he actually takes the stand removes the judge's resistance to an immediate ruling. For instance, counsel for a soldier accused of attempting rape might query the court in writing with a series of questions containing proffers like this one:

> If the accused testified on direct that the alleged victim freely consented to sexual intercourse, can he be impeached with his 19 April 1976 special court conviction for indecent assault?

A detailed and complete special findings request assumes the function of an offer of proof and may allow counsel for the defense to pin down the military judge. Of course, such a request tips the defense hand to the government well in advance of the accused's testimony and may provide much raw material for effective cross-examination by trial counsel. All of these speculative approaches must be considered in the light of a recent Supreme Court decision which places a heavy burden on the defense.

The Impact of *United States v. Luce*

United States v. Luce[23] mandates that defense counsel place the client on the stand in order to preserve the issue of whether the military judge correctly ruled a prior conviction admissible for impeachment against the accused. This decision creates the Hobson's choice for trial defense attorneys of waiving the issue by keeping the accused off the stand or risking almost certain conviction in the hope that the findings and sentence will be reversed or remanded on appeal. *Luce* involved a defendant tried on federal drug charges who moved in limine to preclude the government from impeaching him with a prior state conviction for possession of a controlled substance. The district court judge denied the motion, ruling that the conviction fell within Rule 609(a) admissibility guidelines. The defendant did not testify and was convicted. Chief Justice Burger, writing for a unanimous court, resolved the conflict among the federal circuits by holding that a decision not to testify precluded appellate examination of the trial judge's ruling on admissibility of the prior conviction.[24]

What utility placing the accused on the stand during the motion in limine has in the wake of *Luce* is an open question. That choice, like a detailed request for special findings, has the tactical drawback of laying the case open to the government in advance of trial. If the judge suppresses the conviction and the accused testifies, any inconsistencies between the testimony on the motion and the testimony during trial may be admissible for impeachment. Good preparation of counsel and client will go far to limit that occurrence. *Weaver v. United States*[25] involved such an attempt to place a defendant's testimony on the record outside the presence of the jury. The district judge refused to allow the defendant to take the stand without the jury members in court. Defense counsel then made an offer of proof of what the defendant would say. Nevertheless, the judge ruled that impeachment with a prior conviction was admissible. Weaver never took the stand and was convicted. On appeal, the judge's ruling was upheld as a rational exercise of discretion. The opinion did contain a mild admonition to trial judges that every determination of the admission of a prior conviction should not be approached with an implacable bias toward permitting impeachment.[26] The only military decision to date applying *Luce* on the question of improper ruling on a motion in limine to exclude a prior conviction comes from the Air Force court in *United States v. Goins*.[27] The court applied the *Luce* standard and refused to review the military judge's denial of a motion in limine to preclude impeachment with a prior conviction because the accused never testified.

The impact of *Luce* is clear: unless the accused takes the stand, the issue of the trial judge's correct application of Rule 609 will not be reviewed for error. The only avenue left open for defense exploration is whether having the accused testify during the motion in limine as to what he or she would say during trial will create a sufficient record for review of the judge's application of the *Weaver* factors in balancing prejudice potential against probative value.

Conclusion

Preparing for trial with a client who has a prior conviction requires defense counsel to make several decisions prior to trial. The following checklist of questions to be considered and acted on is suggested:

1. Is the conviction admissible under Rule 609 (or for any other purpose under the Military Rules of Evidence)?
2. If the prior conviction is suppressible, should counsel make a motion in limine or wait and make a trial objection?

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[21] *Id.* at 8.

[22] 405 F. Supp. 938 (S.D.N.Y. 1975).

[23] 105 S. Ct. 460 (1984).

[24] *Id.*

[25] 408 F. 2d 1269 (D.C. Cir.), *cert. denied*, 395 U.S. 927 (1969).

[26] *Id.* at 1272.

[27] 20 M.J. 673 (A.F.C.M.R. 1985). *Luce* was addressed by the Court of Military Appeals in United States v. Owens, 21 M.J. 117 (C.M.A. 1985), but only with regard to a Rule 403 issue.

3. If the conviction may be admissible, will the accused take the stand? If not, *Luce* controls and the issue is waived.

4. If the accused is hesitant or undecided about testifying, is it tactically preferable to attempt to preserve the issue by having the client testify during a motion in limine?

5. If the accused must take the stand, and the conviction is admissible, will defense counsel soften the impact of the evidence by addressing it during voir dire, on opening statement, through witness testimony, or at all three points?

6. Will admissibility be so damaging that the accused cannot take the stand and, if so, should counsel urge his client to seek a pretrial agreement instead of contesting the charges?

No attorney will be able to answer these questions easily; however, complete pretrial preparation will allow rational decision-making and ensure the best possible outcome for the client.

Regulatory Law Office Note

Telephone Rates

On 6 June 1986, under a Delegation of Authority from the General Services Administration, the Regulatory Law Office filed petitions in thirty-one states and the District of Columbia requesting that the regulatory commissions in those jurisdictions consider investigating whether or not all telephone rates of the various Bell telephone companies should be reduced in view of current favorable economic conditions. The states were Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Washington.

This was a follow-up action to the participation by this office in telephone company initiated proposals for general increases in their rates over the last several years in each of those jurisdictions. The participation in those cases on behalf of the Army and all other Executive Agencies before state regulatory commissions in itself was the continuation of a long-standing policy and practice of The Judge Advocate General to be out front in protecting the federal government's consumer interest in regulatory proceedings.

The particular types of cases involved resulted from the high inflation rates of the 1970s and early 1980s that caused the earnings of the various Bell System Companies to suffer. In that period, those companies filed over 100 cases in the various jurisdictions seeking several billion dollars in increased rates. Based upon those filings, telephone rates were increased substantially over the years.

The Regulatory Law Office as an active participant in most of those past cases was puzzled by the fact that only a few of such cases were filed in 1985 and the early part of 1986. A study was made in conjunction with government economists and other technical personnel. It was determined that the current conditions must have caused most companies not to seek further increases and could justify lowering of telephone rates.

The analysis revealed that during the last several years when public utility commissions were allowing higher rates for the Bell companies, the major factors considered by the commissions included the high rate of inflation, high costs of money, and the uncertain investment risks associated with the divestiture of American Telephone and Telegraph Company (AT&T) and the Bell System. As is well known, the Bell System was divided into two separate and distinct types of operations: the interstate and intrastate inter-city long distance operation allowed to be continued by AT&T itself; and the local exchange telephone operation allowed to be continued by the local Bell telephone companies. The latter were placed under seven separate and distinct regional holding companies.

The study revealed that both the inflation rate and the cost of capital had decreased significantly from the early 1980 levels. In 1980, the Consumer Price Index (CPI) increased by 13.5 percent and in 1981 by 10.4 percent. Interest rates in 1981 for a group of public utilities averaged 15.62 percent, new corporate AAA bonds yielded 14.17 percent, and the prime interest rate reached 18.87 percent. In 1985, the public utilities interest rates declined to 12.29 percent, the corporate bonds rates to 11.37 percent, and the prime interest rate to 9.93 percent. The CPI increased by only 3.6 percent.

The divestiture on 1 January 1984, as indicated, resulted in the creation of the seven regional holding companies and their acquisition of the twenty-two Bell Operating Companies and a new AT&T. There was a great amount of uncertainty as to whether the earnings of local Bell telephone companies would decrease. Also, there was a lack of information and experience, economic, financial, and operational, about the new companies, which of itself increased the investment risks. The divestiture process is now completed and the seven regional holding companies and their twenty-two subsidiaries have been in business for over two years. They have published financial reports for 1984, 1985, and are now publishing reports for 1986. The investment risk that existed in 1983–1984, and which was associated with the uncertainty of divestiture, does not now exist.

The petitions filed reflected the results of the study. Each pointed out that since the commission last authorized the particular company to increase its rates and set higher earnings rates on its investment, based on high rates of inflation, high interest rates, and uncertainty as to divestiture, conditions have changed. It was submitted that lower overall earnings rates are now in order based on lower inflation and

interest rates and elimination of the investment risk associated with the uncertainty of divestiture. Each commission was requested to consider whether current conditions justified the institution of an investigation on its own initiative into the reasonableness of the rates charged by the particular Bell telephone company.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Contract Law Note

Procedures for Applying the Debt Collection Act to Government Contracts

The Debt Collection Act, 31 U.S.C. § 3716 (1982) (hereinafter DCA), was enacted to "put some teeth into Federal [debt] collection efforts," 128 Cong. Rec. S12328. Principally, the DCA allows for administrative offsets of debts owed to the federal government. In furtherance of that purpose, however, the DCA also sets forth specific due process requirements that are to be implemented in agency regulations. Two questions arise concerning the applicability of the statute to debt collection in government contracting. First, to what extent does the statute apply to government contractors? Second, what procedures are to be followed in the absence of the required agency regulations?

The first issue was discussed in a recent Contract Appeals Division Trial Note in The Army Lawyer, June 1986, at 64. Briefly stated, beginning with *DMJM/Norman Engineering Co.*, ASBCA No. 28154, 84–1 BCA ¶ 17,226, the Armed Services Board of Contract Appeals (ASBCA) held that the DCA *does* apply to administrative offsets under government contracts. In subsequent cases, the board has explained that the DCA applies only in those situations where the funds are already in the hands of the contractor and therefore a "debt" is involved. The note concluded that a contracting officer must comply with the DCA when the contractor has been fully paid or when the government intends to reduce payment on another contract in order to recover money owed. Baxter, *Application of the Debt Collection Act of 1982—Restraining the Beach,* The Army Lawyer, June 1986, at 65.

The second issue, the subject of this note, involves the problem created by the language in § 3716(b): "before collecting a claim . . ., the head of the agency . . . must prescribe regulations on collecting by administrative offset." Does the fact that the agencies have not yet prescribed any final regulations affect the present ability of agencies to make offsets? The Comptroller General answered the question in the negative in *Need for Regulations Under § 3716,* 64 Comp. Gen. ———, (September 3, 1985).

In that case, the United States Department of Education (USDE) requested the Comptroller General to advise it on administratively offsetting a claim against a student loan recipient for payments he was receiving under "large procurement contracts with the DOD." *Id.* at 1. Because final regulations had not been prescribed, USDE was not sure whether it had the authority to offset under the statute. The Comptroller General concluded that, as long as the debtor was afforded the equivalent of the procedural rights of § 3716, the agency may administratively offset prior to promulgating the final regulations. *Id.* at 7.

To hold otherwise would too strictly interpret the statute. No agency could effectively offset until the regulations were finalized. This would produce a result which was "inconsistent with the stated purpose of the act." *Id.* at 2. The legislative history of the act reflected the balancing of interests between the government's right to collect its debts more efficiently and the debtors' due process rights.

Thus the conclusion drawn was that "Congress expected the agencies to develop implementing regulations as quickly as reasonably possible." *Id.* at 4. Meanwhile, the government may administratively offset debts. The debtors' due process rights are protected by the provisions in § 3716.

Hence, government agencies may administratively offset government contractor debts as long as they comply with the requirements of § 3716. During the interim period before the prescription of regulations on debt collecting by the various agencies, the procedures set forth in § 3716 are to be followed. Those procedures are as follows:

> (a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—
>
> (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
>
> (2) an opportunity to inspect and copy the records of the agency related to the claim;
>
> (3) an opportunity for a review within the agency of the decision of the agency related to the claim; and
>
> (4) an opportunity to make written agreement with the head of the agency to repay the amount of the claim.

It would seem that in the absence of procedures in the Federal Acquisition Regulation, a contracting officer could satisfy the debtor's due process rights under the DCA by complying with the notice requirements set forth above and

then affording those procedural rights described in the notice. Although the language of the statute refers to the "head of an agency," the appropriate agency official in contract debt situations is certainly the contracting officer. Absent specific guidance to the contrary, "review within the agency" could be provided at a level above the contracting officer, whether that be a higher level contracting officer or other more senior procurement official. Any implementation consistent with the act is apparently sufficient until specific regulations are issued.

In sum, the Debt Collection Act provides for administrative offsets of debts owed to the federal government. The Act applies to contract debts to the extent that collection is being made after final payment or by offset under a contract distinct from that upon which the debt is owed. The fact that agencies have not implemented the required regulations does not preclude them from making administrative offsets. Rather, in the absence of specific implementation, procedures consistent with the statute as outlined above should be followed. Miss Valerie Ludlum, Legal Intern.

Criminal Law Note

Lockhart v. McCree and the Death-Qualified Jury

Eighteen years ago, in *Witherspoon v. Illinois,*[1] the United States Supreme Court enunciated the standard to be applied in evaluating challenges for cause against jurors in capital cases based on their opposition to the death penalty. The Court in *Witherspoon* held that prospective jurors who admitted a clear predisposition, regardless of circumstances, to automatically vote against the death penalty were subject to challenge for cause by the prosecution. This test was modified in *Wainwright v. Witt*[2] to exclude jurors whose views on capital punishment would "prevent or substantially impair" performance of their duties as jurors.

Neither *Witherspoon v. Illinois* nor *Wainwright v. Witt* addressed the question whether jurors' views on capital punishment might affect their ability to determine an accused's guilt or innocence during the findings phase of trial. In other words, is a "*Witherspoon*-excludable"[3] juror subject to challenge for cause at the start of a capital case simply because his or her views on capital punishment would prove disqualifying during the sentencing phase? The Court recently answered this question in the affirmative in *Lockhart v. McCree.*[4] This note will examine the issues raised in *Lockhart v. McCree* and the Court's resolution of those issues.

Ardia McCree was first arrested on February 14, 1978, for the robbery and murder of a service station owner in Camden, Arkansas. He was charged with and convicted of capital felony murder under Arkansas law, but the jury refused to impose the death penalty and sentenced McCree instead to life imprisonment without parole. After exhausting his state appeals, McCree filed a habeas corpus petition in federal court.[5]

The basis for McCree's appeal was the trial judge's removal during voir dire, over defense objection, of eight prospective jurors who stated that they could not vote for the death penalty under any circumstances. This, he alleged, deprived him of his right to trial by an impartial jury representing a cross-section of the community as guaranteed by the sixth and fourteenth amendments. Both the district court and the Eighth Circuit Court of Appeals concluded, based on social science evidence, that so-called "death qualified" juries are more prone to vote for conviction in capital cases than "non-death-qualified" juries. As a result, removing jurors at the outset of a trial based on their opposition to capital punishment violated the defendant's sixth amendment right to have his guilt determined by a jury selected from a fair cross-section of the community. The district court's grant of habeas relief was affirmed on appeal by the Eighth Circuit.[6]

The Supreme Court reversed. Writing for a five-member majority,[7] Justice Rehnquist first attacked the sociological basis of the lower courts' rulings, finding the studies cited to be flawed in several respects. Nevertheless, he proceeded on the assumption that "death qualified" juries are more likely to return a conviction than "non-death-qualified" juries.[8] The major issue, he stated, was the scope of the cross-section of the community requirement and its application to "death-qualified" juries.

While the Court in the past had applied this requirement to grand juries, jury panels, and venires, it had never held that the final petit jury must reflect the population of the community. To do so, the Court said, would be a practical impossibility. It would require the Court to review and invalidate challenges for cause and peremptory challenges made at trial: "We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension."[9]

The opinion went one step further to address the substance of McCree's claim that a "death-qualified" jury violated the cross-section requirement of the sixth amendment. In the past, the Court said, only "distinctive" groups

[1] 391 U.S. 510 (1968).

[2] 105 S. Ct. 844 (1985). This is a logical extension of the rationale in *Witherspoon,* 391 U.S. at 521, where the Court vacated the defendant's sentence because all persons expressing any scruples against capital punishment had been excluded from the jury. Scruples are fine, so long as the juror can assess guilt impartially and consider fairly all sentencing alternatives under law, including death.

[3] The term refers to a prospective juror whose views would "prevent or substantially impair" performance of duties. *See* Lockhart v. McCree, 106 S. Ct. 1758, 1761 n.1 (1986).

[4] 106 S. Ct. 1758 (1986).

[5] *Id.* at 1761.

[6] Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc) (*aff'g* 569 F. Supp. 1273 (D. Ark. 1983)).

[7] 106 S. Ct. at 1760. Five justices joined in the Court's opinion. One justice concurred in the result. Three justices filed a dissenting opinion.

[8] *Id.* at 1764.

[9] *Id.* at 1765.

such as blacks, women, and Mexican-Americans[10] were included in this requirement, which also has a basis in the equal protection clause of the fourteenth amendment. These "distinctive" groups, the Court said, share certain immutable characteristics and their exclusion from juries cannot be supported by any lack of ability to serve as jurors. On the contrary, their inclusion as jurors furthers public policy and fosters confidence in the fairness of the American criminal justice system.[11]

The Court then compared the effect of challenging the "*Witherspoon*-excludables" from juries. Unlike the groups mentioned above, "*Witherspoon*-excludables" share no immutable characteristics and constitute no readily-identifiable racial or ethnic minority. There is, first of all, no known method prior to voir dire at trial by which the state could exclude or include jurors based on their views toward capital punishment. In fact, the Court said the state could not stack the jury in this way even if it tried. In the second place, "*Witherspoon*-excludables" are only identifiable at trial by their stated intention to disregard the full range of sentencing alternatives and includes "only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case."[12] The Court stated that present practice under *Witherspoon* furthers a legitimate state interest in obtaining a single jury which can properly and impartially judge both phases of a bifurcated capital case.[13]

Lastly, the opinion discussed whether a "death-qualified" jury can be impartial. The Court rejected McCree's claim that his jury was slanted in favor of conviction. Justice Rehnquist characterized this claim as urging the Court to adopt a standard that would require trial courts to balance the jury in accordance with the predisposition of the jurors, and called this view "both illogical and hopelessly impractical." Balancing a jury, the Court said, would be a "Sisyphean task" requiring equal numbers of "Democracts and Republicans, young persons and old, . . . and so on."[14] McCree's jury, they concluded, was fairly selected, impartial and conscientious in carrying out its sworn duties.[15]

Insofar as military practice now requires unanimous findings of guilt in capital cases, as well as unanimity on any sentence to death, *Lockhart v. McCree* provides a standard with clear application to military law.[16] Further, it is well-established in military law that members with inflexible attitudes on sentencing (*e.g.*, opposition to capital punishment) should be challenged for cause.[17] While the sixth amendment right to jury trials does not apply to courts-martial,[18] the potential application of *Lockhart v. McCree* cannot be overlooked. Major McShane.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to TJAGSA–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Videotape Series Available

The Media Services Office, TJAGSA, and the Legal Assistance Branch, TJAGSA, have completed a three-part consumer information series which is now available for ordering by legal assistance attorneys for preventive law classes.

The series is designed for showing to junior enlisted personnel in unit preventive law classes or for showing in legal assistance waiting rooms. The three videotapes and their running times are:

"The Cost of Credit," running time 11:05. This videotape explains in basic terms how finance charges are computed and how differing credit repayment methods may affect the amount of monthly payments. It encourages soldiers to comparison shop for the best credit terms.

"Applying For Credit," running time 15:32. This videotape explains to soldiers the factors lenders use in determining credit worthiness and discusses the need for, and how to retain, good credit ratings.

"Credit Billing Errors," running time 17:50. This videotape is a basic explanation of consumer rights under the Fair Credit Billing Act. It describes the dispute resolution procedures soldiers must follow when raising billing errors and the sanctions that creditors are subject to for failing to comply with the law.

Each videotape program is designed to stand on its own. Although the series develops logically, it is not necessary for soldiers to have viewed "The Cost of Credit" or "Applying For Credit" to understand "Credit Billing Errors."

Collectively, the series is a succinct 44:27 minute program that explains or addresses most of the consumer credit questions frequently raised by soldiers.

The series combines with other legal assistance videotapes produced by the Media Services Office to provide an extensive preventive law series that is now available for attorneys in the field.

Other legal assistance videotapes and their running times are:

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[10] *Id.* (citations omitted).

[11] *Id.* at 1766.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1767.

[15] *Id.* at 1770. The majority commented favorably upon Arkansas' system requiring unitary juries in capital cases. In such cases, they said, the defendant might benefit from "residual doubts" about guilt. *See* 106 S. Ct. at 1768.

[16] *See* Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 922, 1004.

[17] *See* United States v. Heriot, 21 M.J. 11 (C.M.A. 1985). (Error to deny challenge for cause against member in drug case who maintained he could consider all sentences but would vote to reduce Marine NCO at least one grade if the NCO were convicted of selling drugs.).

[18] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

"Introduction to the Soldiers' and Sailors' Civil Relief Act," 6:45.

"Introduction to Wills," 7:20.

"Introduction to Powers of Attorney," 7:47.

"The Survivor Benefit Plan," 21:05.

Any of these videotapes may be ordered by sending a blank ¾ inch video cassette to: Media Services Office, ATTN: JAGS-ADN-T, The Judge Advocate General's School, Charlottesville, VA 22903-1781.

FTS Service Curtailed

The Legal Assistance Branch frequently responds to telephone inquiries from legal assistance attorneys around the world. Typically, if an attorney with subject matter expertise in the area inquired about is not available, the attorney will return the telephone call.

Effective 30 June 1986, Federal Telecommunications System (FTS) service at The Judge Advocate General's School has been eliminated due to budget cuts. It will be difficult, therefore, in the immediate future for the Branch's attorneys to return telephone calls.

Telephone inquiries from the field may still be made in two ways: First, installations with FTS service may call (804) 293-9850, 293-4095, or 295-4230. Second, a call may be placed by AUTOVON. Call 274-7110 and ask the operator to dial one of the three commercial numbers above.

The number of telephone inquiries has increased dramatically since the Branch was created in 1982. From approximately 150 inquiries that year, the number of annual inquiries now exceeds 700. This service is one that is vital as a resource link with practicing attorneys in the field. The Branch will continue to respond to all inquiries to the maximum extent possible. Legal assistance attorneys making a telephonic inquiry should call back if a return call is not received.

Consumer Law Notes

Insurance Policies—Read The Fine Print

The following article was prepared by Captain Anne H. Avera, Chief of Legal Assistance at Fort Rucker, Alabama, for publication in the post weekly bulletin. This problem, which has also been addressed in Dep't of the Army Message 061000Z Jun 86, subject: Preventive Law Guidance, is of interest to all active duty soldiers.

Soldiers should be aware of problems that may arise when they acquire life insurance policies that contain military service clauses. Such clauses allow insurance companies to avoid payment on a contract of insurance if the soldier is killed in war or by a "military service hazard." The phrase "killed by a military service hazard" may be interpreted by insurance companies to mean any time a soldier dies on active duty.

These military service clauses are often buried in lengthy insurance contracts and are seldom discovered by or brought to the attention of the soldier. The end result could be denial of coverage under the terms of the policy and hardship for the soldier's survivors.

To avoid these potential problems, soldiers should carefully read all provisions contained in any insurance policy prior to acquiring the coverage. Make sure the policy does not contain a clause that could be interpreted in such a way as to deny coverage to an active duty soldier. By being aware of the ramifications of military service exclusion provisions contained in insurance contracts, soldiers can avoid this problem and can assure they have adequate coverage for their families.

Vehicle Repairs

The following article, written by Captain Anne H. Avera, Chief of Legal Assistance at Fort Rucker, Alabama, was recently published in the Army Flier, a Fort Rucker publication.

One of the most common, and frustrating, consumer problems is in the area of car and truck repairs. There are some things the consumer should know when a vehicle needs repair.

Are you covered? If your vehicle is covered by a written warranty and that warranty covers the problem, you should return to the dealer for the necessary repairs. Study your warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations.

If your vehicle is not covered by a written warranty, it could still be covered by an implied warranty unless the car was sold "as is" or the seller otherwise indicates in writing that no warranty is given. The most common type of implied warranty is called a "warranty of merchantability." This means that the seller promises that the product will do what it is supposed to do; for example, that the car will back up without vibrating.

If problems arise that are not covered by the written warranty, you should investigate the possible protection given by an implied warranty. If the dealer or seller of the vehicle is not required to repair it under any type of warranty, you will have to incur this expense. The following tips may prove helpful in these cases.

Do your homework. Your best protection from fraud and faulty repair work is to find a reputable mechanic or repair shop before your car needs to be repaired. A good way to do this is to ask your friends if they know a reliable mechanic. After you have selected some repair shops, check with local consumer protection offices or the Better Business Bureau in your area and ask if anyone has complained about the shops you are considering.

Get it in writing. You should ask the repair shop to give you a written estimate before any work is done on your vehicle. Then tell the mechanic, "If my car requires any additional parts or labor over the estimate, call me with the information before you do anything." Your final bill should be close to the estimated price.

If the charge is much higher than the estimate, or if the work was done without your authorization and you feel that you have been overcharged, question the bill. Have the shop write out the reasons for the difference in cost. Keep that information. If you refuse to pay a repair bill, the mechanic has the legal right to keep your car until you pay.

If you have problems. If you suspect that the repair shop has overcharged you, has failed to adequately perform the requested repairs, or has performed unauthorized work for which you are being charged, first try to resolve the problem with the repair shop. If you cannot get the repair shop to resolve the problem to your satisfaction, often the easiest

and least expensive solution is to pay the bill, clearly indicating that you do not agree with it, and then sue the shop for return of the excess amount. You can do several things to help yourself in this situation: get everything in writing and keep every piece of paper; ask the mechanic for your old parts back (some parts, such as alternators and brake shoes, are returned to the parts supplier for a refund, so you may not be able to get them.); and Tell the shop manager clearly and calmly that you are dissatisfied, and document the response, if possible.

What to do. If legal action is necessary, you must be prepared to prove your claim. The legal assistance section in the staff judge advocate's office is available to advise you, though at some point you may need to contact a private attorney to handle your case. You may also inquire at the local courthouse as to the availability of Small Claims Court procedures. The clerk of court of the local court can usually provide you with the necessary forms and information.

In order to document your claim, your first step should be to take your car to another repair shop. Give the mechanic a copy of your itemized receipt and order an inspection of the alleged repairs and parts. Get their report in writing. If you notice that the same problem is recurring, or you find a new problem that should not have arisen, you will be in a better position to negotiate a refund from the first mechanic if you get a second mechanic's opinion of the work done—in writing.

What the law says. Although Alabama has no comprehensive statute specifically governing auto repairs, certain consumer protection statutes do apply to car repairs. Generally, it is illegal to: knowingly make a false or misleading statement of fact about the need for parts, replacement or repair service; represent that work has been done, or parts replaced, when that is not true; or represent that goods are original or new, when in fact they are secondhand or refurbished.

Devon Home Center Stores

Legal assistance officers at various installations have recently reported consumer complaints involving Devon Home Center Stores, Inc. These stores, which are located primarily near military bases, sometimes submit advertisements for inclusion in post publications. The complaints have concerned advertisements which promise such credit terms as "0% interest" and "free financing," and which arguably violate federal and state disclosure laws. These laws are designed to ensure that consumers receive the information they need to make informed decisions regarding the cost of credit. The laws mandate both certain content and specific format in advertisements and contracts that solicit consumers to purchase goods on credit terms.

Devon's ad's have included numerous potential violations of the Federal Truth In Lending Act (15 U.S.C. §§ 1601–1667e (1982)), Regulation Z, which implements the Truth in Lending Act (12 C.F.R. Part 226 (1986)), and state disclosure laws. Review of several of Devon's ad's revealed the following apparent violations of federal law:

1. One ad identified an item's cost only in terms of the dollars per month which the consumer must pay and failed to identify the terms of repayment or the rate of finance charge expressed as an annual percentage rate in violation of 15 U.S.C. § 1664 and 12 C.F.R. § 226.24

2. Additionally, this ad contained a statement that credit would be extended at "0% interest." This was misleading because this interest rate was available only if the consumer paid off the entire contract, including interest, within one year. If the contract was paid within the year, the interest already paid was refunded to the consumer, resulting in the advertised 0% interest rate. Because the payments were determined on an 18-month schedule, the consumer was required to pay off the contract early in order to receive this interest rate. "Unfair or deceptive acts or practices in commerce" are prohibited by 15 U.S.C. § 45(a)(1). The cases interpreting this statutory provision indicate that such misleading advertising constitutes a deceptive practice.

3. Another Devon ad was a multiple page advertisement. The regulations here provide that unless a multiple page advertisement gives the required disclosures for each item advertised, the ad must include certain specific information in a table or schedule within the ad. This information must be sufficiently detailed to permit determination of the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, and the amount of any finance charge for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered. 12 C.F.R. § 226.24. Devon's ad included neither individual disclosures nor an information schedule.

In addition to these federal statutory and regulatory provisions, many states have passed laws that provide additional consumer protection. For example, § 37–2–304(1) of the South Carolina Consumer Protection Code prohibits advertising, displaying, or publishing "any statement or representation with regard to rates, terms, or conditions of credit . . . that is false, misleading, or deceptive." In addition, § 37–2–305 of that code provides that a credit service charge may not exceed the greater of 18% or a rate which is filed with the Department of Consumer Affairs and posted at locales where this credit rate is offered. Because Devon published misleading advertisements and failed to file a Maximum Rate Schedule, the South Carolina Department of Consumer Affairs required that Devon refund any finance charges assessed in excess of 18% and revise all advertisements to conform with South Carolina law.

Legal assistance officers should review advertisements to verify compliance with federal and state disclosure requirements. The *All States Consumer Law Guide* provides both a general statement of federal law and a discussion of additional state disclosure requirements. In the event of noncompliance, one or more of the following measures may afford the consumer some relief:

1. Some creditors are unaware of the federal and state disclosure requirements. These creditors may, therefore, voluntarily comply with such requirements after an informational phone call by the legal assistance officer.

2. Armed Forces Disciplinary Control Boards may declare noncomplying creditors off limits under

provisions of Dep't of Army, Reg. No. 190–24, Military Police—Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services (15 Nov. 1982). In order to avoid this sanction, creditors may choose to "voluntarily" comply with disclosure requirements.

3. Local Better Business Bureaus not only collect information regarding such violations but may also contact the creditor, publicize the violation in the local media, and serve as a liaison with consumer protection agencies.

4. State and local consumer protection agencies may deal directly with creditors who fail to comply with disclosure requirements, serving either enforcement or advocacy functions.

5. Violations of the Federal Truth in Lending Act may be reported to the Federal Trade Commission, which has general enforcement authority pursuant to 15 U.S.C. § 1607(c).

6. Consumers may proceed directly against noncomplying creditors for actual damages or other statutory remedies provided by 15 U.S.C. § 1640(a).

7. State Attorneys General may take legal action against noncomplying creditors on behalf of individuals or classes. In some states, the attorneys general have the authority to administratively mandate compliance or to assess administrative penalties. Captain Hayn.

Automobile Dealers' Reduced Rate Financing

The California Credit Union League has recently taken the position that the manner in which many automobile dealers conduct reduced rate financing programs violates the Federal Truth in Lending Act (15 U.S.C. §§ 1601–1667 (1982)). The League's research indicates that often a part of the finance charge is concealed within the purchase price of the vehicle sold and financed with the reduced rate. In a letter dated 12 June 1986 from Wilfred F. Broxterman, President of the California Credit Union League, to the Consumer Advisory Council to the Board of Governors of the Federal Reserve System, the League expressed its concern. That letter stated substantially as follows:

The League has received several reports from consumers who have purchased vehicles using the reduced rate financing. One consumer indicated that he negotiated for four hours with the dealership but was not able to reduce the purchase price of the vehicle by one cent and still be able to utilize reduced rate financing.

Another consumer was drawn to a dealership by an advertisement for a pick-up truck; the ad contained the purchase price of the truck. When this consumer arrived at the dealership, the truck advertised was still there, but when the consumer inquired about financing the purchase at the dealer's reduced rate, he was informed that this was not possible. Although he did purchase another truck that was equipped identically to the one which appeared in the ad, the purchase price was between four and five hundred dollars more because of the reduced rate financing. In both instances, the consumers were told approximately the same thing by employees of separate dealerships: "Well, we have to make the money somewhere."

One manager of a credit union in the San Francisco area went to a dealership, negotiated a cash purchase price for a car, and then inquired about the availability of reduced rate financing. He was informed that if reduced rate financing were used, the cash purchase price which had been negotiated would have to be increased by two thousand dollars! The League has received numerous other reports from credit unions throughout the state indicating that this practice is commonplace.

Because it is concerned about the breadth of this problem, the California State Attorney General's Office has initiated four criminal actions against dealerships in the Los Angeles area. The attorney general's staff has charged the dealers with consumer fraud because part of the finance charge was allegedly hidden within the purchase price of the vehicle. Three of the four dealerships have entered into plea arrangements, but the fourth dealership appears intent on defending its practices in court.

This issue is also being pursued in other states. In Michigan, the corporate headquarters of America's three big automobile manufacturers, the state attorney general is pursuing similar action. The League believes that the attorney general would not initiate such a campaign unless clear truth in lending violations existed.

The League also believes that a new trend may be apparent in General Motors' latest round of reduced rate financing. A week or two prior to offering the current reduced rate of 5.9% to the consumer, General Motors made an across-the-board price increase on all of their cars. As a result, the dealers are now selling cars at increased prices regardless of whether the consumer purchases the car with cash or seeks reduced rate financing. Thus, it now appears that *all consumers* are paying for reduced rate financing whether or not they finance the purchase through the dealer.

The League contends that the actions of the states' attorneys general are insufficient because they only respond to the problem piecemeal and on an as-reported basis. According to the League, too many consumers are being duped by reduced rate financing and are not aware of how they are being injured. The League suggests that the Federal Reserve Board Consumer Advisory Council take the necessary steps to initiate regulations that would require the dealers to clearly disclose to the consumer the difference between the cash purchase price and the reduced rate financing price and to reflect that difference in the annual percentage rate.

Financial statements (10K forms) filed with the Securities and Exchange Commission by both Ford Motor Credit Company and Chrysler Credit Corporation appear to reflect a huge subsidy of the reduced rate by the manufacturers. The League therefore suggests that all consumers should receive a disclosure of what part or percent of the purchase price is being used to subsidize the manufacturer's reduced rate financing programs. If the manufacturers are intent on continuing these programs, the League believes that consumers should be given an opportunity to make an informed decision based on how the reduced rate is being paid. They should not be misled into believing that they are saving hundreds or even thousands of dollars when in fact they are not.

The California Consumer Credit League points out that credit unions support consumer education which allows

consumers to make well informed financial decisions. As such, the League notes that it is not opposed to healthy competition but is opposed to a deceptive program that beguiles consumers into believing that they are getting something other than that which is advertised.

Connecticut Credit Card Surcharge Law Enacted

A statute recently passed by the Connecticut legislature provides that sellers in Connecticut may not impose a surcharge on a buyer who uses a credit card in lieu of payment by check, cash, or similar means. Sellers may, however, offer discounts to buyers to induce them to pay by means other than a credit card and may establish a minimum purchase policy if this is disclosed orally or in writing at the time of purchase. The statute, 1986 Conn. Acts Ch. 222 (Reg. Sess.), takes effect 1 October 1986.

Another Connecticut statute, effective 5 June 1986, limits the maximum finance charge that may be applied under an open end credit plan to not more than 1¼% per month. According to Conn. Gen. Stat. § 42–133c, transactions under open end credit plans are subject to this provision whenever a solicitation for the extension of credit is made by a creditor whose primary activity in Connecticut is soliciting Connecticut customers through the mails and such solicitation, though originating outside Connecticut, is directed to and received by a customer who resides in and responds to the solicitation in Connecticut.

Oregon Court Interprets Electronic Fund Transfer Act Liability Provisions

In *Vaughn v. United States National Bank of Oregon,* 79 Or. App. 172, 718 P.2d 769 (1986), a cardholder initially loaned a VISA credit card and personal identification number to a friend so that the friend could perform some transactions on behalf of the cardholder. When the friend subsequently stole the credit card and withdrew $450 from the cardholder's account, the court held that the cardholder was liable only up to $50 based on 15 U.S.C. § 1643 (1982), notwithstanding the bank's argument that the friend had "apparent authority" to use the card, excluding him from the definition of "unauthorized use".

Virginia Home Solicitation Sales Act Amended

Effective 1 July 1986, the Virginia Home Solicitation Sales Act, Va. Code § 59.1–21.2 (1986), was amended to include within the definition of "home solicitation" the sale or lease of goods or services by telephone or other electronic means where such a transaction occurs at any residence other than the seller's. This change expands the scope of the Act, which permits cancellation of any "home solicitation" until midnight of the third business day after the day on which the buyer signed the agreement or offer to purchase. "Home solicitation" sales do not include consumer sales or leases of farm equipment, cash sales of less than $25, sales or leases made pursuant to preexisting revolving charge accounts, or sales or leases made pursuant to prior negotiations between the parties.

Tax Revision—Senate Plan

The following item was prepared by First Lieutenant William P. Trendell, USAR, Individual Mobilization Augmentee to the 101st Airborne Division (Air Assault), Fort Campbell, Kentucky.

On 24 June 1986, the U.S. Senate approved a federal tax package that would affect the tax bills of most Americans. The House-Senate conference committee will meet to work out the differences between the Senate bill and the House version passed last December. The general effective date for the Senate bill is 1 January 1987.

According to the Joint Congressional Committee on Taxation, the federal tax bill for the average taxpayer will be reduced 6.4% under the Senate package, compared to the 9% reduction under the House version. Although the Senate bill offers greater reductions in tax rates, it eliminates more deductions than the House measure.

The major provisions of the Senate plan affecting individuals are:

Income Tax Rates: the 14 tax rates (15 for single taxpayers) in the current law will be reduced to two: 15% and 27%. For married couples filing jointly, the tax rate is 15% of taxable income up to $29,300. Above that, the rate is 27%. Single taxpayers will pay 15% of their taxable income up to $17,600, and at the 27% rate above that. Standard Deduction: The standard deduction, currently called the "zero bracket amount," would increase to $5,000 for joint filers from the current $3,670. For single taxpayers, the standard deduction will increase to $3,000 from $2,480.

The special deduction for married couples who both work will be repealed.

Personal Exemption: The personal exemption would rise to $1,900 in 1987 and $2,000 in 1988 from the current $1,080.

Deductions: Mortgage interest on first and second homes will remain deductible as will state and local income and property taxes. Sales tax deductions will generally be repealed.

Consumer interest payments for car loans, credit cards, etc., will no longer be deductible.

Miscellaneous deductions such as union dues, safe deposit boxes, professional journals, etc., will be eliminated.

Tax Credits: The tax credit for child care expenses would be retained. The credit for political contributions would be eliminated.

Individual Retirement Accounts: Deductions for contributions to IRAs will only be allowed for those taxpayers not covered by an employer's pension plan.

Capital Gains: Long term capital gains will no longer be taxed at a lower rate than other income. The top tax rate on long term gain will rise to 27% from 20%.

Income Averaging: The Senate measure limits income averaging to farmers.

Dividends: The $200 exclusion ($100 for individuals) of dividend income taxpayers currently receive will be eliminated.

Provisions which appear on both the Senate and House tax bills will most likely appear on the bill that comes out of the House-Senate conference. These provisions are: repeal of the two-earner deduction; retention of state and local income and property taxes deductions; retention of mortgage interest deduction for first and second homes; elimination of the $200 dividend exclusion; elimination of

income averaging for non-farmers; and retention of the child care credit.

Family Law Notes

Texas Child Support Guidelines

Texas has taken a substantial step toward full compliance with the Child Support Enforcement Amendments of 1984. Although the Amendments do not require the enactment of child support guidelines until October 1, 1987, the Texas Supreme Court has promulgated a somewhat unique set of child support guidelines effective June 1, 1986.

To date, twelve states have enacted guidelines, two more will have them in effect by the beginning of 1987, two are testing guidelines in various judicial districts, and ten more states have begun legislative consideration. Texas becomes the most recent state to enact guidelines, and the final product of the Texas Supreme Court promises to dramatically alter child support throughout the state.

The Texas guidelines, codified at section 14.05(a) of the Texas Family Code, are an adapted version of the Wisconsin and Colorado guidelines, with several variations. The amount of child support to be ordered by the court is determined by multiplying the obligor's gross income per month by a percentage based on the number of children for whom child support is to be ordered. The applicable percentages are 17% for one child, 25% for two children, 29% for three children, 31% for four children, and 34% for five or more children.

In addition to the percentages, the guidelines assume that the court will order the obligor to provide health insurance coverage for each child.

Texas differs from all other states that have enacted guidelines, with the exception of Colorado, in making the guidelines serve as a rebuttable presumption. According to the statute, it is presumed that the amount of child support computed under the guidelines is in the best interest of the child. That presumption may only be rebutted under very limited and expressly enumerated circumstances. Failure to meet one of the exceptions, regardless of the specific facts of a given case, would require explicit compliance with the guidelines.

The policy of strict adherence to the enumerated guidelines differs from all other programs enacted to date. Colorado, which also establishes their guidelines as a rebuttable presumption, takes a less emphatic approach. The Colorado statute states "the Court may exercise broad discretion in deviating from the guidelines in cases where application would be inequitable to one of the parties or to the child." Co. Rev. Stat. § 14–10–115(3)(b). The general rule has been to use the guidelines as minimum acceptable support awards, or as an advisory standard. It remains to be seen what effect this will have in practice, and whether such a system is workable.

Additionally, while most percentage-based guidelines use disposable income as the starting base, Texas has opted to use the obligor's gross income as the base for computing the child support. Naturally, this will render higher support awards, which may make the payments overly burdensome. This is substantially offset by the relatively low percentage scale, however. Missouri for example, has a scale that ranges from 22% to 46%, but which uses net income.

The new statute also includes a provision that states that if the court finds the obligor has elected to work at a position which generates lower income than would be consistent with the obligor's education, training and work experience, the court may determine that the obligor is underemployed by choice and apply the guidelines to the obligor's earning potential. Several states have adopted this type of provision as it serves to protect against those who try to "beat" the system.

The Texas child support guidelines are also interesting for what is not included. There are no percentage changes based on the ages of the children who are to receive support. Recent research in this area has concluded that as children get older, the percentage of family budgets spent on children increases significantly enough to warrant different age-specific schedules. Some states that have enacted guidelines have included this consideration into the statutes, and the Connecticut guidelines serve as a model example. (Con. Special Act. 84–74). Further, there is no mention of a standard of living adjustment mechanism. Some states, such as Delaware, have devised a formula that requires a percentage of the obligor's surplus income be awarded to the children. This serves to prevent a dramatic decrease in the standard of living for the child after the divorce.

Whether the new Texas child support guidelines will accomplish their purpose remains to be seen. The existence of the guidelines demonstrates that child support and the enforcement of support has a high judicial priority. Mr. Daniel S. Connolly, Legal Intern.

Obtaining Child Support or Alimony From Veterans

Legal assistance officers occasionally receive questions concerning veterans who are receiving veteran's benefits but are not paying child or spousal support. Many times, the veteran may be a military retiree who has waived a portion of longevity retirement pay in order to receive veteran's benefits. This is because veteran's disability benefits are nontaxable while military longevity retired pay is taxable.

Keith Snyder of the National Veteran's Legal Services Project has prepared a short guide on this subject which was published in the May 1986 edition of *Clearinghouse Review*. It has been edited and is republished below with the author's permission.

Many legal assistance attorneys have their first contact with the Veterans Administration (VA) in the context of trying to obtain child support or spousal support from retired veterans who are behind in their payments. Calling a VA Regional Office and asking how a veteran's benefits can be garnished or assigned and sent straight to children not living with the veteran can lead to mixed responses. Asking how to garnish or assign the benefits will be met with a short answer; the benefits cannot be assigned. However, asking how to apportion the benefits will be met with a longer, and more satisfactory, answer; a part of the benefits may be received by the children.

Of course, initially, counsel must determine the nature of the VA benefit program from which the veteran receives assistance. Calling or writing the nearest VA Regional Office should produce the necessary information. The amount of pension compensation, dependency and indemnity compensation, educational assistance allowance, retirement pay,

and subsistence allowance of any veteran may be disclosed to any person who requests such information.

With certain exceptions, VA benefits cannot be garnished or assigned. The statute states:

> Payment of benefits due or to become due under any law administered by the [VA] shall not be assignable except to the extent specifically authorized by law and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.[1]

One exception to this nonassignability provision occurs in the context of child support and alimony obligations. The exception involves a veteran who is eligible for military retirement benefits. If the veteran has waived *a portion* of his or her military retired or retainer pay in order to also receive VA disability compensation benefits, the amount waived would be subject to garnishment as "based upon renumeration for employment" payable by the federal government.[2]

Payments of disability compensation by the VA to an individual whose entitlement to disability compensation is greater than his or her entitlement to retired pay, and who has waived *all* of his or her retired pay in favor of disability compensation, are not subject to garnishment.[3] Other VA benefits, including Chapter 34 educational assistance and pension benefits, are also not subject to garnishment and, even if they are on deposit in a bank, retain their exempt-from-garnishment status; but, as long as they remain deposited and are available on demand for use for the veteran's support and maintenance, they are exempt.[4] Some states have similar statutory provisions.[5]

If an order for garnishment of VA benefits is obtained, it must be served on the Finance Officer at the nearest VA Regional Office. In cases in which garnishment is not available, a request for an apportionment *may* be appropriate. The granting of an apportionment is, by the VA's description, a discretionary function. By statute, such decisions are not subject to judicial review.

Sometimes, VA benefits can be apportioned among the veteran's spouse, children, or dependent parents.[6] For example, if the veteran is incompetent and is being furnished hospital treatment, institutional care, or domiciliary care by the government, compensation or pension benefits can be apportioned. Apportionment is also allowed if the veteran is not living with his or her spouse or children and is not "reasonably discharging his or her responsibilities" for their support.[7] Certain benefits that are ordinarily not payable due to incarceration for a felony may be apportioned to a dependent spouse and children if the dependents can demonstrate the need for support.[8]

Regardless of the provisions in regulations relating to a particular type of benefit, a "special" apportionment is available if hardship is shown to exist—as long as such apportionment does not cause undue hardship to other persons in interest.[9]

The factors considered in determining whether a special apportionment should be made are:

the amount of VA benefits payable;

other resources and income available to the veteran and those dependents in whose behalf apportionment is claimed; and

special needs of the veteran, his or her dependents, and the apportionment claimants.

Ordinarily, according to the VA, apportionment of more than fifty percent of the benefits would constitute undue hardship on the veteran, while apportionment of less than twenty percent would not provide a reasonable amount for any apportionee. No apportionment will be made until the veteran's estranged spouse files a claim for an apportioned share. There is no special form used for this purpose. The request should, however, include the veteran's claim number, which frequently is the same as his or her social security number. Apportionment will not be made:

if the total benefit payable does not permit payment of a reasonable amount to any apportionee;

if the veteran's spouse has been found guilty of conjugal infidelity;

if the veteran's purported or legal spouse lives with another person; or

if the veteran's child has been legally adopted by other persons (except, if the veteran is receiving additional compensation for the child, this amount will be apportioned to the child).[10]

Rules on how different benefits are to be apportioned vary with the benefit program.[11] Sometimes an issue is raised as to whether VA disability compensation is considered earned income that should be considered as part of the veteran's resources in determining the veteran's ability to pay child support. According to a December 5, 1985, letter

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[1] 38 U.S.C. § 3101(a) (1982). *See also* 38 U.S.C. § 770(g) (1982) concerning insurance policy proceeds.

[2] 42 U.S.C. § 662(f)(2) (1982).

[3] 5 C.F.R. § 581.103(c)(4)(iv) (1986).

[4] Porter v. Aetna Casualty Co., 370 U.S. 159 (1962); Lawrence v. Shaw, 300 U.S. 245 (1937).

[5] *See, e.g.*, Wis. Stat. § 815.18(24).

[6] 38 U.S.C. § 3107 (1982).

[7] 38 C.F.R. § 3.450(a)(ii) (1986).

[8] Adjudication Manual of the Department of Veterans' Benefits, M21-1, ¶ 24.07 [hereinafter cited as M21-1].

[9] 38 C.F.R. § 3.451 (1986).

[10] 38 C.F.R. § 3.458 (1986).

[11] Guidance on this and on the evidence required to establish relationships and to establish need are found at 38 U.S.C. §§ 3503(e), 3504(c) (1982), and 38 C.F.R. §§ 3.450–61 (1986). *See especially* M21-1, ch. 26, and Department of Veteran's Benefits, DVB Cir. 20–82–38 (Nov. 19, 1982) (available from any VA Regional Office or from the National Veterans Legal Services Project). *See also* 38 U.S.C. § 3101 (1982).

from the VA General Counsel, a court of competent jurisdiction has the authority to base the amount of a parent's child support obligation on income and assets from whatever source derived, including VA benefits. Whether or not VA benefits are included for purposes of such calculation is a matter of state law in the relevant jurisdiction.

For further information, contact the National Veterans Legal Services Project, 2001 S. Street, N.W., Suite 702, Washington, DC 20009.

National Survey On Consumer Account Bank Fees

The Consumer Federation of America (CFA) recently released its third annual national survey on bank fees, and its findings are of interest to legal assistance attorneys advising clients on consumer preventive law matters.

The report, an edited version of which appears below, was compiled by Alan Fox, legislative representative for CFA, and Ken McEldowney, Director of the San Francisco Consumer Action Group, in conjunction with twenty other state and municipal consumer groups.

For the second consecutive year, the survey has found fees for routine services rising sharply for most depositors. High balance requirements and high fees have combined to make interest-bearing checking (NOW) accounts unavailable to nearly half of all American families. Even a family willing to forego a chance to earn interest will pay, on the average, $98 for a low-balance, non-interest checking account. Bounced check fees now range as high as $40.

Including all fees, the cost of the average NOW account to a small depositor rose 12.3% in just one year, after a 13.1% increase in the previous year. The cost of a small checking account increased 3.3% in the past year, on top of a 5.2% increase the year before. Bounced check charges, which rose 4.8% in 1984–1985, climbed an additional 5.6% in 1985–1986.

In all, 113 banks and 112 thrifts were surveyed. Comparable data from CFA's 1985 survey was available for 92 institutions and provided the basis for 1985 to 1986 comparisons. All such comparisons in this report are based only on institutions surveyed in both years. Comparisons between 1984 and 1985 are based on 38 institutions that were surveyed both years.

Non-Interest Checking Accounts

Despite the availability of interest-bearing accounts, many consumers keep non-interest checking accounts for their day-to-day transactions. These accounts cost banks nothing in interest and, with the advent of automation, should not be significantly more costly to maintain than in the past.

But the days of "free checking" are over. The 155 institutions that offered non-interest accounts, most of them banks, charge between $22 and $184 annually for a low-balance checking account with relatively few transactions. The average cost was $98.

Minimums to Avoid Charges. Most of the institutions required account holders to maintain several hundred dollars, interest-free, to avoid charges. Eleven (7%) of the 155 institutions charged consumers for checking accounts no matter how large a balance was maintained, and eight others (5%) had no monthly or transaction fees and thus no balance requirements. Of the remaining 136 institutions with fees based on balance levels, the 56 (41%) that used average balance methods required an average of $735 to avoid fees, with a range of $100 to $1200. The 105 institutions (77%) that used low balance methods averaged $436, with a low of $100 and a high of $1500, and some calculated both ways. In New York, no institution using either method had a minimum balance less than $1000, and most other areas had at least one bank that required that high a balance.

Changes. Sixty-three institutions charged a monthly fee for all accounts or for those that failed to meet balance requirements, 4 charged only for every check, and most, 80 accounts, charged both fees. Some of these charged as well for Automatic Teller Machine (ATM) withdrawals (see separate section on ATMs). As with NOW accounts, fees varied further at a particular bank based on balances or the number of checks written. In calculating averages, the report used the charges for accounts with $200 average balances, $100 minimum balances, and ten checks per month, and assumed a consumer would pay extra if necessary to receive cancelled checks.

The average monthly charge was $4.19, and the average per check charge was $.24. Monthly fees were as high as $12, and never below $1. Check charges ranged from $.10 to $.50.

Combined Non-interest Checking Charges. Charges for checking accounts ranged between $22 and $184 per year, and averaged $98, when all factors were considered. The CFA calculated these averages assuming an average monthly balance of $200, falling below $100 at least once a month, ten checks and four automatic teller withdrawals per month, and two bounced checks and one returned deposit per year.

1985 v. 1986. In 1985, only bank's non-interest accounts were surveyed. Forty-six of the banks surveyed in 1986 were also surveyed in 1985. Those banks charged small depositors an average of $108.32 in 1986, well above the average for all institutions, but only slightly above the average for banks in the full survey. That figure is a 3.3% increase over the 1985 average of $104.89 for the same accounts at the same institutions.

"No Frills" Accounts

How Available and at What Cost? The banking industry claims that low-cost "basic" or "no-frills" accounts are widely available as inexpensive alternatives for consumers. An attempt was made to test this claim in two ways.

First, all institutions were asked to recommend an account for a low-balance customer who writes eight checks per month. Because the industry has touted shifting such consumers to ATM machines in order to cut costs, the survey did not mention such withdrawals, assuming that low-cost alternatives were available. When asked if they would suggest a checking account, a NOW account, a different account, or if they would say no account was suitable, 117 institutions (52%) recommended one of the institution's regular accounts and 48 (21%) said no account was appropriate. Only 60 (27%) recommended an alternative account.

Many of the recommendations would not have been very helpful to low-balance depositors. Interviewers were frequently steered to high-balance, high-cost NOW accounts with the assurance that fees of $5 a month or more would be offset by interest income, even though the account described would only earn about $10 a year.

There is no standard definition of a "basic" account, but most in the industry seem to regard them as no-balance accounts, where fees are charged regardless of the account balance. For a second analysis, a "basic" account was defined as such an account or as one with no regular fees, provided that the account was recommended as a low-balance account in the interview. In contrast to analyses of other accounts, it was assumed that such a customer would accept check truncation to reduce costs.

Only 61 of the 225 institutions (27%) offered accounts meeting this definition. They were not distributed evenly around the country. For example, six of the accounts were located in Boise, Idaho, and only one in Boston.

Nor were the accounts inexpensive. Under the assumptions used—eight checks and six ATM withdrawals per month, two bounced checks and a returned deposit each year, cancelled checks not returned—the average cost of these accounts was over $75. Some cost over $100. Citibank, in New York City, for example, charged $4 per month plus $.75 per check or ATM withdrawal after the first six months, which adds $6 per month to the costs in this example. Including the other factors, the total cost was $138, six dollars more than the same customer would pay for an ordinary Citibank checking account. Even if only eight checks or withdrawals were made each month, this account would cost $84 per year.

Other Account Charges

Bounced Checks. Every institution surveyed charged at least $5 for writing a check for which there are insufficient funds. The charge ranged as high as $40. Nationally, the average charge was almost $14.

In comparing 1985 and 1986 data for 92 institutions, the average bounced check charge at these institutions increased from $13.04 to $13.77, a 5.6% increase.

Returned Deposit Charges. Sixty-four percent of the surveyed institutions—144 of 225—now assess a charge if a deposit check is subsequently returned. These charges range from $1 to $25, averaging almost $5. In some areas, few institutions surveyed have such a charge, while in Boston and Buffalo, every institution surveyed reported such a charge.

Automatic Teller Machine Withdrawal Charges. Over 90% of the institutions surveyed allow access to NOW accounts or checking accounts or both through automatic teller machine (ATMs). Most did not charge for ATM withdrawals, or only charged if minimum balance requirements were not met and there was a charge for checks as well as ATM withdrawals.

Under the minimum balance assumptions previously used, 51 NOW accounts (23%) and 58 checking accounts (37%) required fees for ATM withdrawals. These fees usually were the same as the institutions' per check charges ($.10 to $.50), and occasionally were a little lower. The charges averaged $.24 for both types of accounts.

In addition to these transaction charges, some institutions charged an annual fee for use of an ATM card. Eight institutions levied such a charge for one or more of their accounts, with most charging $12 to $18 a year for ATM access.

Cashing Government Checks. One thing has not changed much: People who cannot afford bank service charges and rely on government benefit checks have an extremely difficult time cashing their checks at banks and savings and loans.

Over 72% of the institutions surveyed would not cash a government check for a noncustomer at any price. Only 26 institutions—11.6%—would cash a check for free. Another 36 charged an average of $3.28 for a $300 check; many had variable charges depending on the amount of the check.

Data on check cashing is a little difficult to interpret because many institutions give individual branches authority to determine policies. There may have been a modest increase in the number of institutions cashing government checks for free, but branch autonomy practices may account for all or part of this improvement.

Other Information

Identification Requirements. Over sixty-three percent of the institutions surveyed required two pieces of identification to open an account, one of which usually had to be a picture ID. About thirty-five percent required only one piece, usually with a picture, and 1.4% required three pieces. Identification requirements at a particular institution were usually the same for both checking and NOW accounts.

Thirteen-and-a-half percent of the NOW accounts surveyed and 11.6% of all noninterest accounts required a depositor to have a major credit card to open an account. This is a significant barrier to low- and moderate-income consumers; only 42% of all families have bankcards, and their median income, $30,000, is well above the national average. Credit card requirements were more widespread than expected, with institutions requiring a credit card located in Minnesota, Wisconsin, Maryland, Kansas, Arizona, Massachusetts, Florida, Idaho, Ohio, Michigan, New York, Illinois, and Washington, D.C.

In some cases, stiff identification requirements render otherwise attractive accounts inaccessible. First National Bank of Chicago, for example, offered a checking account with only a $100 average balance required to avoid fees, but required three pieces of identification, including a credit card, to open the account.

Free Accounts for Senior Citizens and Minors. Many institutions had free accounts, or would waive routine fees on regular accounts, for senior citizens and minors. Few interest-bearing checking accounts were offered free; seniors could get fees waived on 39% of such accounts, and minors on only 4%. But noninterest checking accounts were often available free to seniors; 60% would waive senior's fees, while only 5% would do so for minors. Another 5% are free to all customers.

Twenty-three percent of all savings accounts were free to all customers regardless of age. Another 23% were available free to seniors, and 46% would waive fees for minors. Some institutions required direct deposit of Social Security

or other benefit checks as a condition for waiving fees, particularly on NOW accounts. Institutions defined "seniors" at a variety of ages between 55 and 65.

Opening Balance Requirements. At most institutions, balance requirements to avoid fees serve to discourage small depositors. In some instances, high opening deposit requirements compounded the problem.

About 80% of all institutions imposed an opening balance requirement on each of the three types of accounts. These requirements were particularly high on NOW accounts, averaging over $425. In two areas, Louisiana and New York City, averages exceeded $1000.

The Biggest Banks and Savings & Loans

Information was compiled separately on the ten largest banks and ten largest savings and loans in the nation, as measured by deposits. Two large banks were excluded because they handled few consumer dollars.

The results of this compilation were mixed. These institutions tended to have substantially higher balance requirements to avoid fees. Their fees for failing to meet balance requirements were about 10% above the national averages. Their bounced check charges, however were well below average—$10.68 v. $13.92—largely because 17 of the 20 institutions were located in California and New York which, along with Idaho, have the lowest bounced check charges in the country. In fact, if the Mellon Bank's $30 charge, second highest in the country, is excluded, bounced check charges among these institutions average just $9.66.

Total fees for small depositors were little different at these institutions than at others around the country. But the higher balance requirements make a big difference to many large depositors. A $1475 average balance in a NOW account was enough in most cases to avoid fees and receive interest. But at every one of the 10 largest banks, a $1475 account would incur fees. Two banks would not pay interest on $1475, effectively an annual penalty of $80. In fact, three of the 10 banks would not even open an account for $1475, even though that amount is substantially above the average customer's monthly take-home pay.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

The Judge Advocate General's School Continuing Legal Education (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, instructors, and local action officers for The Judge Advocate General's School Continuing Legal Education (On-Site) Training program for Academic Year (AY) 1987. The Judge Advocate General has directed that all Reserve Component judge advocates assigned to The Judge Advocate General Service Organizations (JAGSOs) or to judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135–316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The On-Site program features instructors from The Judge Advocate General's School, U. S. Army (TJAGSA), and has been approved for continuing legal education (CLE) credit in several states. Some On-Sites are co-sponsored by other organizations, such as the Federal Bar Association, and include instruction by local attorneys. The civilian bar is invited and encouraged to attend On-Site training.

Action officers are required to coordinate with all Reserve Component units in their geographical area that have assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed forces installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Limited funding from ARPERCEN is available, on a case by case basis, for IRR members to attend On-Sites in an ADT status. Applications for ADT should be submitted 8 to 10 weeks prior to the scheduled On-Site to Commander, ARPERCEN, ATTN: DARP–OPS–JA (MAJ Hamilton), 9700 Page Boulevard, St. Louis, MO 63132–5260. Members of the IRR may also attend for retirement point credit pursuant to AR 140–185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange legal specialists/NCO and court reporter training to run concurrently with On-Site training. In the past, enlisted training programs have featured Reserve Component JAGC officers and non-commissioned officers as instructors as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison. A model training plan for enlisted soldier On-Sites was distributed this year to assist in planning and conducting this training.

JAGSO detachment commanders and SJAs of other Reserve Component troop program units will ensure that unit training schedules reflect the scheduled On-Site training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

Questions concerning the On-Site instructional program should be directed to the appropriate action officer at the local level. Problems that cannot be resolved by the action officer or the unit commander should be directed to Major Craig P. Wittman, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22903–1781 (telephone 804/293–6121).

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 87

Date	City, Host Unit and Training Site	Subject/Instructor		Action Officer
4, 5 Oct 86	Minneapolis, MN 214th MLC Thunderbird Motel 2201 E. 78th Street Bloomington, MN 55420	Contract Law Criminal Law	MAJ McCann CPT Lewis	MAJ Robert Blum 617 10th Street Albert Lea, MN (507) 373–7600
8, 9 Oct 86	Honolulu, HI IX Corps (Aug) Kolani Center Fort DeRussey, HI	Admin & Civil Law International Law	MAJ Brown MAJ McAtamney	MAJ Douglas Silva WESTCOM Claims Service Fort Shafter, HI 96858–5100
18, 19 Oct 86	Philadelphia, PA 79th ARCOM Willow Grove NAS Willow Grove, PA	Admin & Civil Law Criminal Law	CPT Hayn MAJ Williams	CPT James M. Brogan 153d JAG Det. USARC, NAS Willow Grove, PA 19090–5110 (215) 563–4470
25, 26 Oct 86	Boston, MA 94th ARCOM Hanscom AFB Bedford, MA	Contract Law International Law	MAJ D. Kennerly MAJ Hall	LTC Paul L. Cummings HQ, 94th ARCOM AFRC, Bldg 1607 Hanscom AFB, MA 01731–5290 (617) 277–1991
1, 2 Nov 86	St. Louis, MO 102d ARCOM TBD	Admin & Civil Law International Law	MAJ Woodruff MAJ Hall	COL C.W. McElwee Suite 204 22 North Euclid St. Louis, MO 63108 (314) 454–5414
15 Nov 86	Detroit, MI 123d ARCOM 26402 West 11 Mile Rd Southfield, MI	Admin & Civil Law International Law	MAJ Serene MAJ McAtamney	LTC Michael L. Updike 6061 Venice Drive Union Lake, MI 48085 (313) 851–9500, Ext. 477
16 Nov 86	Indianapolis, IN 123d ARCOM TBD	Admin & Civil Law International Law	MAJ Serene MAJ McAtamney	MAJ John Joyce 10404 Stormhaven Way Indianapolis, IN 46256 (317) 637–5353
6, 7 Dec 86	New York, NY 77th ARCOM World Trade Center New York, NY	Contract Law International Law	MAJ D. Kennerly MAJ Romig	COL Frederick W. Engel P. O. Box 448 Madison, NJ 07940 (201) 377–0666
10, 11 Jan 87	Los Angeles, CA 78th MLC Marina Del Rey Marriot Marina Del Rey, CA	Admin & Civil Law Criminal Law	MAJ Rosen MAJ Wittmayer	LTC Charles W. Jeglikowski 4256 Ellenita Avenue Torrance, CA 91356 (213) 894–4636
17, 18 Jan 87	Seattle, WA 124th ARCOM 6th MLC University of Washington School of Law Seattle, WA	Admin & Civil Law Criminal Law	MAJ Guilford MAJ Anderson	MAJ Robert Burke 4505 36th Avenue W. Seattle, WA 98199 (206) 623–3427
7, 8 Feb 87	San Antonio, TX 90th ARCOM HQS, 90th ARCOM 1920 Harry Wurzbach Highway San Antonio, TX	Admin & Civil Law Contract Law	MAJ Gruchala MAJ Post	MAJ Michael D. Bowles 7303 Blanco Road San Antonio, TX 78216 (512) 349–3761
21, 22 Feb 87	Denver, CO 96th ARCOM TBA	Contract Law International Law	MAJ Pedersen MAJ McAtamney	LTC Timothy J. Simmons 3205 Parade Circle E Colorado Springs, CO 80917 (303) 475–0924

Date	City, Host Unit and Training Site	Subject/Instructor		Action Officer
7, 8 Mar 87	Columbia, SC 120th ARCOM University of South Carolina School of Law Columbia, SC	Admin & Civil Law Criminal Law	MAJ L. Kennerly MAJ Capofari	LTC Costa M. Pleicones 1529 Laurel Street Columbia, SC 29201 (803) 771–8000
10, 11 Mar 87	San Juan, PR 7581st USAG Fort Buchanan, PR	Admin & Civil Law Criminal Law	MAJ L. Kennerly MAJ Capofari	CPT Harold Granville Box 7974 Ponce, PR 00731 (809) 843–7676
14, 15 Mar 87	Kansas City MO 113th MLC Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law Contract Law	MAJ Brown MAJ McShane MAJ McCann	COL David W. Kolenda 8890 West Dodge Road Suite 335 Omaha, NE 68114 (402) 393–3227
21, 22 Mar 87	Sacramento, CA CA ARNG TBA	Admin & Civil Law Criminal Law	MAJ Brown MAJ Warren	MAJ Tom Erres 770 L Street Suite 1200 Sacramento, CA 95814 (916) 444–8820
21, 22 Mar 87	Louisville, KY 125th ARCOM TBD	Admin & Civil Law International Law	MAJ Hockley MAJ Romig	LTC James H. Barr III 218 Choctaw Road Louisville, KY 40207 (502) 582–5911
11, 12 Apr 87	New Orleans, LA 2d JAG Detachment Sheraton Hotel New Orleans, LA	Contract Law Criminal Law	LTC Zucker LTC Gordon	CPT Clem Donelon 2d JAG Det 5030 Leroy Johnson Drive New Orleans, LA 70146–3602 (504) 885–9183
11, 12 Apr 87	Chicago, IL 86th ARCOM USAREC Conf. Room Fort Sheridan, IL	Contract Law International Law	MAJ Pedersen MAJ Romig	MAJ Terrence J. Benshoof 123 Grove Avenue Glen Ellyn, IL 60137 (312) 858–6877
25, 26 Apr 87	Washington, DC 10th MLC TBA	Contract Law International Law	MAJ Post MAJ Hall	CPT David W. LaCroix 113 Grantham Court Walkersville, MD 21793 (202) 282–2524
2, 3 May 87	Birmingham, AL 121st ARCOM Cumberland Law School Birmingham, AL	Contract Law Criminal Law	MAJ McCann MAJ Mason	MAJ William D. Hasty, Jr. 90 Bagby Drive, Suite 200 Birmingham, AL 35209 (205) 942–7649
16, 17 May 87	Columbus, OH 83d ARCOM Defense Construction Supply Center (DCSC) Columbus, OH	Admin & Civil Law Criminal Law	MAJ Phelps CPT Lewis	MAJ James R. Kingsley Building 150 DCSC Columbus, OH 43216–5004 (614) 477–2546
16, 17 May 87	Atlanta, GA USARCENT/81st ARCOM TBA	International Law Contract Law	LTC Graham LTC Zucker	CPT Paul Stephens HQ, 3rd U.S. Army ATTN: AFRD–JA Fort McPherson, GA 30330–6000 (404) 752–3836

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

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
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually

Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

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

4. Civilian Sponsored CLE Courses

November 1986

2–7: NJC, The New Judge and the Trial, Reno, NV.

2–14: NJC, Administrative Law (for Judges), Reno, NV.

2–14: NJC, Administrative Law Decision Making, Reno, NV.

3–4: PLI, Managing the Medium-Sized Law Firm, New York, NY.

3–4: PLI, Managing the Small Law Firm, New York, NY.

3–7: FPI, Concentrated Course in Government Contracts, Washington, DC.

3–7: Cost Reimbursement Contracting, Washington, DC.

5–7: PLI, Equipment Leasing, San Francisco, CA.

7: GICLE, Recent Developments in the Law, Amelia Island, FL.

9–13: NCDA, Office Administration, San Francisco, CA.

9–14: NJC, Trends in the Law for New Judges, Reno, NV.

13–14: NELI, 1986 Employment Law Conference, New York, NY.

13–14: PLI, Communications Law, New York, NY.

16–20: NCDA, Prosecution of Violent Crime, Orlando, FL.

17–21: GCP, Construction Contracting, Washington, DC.

21–22: NCLE, Evidence, Lincoln, NE.

22: GICLE, Commercial Real Estate, Atlanta, GA.

30/11–3/12: NCDA, Representing State & Local Governments, San Francisco, CA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FLB: The Florida Bar, Tallahassee, FL 32301.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, D.C. 20006. (202) 337–7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676–6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Havard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, Chicago Conference Center, 29 South LaSalle Street, Suite 250, Chicago, IL 60603. (217) 787–2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257–2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421–5722; (504) 566–1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504) 388–5837.

MCLNEL: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MNCLE: Continuing Legal Education, A Division of the Minnesota State Bar Association, 40 North Milton, St. Paul, MN 55104.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635–4128.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749–1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8979, Reno, NV 89507–8978.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NELI: National Employment Law Institute, 520 Tamalpais Drive, Suite 205, Corte Madera, CA 94925.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 328–4815 ext. 225; (800) 752–4249 ext. 225; (612) 644–0323.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784–6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Northern Kentucky University, Chase College of Law, 1401 Dixie Highway, Covington, KY 41011. (606) 527–5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452–0620.

NMCLE: State Bar of New Mexico, Continuing Legal Education, P.O. Box 25883, Albuquerque, NM 87125. (505) 842–6132.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463–3200.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038.

NYULS: New York University, School of Law, 40 Washington Sq. S., Room 321, New York, NY 10012. (212) 598–2756.

NYUSCE: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036. (212) 790–1320.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108. (800) 932–4637; (717) 233–5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765–5700 ext. 271.

SBA: State Bar of Arizona, 234 North Central Avenue, Suite 858, Phoenix, AZ 85004.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 475–6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080. (214) 690–2377.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SPCC: Salmon P. Chase College of Law, Committee on CLE, Nunn Hall, Northern Kentucky University, Highland Heights, KY 41076 (606) 527–5380.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036, (202) 337–7000.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, D.C. 20036, (202) 237–7000 and University of Denver, Program of Advanced Professional Development, College of Law, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372–0140.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276–1648.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284–4762.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

UTSL: University of Texas School of Law, 727 East 26th Street Austin, TX 78705 (512) 471–5151.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924–3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

Current Material of Interest

1. 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.

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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).
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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).

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

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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 B102527 Criminal Law: Jurisdiction/ JAGS–ADC–86–6 (307 pgs).

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

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

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

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

AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

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

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

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
UPDATE 9	Unit Supply Update		10 May 86
AR 60–20	Exchange Service Operating Policies	I02	2 Jun 86
AR 600–100	Army Leadership		27 May 86

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I,* 26 Va. J. Int'l L. 693 (1986).

Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee,* 13 J. Legis. 1 (1986).

Bernheim, *United States Armed Intervention in Nicaragua and Article 2(4) of the United Nations Charter,* 11 Yale J. Int'l L. 104 (1985).

Essen & Aldred, *The American Medical Association vs. the American Tort System,* 8 Campbell L. Rev. 241 (1986).

Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After* Strickland, 17 Loy. U.L. Rev. 203 (1986).

Langstratt, *Maximum Deferral of Distributions from IRAs,* 64 Taxes 452 (1986).

Lewin, *The Tail Wags the Dog: Judicial Misinterpretation of the Punitive Damages Ban in the Federal Tort Claims Act,* 27 Wm. & Mary L. Rev. 245 (1986).

March, *An Interdisciplinary Approach to the Strategic Defense Initiative Debate,* 19 Akron L. Rev. 351 (1986).

McCoy, *The Cop's World: Modern Policing and the Difficulty of Legitimizing the Use of Force,* 8 Hum. Rts. Q. 270 (1986).

McGinley, *The Achille Lauro Affair—Implications For International Law,* 52 Tenn. L. Rev. 691 (1985).

Miner, *Victims and Witnesses: New Concerns in the Criminal Justice System,* 30 N.Y.L. Sch. L. Rev. 757 (1985).

Moore, *The Medical Diagnosis and Treatment Exception to Hearsay—The Use of the Child Protection Team in Sexual Abuse Prosecutions,* 13 N. Ky. L. Rev. 51 (1986).

Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?,* 24 J. Fam. L. 149 (1985–1986).

Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office,* 20 Law & Soc'y Rev. 93 (1986).

Thompson, *Relief for First Mortgagees?,* 49 Mod. L. Rev. 245 (1986).

Project, *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1984–1985,* 74 Geo. L.J. 499 (1986).

Note, *Constitutional Law—The Law's Strongest Presumption Collides With Mankind's Strongest Bond: A Putative Father's Right to Establish His Relationship to His Child,* 8 W. New Eng. L. Rev. 229 (1986).

Note, *The Incompatibility of ANZUS and a Nuclear-Free New Zealand,* 26 Va. J. Int'l L. 455 (1986).

Note, *Justice Sandra Day O'Connor: Trends Toward Judicial Restraint,* 42 Wash. & Lee L. Rev. 1185 (1985).

Comment, *Injunctive Relief in the United States Claims Court: Does a Bid Protester Have Standing?,* 1985 B.Y.U. L. Rev. 803.

Brickner, Book Review, 34 U. Kan. L. Rev. 809 (1986) (reviewing C. Hoffer & N. Hull, Impeachment in America: 1635–1805).

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