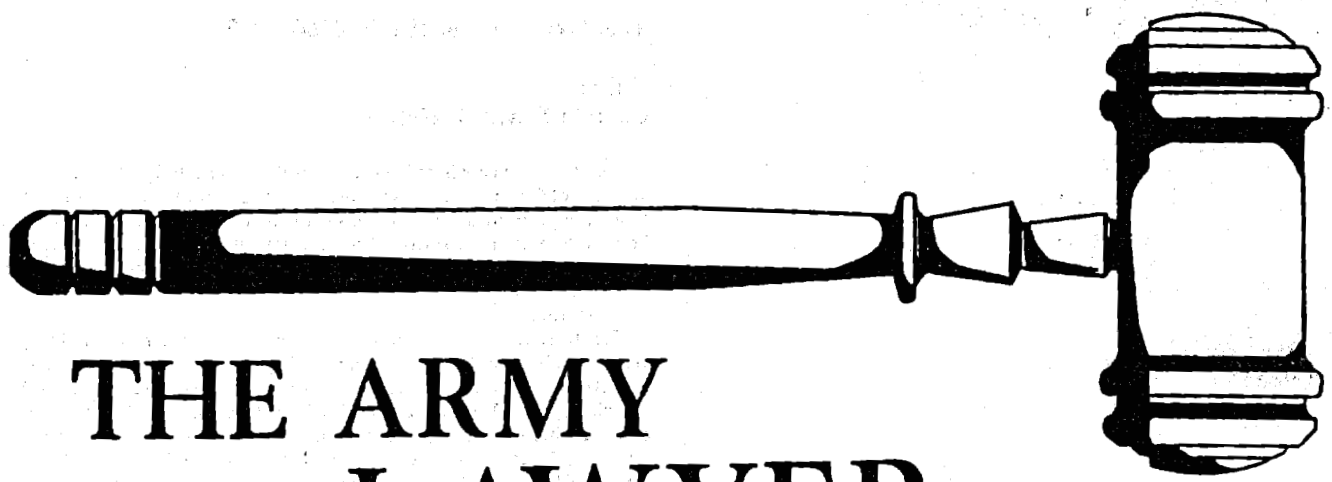

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Editor
Captain David R. Getz

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REPLY TO
ATTENTION OF

DAJA-LA

29 JUL 1986

SUBJECT: Comprehensive Legal Assistance - Policy Letter 86-8

STAFF AND COMMAND JUDGE ADVOCATES

1. The Gander tragedy has caused us to review how well our soldiers managed their personal affairs prior to deployment. We learned once again that we cannot assume all soldiers fit into a single mold. Many have divorced parents, some are separated from their spouses, others have common law marriages or illegitimate children. These differing circumstances raise many legal problems that must be anticipated and recognized by Legal Assistance Officers (LAO's).

2. Our goal in legal assistance is to service the whole person. LAO's should--

a. Remind soldiers to regularly review their personal affairs to ensure they are in proper order.

b. Anticipate related legal needs. For example: when advising a soldier on a separation agreement, LAO's should anticipate that the soldier may want to change beneficiaries. LAO's should provide advice on the need to update a will, change DD Form 93 (Record of Emergency Data) and SGLI election, revoke powers of attorney, retitle property, etc.

3. Preventive law briefings should include advice on--

a. The relationship of wills and powers of attorney to other important legal documents and the need to ensure they are consistent with the soldier's intent.

b. Potential problems with the SGLI "by law" designation, including problems with divorced parents, illegitimate children, separations, and common law spouses.

c. Selecting correct death gratuity and unpaid pay and allowance options and the problems caused by improper completion of DD Form 93.

Hugh Overholt

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WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LA

8 JUL 1986

SUBJECT: Legal Assistance for Reserve Component Personnel - Policy Letter 86-9

STAFF AND COMMAND JUDGE ADVOCATES

1. This letter reemphasizes and expands the policy found in TJAG Policy Letter 84-1, 16 Feb 84 (The Army Lawyer, March 1984), which authorizes Reserve Component (RC) judge advocates (JA's) designated as Legal Assistance Officers to render legal assistance to RC soldiers serving on Annual Training or Active Duty for Training for periods of 29 days or less and during Inactive Duty for Training.

2. Premobilization legal counseling of RC soldiers is a requirement imposed by the FORSCOM Mobilization Deployment System (FORMDEPS). Legal assistance by RC JA's that prepares RC soldiers for mobilization should be provided to the maximum extent that resources permit without detracting from unit preparedness.

3. Reserve Component soldiers who are on orders for OCONUS training are authorized mobilization legal assistance by active duty or RC JA's. This exception to the policy set forth in AR 27-3, para 1-8, is established because of the recognition of the additional factors inherent in overseas duty.

Hugh Overholt

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Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF
DAJA-ZB

27 June 1986

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES
DIVISION/OFFICE/FOA CHIEFS, OTJAG

SUBJECT: Curriculum Review

1. The Judge Advocate General's School is responsible for educating and training judge advocate officers at all levels, from the Basic Course through the Graduate Course and the various continuing legal education courses that are offered each year. While the School is in frequent contact with staff judge advocate offices in the field and with the various offices and divisions of the Office of The Judge Advocate General (OTJAG) to help keep the curriculum current, occasionally new issues arise that need to be addressed in the School's courses of study.

2. The Assistant Judge Advocate General oversees the operations of the School. As part of that function, I intend to periodically review the curriculum of the various courses and discuss trends, new subjects, and the need for changes in emphasis with the Commandant and the Director of Academics. To assist in that endeavor, I solicit your ideas and thoughts concerning new areas that should be taught or emphasized in any part of the School curriculum. Staff judge advocates should submit ideas or suggestions through their MACOM SJA to the Commandant. Field operating agencies and OTJAG offices and divisions should submit their ideas to me through their supervising general officer.

3. There is no suspense date for submissions and no requirement that any suggestions be submitted. Instead, this is part of an ongoing process to ensure that our School's curriculum remains current and helps provide the best possible training and education. When you have an idea or suggestion, please submit it for consideration.

We need your help on this. Many thanks! S

William K. Suter

WILLIAM K. SUTER
Major General, USA
The Assistant Judge Advocate General

Veterans Administration Benefits and Tort Claims Against the Military

*Captain E. Douglas Bradshaw, Jr., USAR**
Individual Mobilization Augmentee, U.S. Army Claims Service, Fort Meade, Maryland

A tort claim for personal injury or wrongful death against the military, filed either under the Federal Tort Claims Act (FTCA)[1] or the Military Claims Act,[2] may be affected by activities of the Veterans Administration (VA), which provides both monetary and medical benefits and services to veterans, their dependents, and their survivors. Whenever the claimant (or claimant's decedent) is an active duty soldier or veteran, the VA may provide the tort claims investigator assistance such as furnishing evidence regarding the claimant's lifestyle, providing alternate sources of medical care or monetary compensation pending resolution of the claim, and documenting non-collateral source income against which the government is entitled to set off damages. Knowledge of the wide range of VA benefits available and their application to tort claims allows the claims investigator to ensure the interests of the United States are protected while fairness to the claimant is preserved. This article will survey the range of VA benefits and information available and their application to tort claims against the United States.

Organization of the VA

The Veterans Administration, the largest independent agency in the Federal government,[3] is divided into three departments. The smallest of the three, the Department of Memorial Affairs, operates the National Cemetery System. The Department was originally established under the Army in 1862 to provide burial grounds in or near the battlefields or POW camps in the Civil War. With the enactment of Pub. L. No. 93–43 (Sept. 1, 1973), 82 national cemeteries were transferred to the VA, which brought the total number of cemeteries under VA jurisdiction to 103. Since then, the number has grown to 110.[4]

The largest element in the VA, the Department of Medicine and Surgery, operates 172 medical centers, 226 outpatient clinics, 100 nursing home units, and 16 domiciliaries.[5] In fiscal year 1984, the Department treated 1.3 million inpatients and trained 100,000 health care professionals.[6]

The third major element of the VA is the Department of Veterans Benefits. This Department administers the VA's programs of financial assistance to veterans, their dependents, and survivors. These programs include disability or death compensation, disability or death pension, burial benefits, educational assistance (the "GI Bill"), vocational rehabilitation benefits, home loan benefits, and insurance coverage (*e.g.*, SGLI). The Department has fifty-eight regional offices, with at least one in each state, the District of Columbia, San Juan, and Manila.[7]

Monetary Benefits

Compensation for Service-Connected Disabilities and Deaths

The primary periodic monetary benefits payable to veterans, their dependents, or survivors for disability or death are compensation and pension. Disability compensation is a monthly payment for a service-connected disability designed to compensate a veteran for the average loss of earning capacity due to a disease or injury incurred in or aggravated during active military service.[8] Payments are based upon the degree or severity of disability. The amount of compensation ranges from $68 per month for a 10% disability to $1,335 per month when the veteran is 100% disabled.[9] Additional allowances are paid for dependents, and special monthly compensation is payable for certain specified, severe disabilities. As a result, a severely injured, *e.g.*, quadriplegic, veteran whose disabilities are service-connected may receive up to $3,812 in monthly compensation from the VA.[10] In addition to monthly disability compensation, veterans with certain service-connected disabilities are entitled to a one-time payment of up to $5,000 toward the purchase of a specially adapted vehicle,[11] an annual clothing allowance of $360,[12] and a grant of not more than $35,500 for building, buying, or remodeling a specially adapted home.[13]

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*This article is based on a paper submitted in satisfaction of the Legal Research and Writing Program of the Judge Advocate Officer Advanced Correspondence Course.

[1] 28 U.S.C. §§ 1346(b), 2671–2680 (1982).

[2] 10 U.S.C. § 2733 (1982).

[3] VA 1984 Annual Report vi.

[4] *Id.*

[5] *Id.* at xvii. VA domiciliaries provide medical and other professional care for eligible ambulatory veterans who are disabled by age, disease, or injury and are in need of care but do not require hospitalization or the skilled services of a nursing home.

[6] *Id.* at 9–10. Health care professionals in training included, among others, medical and dental residents and students, and students in nursing, social work, and psychology.

[7] *Id.* at xv, xvii.

[8] 38 U.S.C. § 101(13) (1982 and Supp. I 1983).

[9] 38 U.S.C. § 314 (1982), *as amended by* the Veterans' Compensation Rate Increase and Job Training Amendments of 1985, Pub. L. No. 99–238, 1986 U.S. Code Cong. & Ad. News (99 Stat.) 1765.

[10] *Id.*

[11] 38 U.S.C. § 1901–1904 (1982 and Supp. I. 1983).

[12] 38 U.S.C. § 362 (1982 and Supp. I 1983).

[13] 38 U.S.C. § 801–806 (1982 and Supp. I 1983).

Death compensation, known as Disability and Indemnity Compensation (DIC), is paid to eligible survivors (spouse, children, dependent parents) of a veteran who dies of a service-connected disability or while on active duty.[14] DIC is also payable to the surviving spouse of a veteran who dies from any cause after having been continuously rated 100 percent disabled from service-connected disabilities for a specified period, usually ten years.[15] The monthly amount of DIC paid to a surviving spouse is based upon the veteran's highest military grade while in service. Current rates range from $491 for the spouse of an E–1, to $1,345 payable to the spouse of a veteran who served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army or Air Force, Chief of Naval Operations, or Commandant of the Marine Corps or Coast Guard.[16] Additional allowances are available if there are children or dependent parents, or if the spouse is either housebound or in need of the regular aid and attendance of another person.[17]

Pension for Nonservice-Connected Disabilities and Deaths

While "compensation" denotes payments for service-connected disabilities or deaths, "pension" refers to payments for nonservice-connected disabilities or deaths. Disability pension is payable to a veteran of a period of war who is permanently and totally disabled from nonservice-connected conditions.[18] Unlike compensation, pension is need based. The current pension law provides pensioners with payments equal to the difference between the veteran's income from all sources and an income standard indexed to social security increases.[19]

Death pension is paid to needy survivors of a veteran of a period of war who died from a nonservice-connected condition. There are income standards and net worth limitations that may reduce or eliminate death pension. A surviving spouse who is in a nursing home, in need of aid or attendance of another person, or who is permanently housebound may be entitled to increased pension or be subject to higher income limitations.[20]

Compensation for a Nonservice-Connected Disability or Death

When a veteran undergoes treatment for a nonservice-connected disability in a VA medical facility and sustains additional disability or dies as a result of that treatment, compensation may be paid "as if such disability, aggravation, or death were service-connected."[21] The regulations promulgated pursuant to the statute limit its applicability to those instances where the "disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA, or in the event of an "accident," defined as "an unforeseen, untoward event."[22] Section 351 also requires that, in the event of a recovery under the Federal Tort Claims Act for the same disability or death, the payment of disability compensation or DIC is suspended until the amount of the tort award, either settlement or judgment, is recouped. As will be discussed *infra*, section 351 benefits may come into play in a military tort claim because the VA has awarded compensation for disabilities incurred as a result of military medical care furnished to a veteran hospitalized in a military medical treatment facility as a VA beneficiary.

Medical Benefits

Hospitalization

Pursuant to a recent statutory revision of VA health care eligibility,[23] the Administrator of Veterans Affairs "shall" furnish needed hospital care to nine groups of veterans. These "Category A" veterans range from those with service-connected disabilities to nonservice-connected veterans who are "unable to defray the costs of care," defined as veterans with income of $15,000 or less if single, and $18,000 or less if married, plus $1,000 for each dependent. A veteran who is unable to qualify for Category A but whose income does not exceed $20,000 if single, or $25,000 if married, plus $1,000 for each dependent, "may" receive cost-free VA care as a Category B veteran to the extent resources and facilities are available. A veteran who meets neither the Category A nor the Category B criteria may, nevertheless, receive VA hospital care to the extent of available resources and facilities if the veteran agrees to make a copayment to the VA of approximately $492 for the first ninety days of care.

Nursing Home Care

Eligibility for admission or transfer to a VA Nursing Home Care Unit is similar to that for hospitalization. Direct admission or transfer to a private nursing home at VA expense is much more limited and usually may not exceed a period of six months.[24]

Credit for VA Monetary Benefits Under the FTCA

Legal Authority

Early in the history of the FTCA, the Supreme Court was called upon to decide whether the injury or death of a service member was actionable under the Act. In *Brooks v.*

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[14] 38 U.S.C. §§ 101(14), 410(a) (1982 and Supp. I 1983).

[15] 38 U.S.C. § 410(b) (1982 and Supp. I 1983).

[16] 38 U.S.C. § 411 (1982), *as amended by* the Veterans' Compensation Rate Increase and Job Training Amendments of 1985, Pub. L. No. 99–238, 1986 U.S. Code Cong. & Ad. News (99 Stat.) 1765.

[17] *Id.*

[18] 38 U.S.C. §§ 101(15), 521 (1982 and Supp. I 1983).

[19] 38 U.S.C. § 3112 (1982 and Supp. I 1983).

[20] 38 U.S.C. §§ 541–543 (1982 and Supp. I 1983).

[21] 38 U.S.C. § 351 (1982).

[22] 38 C.F.R. § 3.358(c)(3) (1985).

[23] 38 U.S.C. § 610, 622 (1982), *as amended by* the Veterans' Health Care Amendments of 1986, Pub. L. No. 99–272, 1986 U.S. Code Cong. & Ad. News (99 Stat.) 1765.

[24] 38 U.S.C. § 620 (1982 and Supp. I 1983).

United States,[25] the court permitted suits for personal injuries to a soldier, Welker Brooks, and the wrongful death of his brother, Arthur, because the injuries and death were not incident to their military service. The surviving brother was receiving VA disability compensation for the injuries that were the subject of his suit and the mother of the deceased soldier received a six months' pay death gratuity. The Court, finding in the FTCA "no indication that Congress meant the United States to pay twice for the same injury," reasoned that "the amount payable under servicemen's benefit laws should . . . be deducted, or taken into consideration [in a] judgment under the Tort Claims Act."[26] On remand, the Fourth Circuit found it "clear that the award should be diminished by the amount which [plaintiff] has received or is to receive from the Government by way of disability benefits."[27] The Supreme Court later cited the Fourth Circuit's *Brooks* decision with approval in *United States v. Brown*,[28] where it held in the case of a veteran injured by malpractice in a VA hospital, "that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act."[29]

Application to Tort Claims Against the Military

Two cases are of particular interest to the military. In *O'Keefe v. United States*,[30] the veteran/military retiree had waived retirement to receive VA compensation. A credit was allowed only for past and future disability benefits in excess of the amount that would have been received as retirement pay but for the waiver. *O'Keefe* is important because military medical malpractice claims frequently involve military retirees. The district court in *Johnson v. United States*[31] awarded $3,666,695.69 to an active duty soldier for injuries he sustained in an automobile accident. It then subtracted past and future VA benefits from the award, calculated at over $1.4 million. The award was then further reduced by twenty-five percent for plaintiff's comparative negligence. On appeal, the government successfully argued that the reduction for comparative negligence should have been accomplished first; otherwise, the United States would be paying 85% of plaintiff's damages instead of the 75% it owed. Both *O'Keefe* and *Johnson* are strongly recommended reading for any claims investigator trying to understand credits for VA benefits. The court's calculations are set out in the opinions, aiding the mathematically disabled claims investigator or judge advocate.

The potential for a government credit against tort damages exists whenever the claimant or claimant's decedent is a veteran. The military claims investigator should, therefore, always determine whether the claimant is a veteran and, if so, whether he or she has any service-connected disabilities that may have been aggravated by the injuries giving rise to the tort claim. In a catastrophic injury case, the claimant-veteran with no service-connected disabilities may be drawing VA pension for permanent and total disability. The next step is to contact the VA to verify and document the credit. This may be done either through the VA District Counsels, most of whom are located in the VA Regional Offices, or through the U.S. Army Claims Service.

Caveats

The rule that the government may claim a credit against tort damages for VA monetary benefits has exceptions. Some courts have held that where the plaintiff makes no claim (or fails to carry the plaintiff's burden or proof) for recovery of lost earnings or earning capacity, VA benefits are not deductible from the tort award. Thus, the deduction was not permitted in *Schales v. United States*,[32] where the plaintiff-widow was in receipt of death pension, and there was no claim of lost financial support as a result of her unemployed husband's death. Similarly, in *Pike v. United States*,[33] the court found no danger of double recovery as a result of receipt of DIC payments by the children of a deceased veteran, even though it upheld the district court's awards of $25,000 for the present value of prospective net accumulations and another $25,000 for the children's loss of love, society, and companionship of their father. The court reasoned that the avoidance of duplicate recovery was accomplished by the district court's refusal to award damages for loss of support, for which DIC is designed to compensate.

Another basis for denial of a credit arises when the VA benefit is reduced or eliminated by the receipt of the FTCA award. Where, for example, the VA benefit is a pension, a court's refusal to allow a credit, at least as to future pension payments, is sound because the payment of a large tort award increases the income of the plaintiff and renders the plaintiff ineligible for future payments until his or her total

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[25] 337 U.S. 49 (1949).

[26] *Id.* at 53.

[27] United States v. Brooks, 176 F.2d 482, 484 (4th Cir. 1949).

[28] 348 U.S. 110, 111 (1954).

[29] *Id.* at 113. Other cases recognizing the government's right to receive a credit for VA benefits include Kubrick v. United States, 581 F.2d 1092 (3d Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979), where credit was allowed for past section 351 benefits estimated at $50,000 and future benefits would be administratively offset by VA under the statute; Steckler v. United States, 549 U.S. 1372, 1378–79 (10th Cir. 1977), where the court deducted VA benefits from an award but found social security payments a collateral source as to amounts contributed by the worker and employer; Mosley v. United States, 538 F.2d 555, 561 (4th Cir. 1976), where the court allowed a credit for widow's and children's future survivor benefits; Christopher v. United States, 237 F. Supp. 787, 799 (E.D. Pa. 1965), where the court emphasized that "in making our award proper weight was given to the possible future VA benefits accruing to the plaintiff and our judgment was reduced accordingly"; and United States v. Gray, 199 F.2d 239, 244 (10th Cir. 1952), where a tort award was reduced by the aggregate of the benefits already paid and by payments to be made in the future. In Smith v. United States, 437 F. Supp. 1004 (E.D. Pa. 1977), *aff'd*, 587 F.2d 1013 (3d Cir. 1978), the veteran was receiving VA compensation before his suicide. His widow received DIC for his service-connected death. The court found damages limited to the difference in VA benefits payable before and after death plus funeral expenses.

[30] 490 F. Supp. 33 (W.D. Okla. 1980).

[31] 510 F. Supp. 1039 (D. Mont. 1981), *aff'd in part*, 704 F.2d 1431 (9th Cir. 1983).

[32] 488 F. Supp. 33 (E.D. Ark. 1980).

[33] 652 F.2d 31 (9th Cir. 1981).

income falls below the index.[34] This rationale was the basis for the court's refusal of a deduction for future VA disability pension benefits in *Aretz v. United States.*[35] The disallowance of a credit is less understandable in a situation like *Pike,* where the compensation is payable for the same injury or death, and will continue despite the tort judgment. It does not seem fair for the government to pay twice for the same injury or death, even though disability compensation is based upon average loss of earning capacity.[36]

Credit for VA Medical Benefits

The courts have been loathe to refuse a veteran/plaintiff damages for future medical care even though double compensation could result where the veteran is eligible for and may decide to choose VA medical treatment.[37] The primary importance of the VA medical care system to the military claims investigator is that it may be a source of care not otherwise available. For example, rehabilitation, spinal cord injury care, or nursing home care may be available to the claimant pending investigation and resolution of the claim. In the rare situation where section 351 benefits are awarded to a veteran who was injured through malpractice at a military hospital furnishing care on behalf of the VA, payment of section 351 compensation is a basis for VA medical care eligibility. The eligibility will be lost, however, upon settlement of or judgment on the tort claim unless the settlement or judgment provides otherwise.[38] Thus, in the section 351 situation, eligibility for VA medical care can be made part of the claims settlement, in which case the need for payment of damages for private medical expenses would be obviated. This bargained-for VA eligibility has been included in at least one Army administrative settlement.[39]

Beyond Credits—VA Records as an Information Source

Whether or not a basis is present for claiming a credit for VA benefits, the military claims investigator should examine a claimant's VA records for whatever useful information they may contain. Typically, the file will include the veteran's original military outpatient record, disability claims and examinations, marriage certificates, divorce decrees, children's birth certificates, income and net worth statements, and correspondence between the veteran and the VA. These records are subject to federal confidentiality statutes, however, and the written consent of the veteran is required for disclosure of much of the information contained therein.[40]

Conclusion

The array of benefits available to veterans and their dependents can often have an impact on FTCA or Military Claims Act claims that is favorable to the government. It is up to the military claims investigator to educate himself or herself about the benefits, document them, and then educate the claimant or claimant's attorney so that, where appropriate, the benefits can be used to prevent a double recovery from the United States.

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[34] *See supra* text accompanying notes 18–19.

[35] 456 F. Supp. 397 (S.D. Ga. 1978), *aff'd,* 604 F.2d 417 (5th Cir. 1979), *reh'g granted,* 616 F.2d 254 (5th Cir.), *certified to Georgia Supreme Court,* 635 F.2d 485 (5th Cir. 1980), *aff'd and remanded,* 660 F.2d 531 (5th Cir. 1981).

[36] 38 U.S.C. § 355 (1982 and Supp. I 1983).

[37] Feeley v. United States, 337 F.2d 924 (3d. Cir. 1964).

[38] 38 U.S.C. § 610(a)(3)(B) (1982 and Supp. I 1983).

[39] Administrative Claim of Keiji Morikami (1985). The nonservice-connected veteran was injured in a fall from a porch at an Army Medical Center where he was hospitalized as a VA beneficiary. The VA awarded section 351 benefits and the veteran filed a tort claim with the Army. A structured settlement was negotiated by U.S. Army Claims Service with assistance from VA's Office of General Counsel, including a stipulation that, even though the veteran's 351 compensation would be suspended as a result of the tort award, his eligibility for VA medical care would continue.

[40] The VA's records confidentiality statute, 38 U.S.C. § 3301 (1982), permits disclosure of records when "required by any department or other agency of the United States Government." 38 U.S.C. § 3301(b) (3) (1982). The statute requires, however, that any disclosures be made in accordance with the Privacy Act of 1974, 5 U.S.C. § 552a (1982). *See* 38 U.S.C. § 3301(j) (1982); *Doe v. DiGenova,* 779 F.2d 74 (D.C. Cir. 1985). The Privacy Act permits disclosures "for a routine use," 5 U.S.C. § 552a(b) (3) (1982), and one of the VA's published routine uses allows disclosure of information contained in VA medical records to federal agencies in connection with review of tort claims under the FTCA (but not the Military Claims Act). Routine Use 17, 24 VA 136, "Patient Medical Records-VA," Privacy Act Issuances, 1984 Comp., Vol. V, at 713. There is as yet no similar routine use for disclosure of information from VA claims folders, except that disclosure of the amount of pension, compensation, DIC, retirement pay, or subsistence allowance may be made to any person who applies for such information. Routine Use 18, 58 VA 21/22/28, "Compensation, Pension, and Education and Rehabilitation Records-VA," Privacy Act Issuances, 1984 Comp., Vol. V, at 739. A routine use is being considered for promulgation to allow disclosure of information contained in claims folders that is relevant to assessment of an administrative tort claim upon receipt of a request from an agency investigating the claim or potential claim. Routine uses do not permit disclosure of drug, alcohol, or sickle cell anemia treatment records, however. An even more restrictive confidentiality statute, 38 U.S.C. § 4132 (1982), applies to records of treatment, training, education, rehabilitation, or research relating to drug abuse, alcoholism or alcohol abuse, or sickle cell anemia. A specially detailed written consent of the patient is prescribed in 42 C.F.R. § 2.31 (1985).

Opening Statement: An Opportunity for Effective Defense Advocacy

Captain John R. Morris
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It is more than an opening speech, far more than a formality in the trial process. The opening statement in a contested court-martial tried with members[1] is the first real opportunity for the trial defense counsel to speak with the members, educate these triers of fact, and advocate his or her cause.[2] One civilian study concluded that by the time opening statements are completed in a trial, as many as eighty percent of the jurors will have judged the "merits" of the case and actually decided how they will vote during deliberations.[3] Several aspects of the opening statement, particularly its purposes and the timing and style of its delivery, are thus worthy of review and discussion. Counsel, after carefully considering all of the relevant factors, will determine how and when opening statement will be presented. The decision will be critical.

Purposes of the Opening Statement

A number of purposes exist for the opening statement, perhaps the most obvious of which are to establish a theory of the case and summarize for the triers of fact the evidence which will be elicited during the trial by the speaking counsel. Equally important to the defense counsel, however, is that opening statement presents the first substantial opportunity for the defense to advocate its cause. While neither counsel may "argue" during opening statement, the effective use of a few carefully chosen adjectives, adverbs, and phrases can subtly—but clearly—articulate the defense position and begin to establish the necessary rapport with the triers of fact.

Similarly, opening statements present the opportunity for both counsel to establish, or destroy, their own credibility with the members. To overstate needlessly that one's proof will be "beyond any doubt" or that one's evidence will be "crystal clear" invites opposing counsel to highlight any unfulfilled promises during his or her closing argument to characterize the opponent's entire case:

> Trial counsel promised in his opening statement that his evidence would be "crystal clear," that his proof of guilt would be "beyond any doubt." He *promised* you that. But you heard the witnesses; you saw the evidence. What about those inconsistent statements by Private Jones, the alleged "eyewitness," who gave three different descriptions of the assailant to the military police *under oath* and *within two hours* after the incident? What about Dr. Matthews, the defense expert, who testified that the tires on PFC Smith's car could not have caused the imprints found by the military police in the wooded area on 17 May 1985? "*Crystal* clear"? "*No* doubt"? No, the trial counsel has misled you, he has attempted to gloss over the *real* facts and the *real* evidence with fine words and nice promises. He has been unable to fulfill his promises to you; he has been unable to prove the guilt of this young soldier. . . .

Lastly, the opening statement conveys the tempo of the trial to the triers of fact—whether the speaker will be prepared or fumbling for notes; whether the presentations will be smooth or mechanical; whether the case will be an enjoyable experience or a member's worst nightmare. To be effective, trial defense counsel must strive to attain each of the following goals during the defense opening statement: present a concise overview of the case and highlight the relevant facts forming the basis of counsel's theory of the case; define the issues and thus make the case more intelligible for the triers of fact; carefully discuss and minimize potential weaknesses in the defense case which will arise during the trial; win the interest of the members; and establish a rapport with the triers of fact and thereby encourage them to empathize with the client.

Timing of the Opening Statement

One source of undying disagreement among trial practitioners is when—but not if—to deliver the defense opening statement. Some attorneys argue adamantly that unless the defense presentation immediately follows the prosecution opening statement, the entire defense will be interpreted as stalling, being unsure or unorganized, or having no substantial answer to the government's charges. According to this philosophy, reserving opening statement will force the members, with potentially disastrous effects, to accept at face value the prosecution's version of the facts for the first hours, or even days, of the trial. Because the triers of fact may be most curious, impressionable, and attentive at the outset of the trial, immediate presentation of the defense opening statement is thus believed by some to be the preferable course of action.

On the other hand, reserving opening statement until after the prosecution rests its case-in-chief provides the defense with additional time and room in which to maneuver during the trial and permits the defense to "play its cards close to the vest" for as long as possible. Reserving

[1] Although also useful during a trial by judge alone, the opening statement is most important in a trial with members.

[2] This is increasingly true as the limitations on voir dire are expanded. *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912(d) (the military judge may conduct voir dire and permit counsel to supplement with questions deemed by the military judge to be "proper").

[3] University of Chicago study cited in L. Decof, Art of Advocacy: Opening Statement § 1.01 at 1–4 (1983).

opening statement may allow the trial counsel's introduction to go unchallenged initially,[4] but the fluidity of a trial and the element of surprise may necessitate such a delay.

No consensus on the timing for delivery of opening statement will ever be reached, and rightly so. Just as with "knowing" when to challenge a member peremptorily, when to object, or when to forgo cross-examination, the decision when to deliver opening statement is one which, by necessity, must be made on a case-by-case basis. The following factors, however, should be analyzed during the pretrial preparation of the defense case:

1. Are there strong indications that the prosecution has misperceived the crux of the defense or its evidence or failed to interview critical defense witnesses? If so, this would favor reserving opening statement in order to highlight a single defense witness or issue—but only *after* the trial counsel has labored to construct the many details of the government's entire prima facie case.

2. Are there foreseeable "holes" in the prosecution's evidence that will likely make legal maneuvering by the defense (such as a motion for a directed finding of not guilty) successful? If so, this, too, could justify reserving the defense opening.

3. Will the defense be one based solely on the anticipated inability of the prosecution to prove the accused's guilt "beyond a reasonable doubt"? In such cases, additional factors must be considered. For example, in a trial in which the government will offer no positive facial identification of a perpetrator, immediate framing of the issue for the members may be advisable. ("The defense knows a murder occurred on 17 May 1985. The question, however, is one of *identity*. The prosecution's evidence, based on the fibers to which the trial counsel has just referred, will be challenged by Dr. Roberts, a well-known forensic scientist and scholar, who will tell you that those fibers could *not* have come from the carpets in the home of PFC Stanley Smith.") By giving this information to the members early, and by summarizing the qualifications of the defense expert, the defense counsel will encourage the members to question the assumptions, techniques, and conclusions of all of the expert witnesses and may thus sow the seeds of "reasonable doubt."

On the other hand, the challenge to the prosecution's evidence may be better delayed until after the government rests in order to preserve the defense advantage—surprise. (Imagine the impact of telling everyone, only minutes into a lengthy trial, "The defense in this case is that the government is unable to meet its legal duty to prove PFC Smith's guilt beyond a reasonable doubt. Our expert will testify that it is just as likely that the forged signature in question was done by Specialist Five Jones, the finance clerk who paid the disputed claim. The government's own expert never even bothered to check this other soldier's signature or writing style.")

Finally, some attorneys advocate the use of a simpler, more generalized opening statement when challenging the government's proof. ("There are two sides to every story, and you must not judge until you have heard both sides and all of the witnesses.") Such a limited opening, however, only restates the obvious to the more mature and experienced military triers of fact and requires that the defense forgo the first real opportunity for a pointed, concise analysis of its anticipated evidence and theory of the case.

4. Have the prosecution (or defense) witnesses been inconsistent in their pretrial statements or expressed an unwillingness to appear? If so, reserving opening statement until is is clear whether a particular witness will appear or how he or she will testify gives the defense additional leeway without risking a compromise of its own credibility with triers of fact. One actual case (a barracks larceny) illustrative of this and other points occurred when a busy prosecutor failed to interview his "eyewitnesses" on the eve of trial; all were about to repudiate the statements each had given initially to Criminal Investigation Division (CID) and testify that they saw *either* the accused *or* another soldier (with whom the accused was walking) in possession of the crucial laundry bag with its "bulky, box-shaped contents." Had the defense not known about this before the trial, it would probably have attacked the reliability of these witnesses in its opening statement (based on the earlier statements to CID); had it known this but opted to present its opening statement immediately, the defense would have "tipped its hand" to the prosecution. Instead, by reserving opening statement, the defense was able to waive cross-examination of these individuals, exploit the trial counsel's confusion and his weakened evidence, and carry the identification issue directly into its own case. The accused was acquitted.

5. Will the defense focus on important matters to be brought out by or through a prosecution witness? If so, immediate delivery of opening statement may be necessary to alert the members and emphasize these points. For example, if the defense is one of self-defense and centers on the "victim's" physical size and aggressive conduct, tell this to the triers of fact up front and meet the government's allegations head on. ("When Private Jones takes the stand to testify, look at him. Look at him closely. Watch him as he lumbers across the courtroom; note well his size and his imposing physical presence. PFC Stanley Smith, charged with assaulting that hulk, will tell you that when he saw that other soldier coming toward him, those eyes flashing in a drunken rage, he truly believed that he had to defend himself or else suffer great bodily harm. He knew about Jones' reputation for violence, and you will, too, after hearing several other soldiers tell you all about it.

[4] A distinction must be drawn for our analysis between courts-martial tried with members and civilian trials having a larger, constantly-changing pool of jurors. In the military, counsel are likely to appear before the same panel on many occasions, and the same court members may participate in a number of trials during their tenure. Because of this, a court-martial member may become better "educated" than his or her civilian counterpart and ultimately accept the fact that some defense counsel do, for legitimate reasons, reserve opening statement. Defense counsel, during the later opening statement, should be able to dispel any notion that the defense case was contrived in the few minutes, or hours, between the government's case and the defense opening.

PFC Smith did what he had to do that night, what the law permits him to do: defend himself.")

6. Will the accused testify? Do not promise or discuss this critical matter unless there is no doubt that the accused will in fact testify and that each point you mention will be vital to the defense case. Reserving opening statement permits greater freedom for the defense in a case where the decision of the accused to testify cannot be made until after the government rests its case-in-chief.

Style of Delivering the Opening Statement

How counsel delivers the opening statement is just as important as *when* he or she presents it. Reading from a script will bore and alienate the members, making the presence of counsel a painful reminder of how many other things the members could be doing on that particular day. Reciting, point-by-point, the anticipated testimony of the witnesses may likewise cause attentions to wander. The key is to "sell" the defense facts and witnesses and set the stage for the justice of the defense cause. Educate. Advocate. Avoid legal jargon, talking down to the members, and unnatural theatrics. Be confident and sincere, simple and direct, clear and sharp.

Using Effective Defense Language

As military advocates, it can be a tiresome and unnecessary procedure for defense counsel to concentrate on the "law of opening statements": "An opening statement is not evidence, it is merely argument by counsel; it serves as an outline, a road map, a picture of what the jigsaw puzzle of evidence will reveal at the end of trial. . . ." Many court members have heard all of that before and are likely to hear it again from the military judge or the trial counsel during the present litigation. You may note this point, but use your imagination. Be creative and descriptive. Of course, *get to the point*. Tell the members, for example, that you will present five witnesses who will show why the accused's actions in self-defense were justified on the date in question. Tell them that your five witnesses will describe how the so-called "victim," on that fateful night, was in fact the *aggressor*. Tell them how all five of your witnesses observed that physically-larger soldier become drunker and drunker and watched as he angrily staggered toward the accused in a manner that convinced *all* of them that he was going to attack him. In making your point, avoid the monotony of repeating, "PFC Able will testify that . . ., PFC Baker will testify that . . ., PFC Charlie will testify that. . . ." Although this type of opening statement may seem necessary to cover all of the witnesses or all of the anticipated testimony, the trial defense counsel will often do better by broadly summarizing the evidence to develop his or her theory of the case, naming witnesses or the specific points of their testimony only for clarity or emphasis. Not only is this a more interesting presentation, but it also does not later tie the defense to a single witness or a single promise.

Finally, defense counsel must employ the language of effective defense advocacy. The accused is not "the accused," he is "Private First Class Stanley Smith," "PFC Smith," or "this young soldier." The victim is not "the victim," he is "Private Jones," "Jones," or "that drunk soldier." The location of evidence is not "where the body was found" nor "the scene of the crime," it is "Range 42," "the NCO Club," or "the parking lot behind the PX." The words of the trial defense counsel must be meticulously chosen and then utilized in a manner consistent with the picture being painted for the triers of fact. A single slip could cause a negative reaction by the members and result in a serious setback for the entire defense case.

Using Demonstrative Aids[5]

Experienced trial attorneys extol the virtues of demonstrative evidence and aids in the trial process. To hold the proverbial "smoking gun" during closing argument visually assists counsel in making the ultimate point—it connects argument with evidence, injects "reality" into a battle of words and witnesses, and stresses the logic between that evidence and the desired verdict. Trial lawyers, whether seeking the admission of summaries of other evidence[6] or simply utilizing a chart in order to highlight testimony, often find visual evidence and aids to be invaluable to their cases. This point is equally applicable to the opening statement.[7] The following narrative describes, albeit from a prosecutor's experience, one such example.

The accused, a noncommissioned officer, was charged with four specifications of indecent assault and one specification of assault with the intent to commit rape. One theme ran throughout the government's case: the use or presence of an automobile in conjunction with the sexual assaults on the eight females. The first five victims observed a certain make and color of automobile, and all of them observed all or parts of a green, U.S. Army, Europe (USAREUR) license plate on this car. The final three victims observed a second make and/or color of vehicle, and some could recall parts of the USAREUR license plate number. The complexity arose, however, from the fact that the accused had owned a series of automobiles during his three-year tour in Germany; because of theft, loss, or re-registration, a number of license plates had been assigned to each of his cars. The question: how to provide an effective overview to the members without losing their attention or causing them to become overwhelmed by the evidence of several vehicles of various makes, models, and colors; a number of license plates; dates of purchase, ownership, and disposal of each automobile over a period of some thirty-six months; and, of course, the anticipated testimony of eight victims. The answer: charts.

During opening statement trial counsel used several charts to summarize the exhibits from the registry of motor vehicles, the testimony expected from the eight victims, and the connection between all of this anticipated evidence. One chart depicted the history of the accused's automobile collection during the period in question: beginning with the first relevant car, the chart reflected (in colored print corresponding to the color of the applicable vehicle) the make, model, and color of each of the accused's automobiles, the

[5] *See generally* A. Julien, Opening Statements § 1.08.50 (1985 Supp.); A. Morrill, Trial Diplomacy § 2.11 (2d ed. 1979).

[6] Mil. R. Evid. 1006.

[7] Caution must be exercised, however, because any promises made *visually* during the opening statement are almost certain to return to haunt the speaker during his or her opponent's closing argument if such promises are not fulfilled by the evidence presented during trial.

license plate(s) assigned to them, and the dates that they were possessed by him. The second chart highlighted the testimony of the five sets of victims in terms of their observations—a physical description of their assailant, a color and/or make or model of the car, and, if possible, the license plate number on this vehicle. The third chart tied all of the evidence together by date of attack, but, unlike the first charts, this display was covered with tear-away paper until a specific point was being made—thereby dramatizing the effect of seeing in a single space the pertinent date, observations, and vehicular information. While summarizing the government's proof during his opening statement, trial counsel, with charts readied, referred to one of the five dates and uncovered this portion of the third chart; summarized the victim's anticipated testimony (for example, "turquoise Renault car, plate # ??–6646") and revealed this part of the second chart; and declared what the motor vehicle information would ultimately reflect (for example, a corresponding registration form for a "blue/green Renault 16L, plate # PW–6646," owned by the accused on the date in question) and disclosed this portion of the first chart.

As the government's opening statement proceeded—moving from date to date, from witness to witness, from car to car—the members were taking notes from the information being conveyed to them in large, bold, color-coordinated figures. Opposing counsel objected that trial counsel was "testifying," but the objection was properly overruled; after all, the prosecution was merely summarizing his anticipated evidence. Two days and over twenty witnesses later, the accused was convicted of all charges and specifications and sentenced, *inter alia,* to a dishonorable discharge and confinement at hard labor for twenty years.

As the foregoing example illustrates, the prepared trial attorney, by conveying information both orally and visually to the members during the opening statement, may be able to pique the member's curiosity and convince them that the desired verdict is the logical result of the evidence to be presented. For courts-martial members, who are trained to give and attend military briefings that often involve charts, graphs, and similar visual displays, the selective use of demonstrative aids by counsel during special points in the trial—such as opening statement—is a valuable, and, indeed, necessary, extension of the members' own experiences and expectations. The results will speak for themselves.

Conclusion

The opening statement by the defense in a contested court-martial with members is more than an obligatory preface to an often lengthy trial process: it is a first and invaluable opportunity for the trial defense counsel to establish rapport with the triers of fact, to indicate to them—by voice and actions—that counsel sincerely believes in his or her cause, to demonstrate that this trial will be an enjoyable experience, and to convince the members of the logical and emotional justice of his or her position. The opening statement must be a positive exercise in legal artistry, a series of effective first strokes by the defense counsel upon the collective *tabula rasa* of the triers of fact. By carefully planning, rehearsing, and delivering the opening statement, the prepared advocate is able to transform a "small step" in the trial process into a "giant leap forward" toward successful litigation.

Providence Inquiry: Counsels' Continuing Responsibility to Their Clients

Major E.V. Kelley, Jr., U.S. Marine Corps
Military Judge, Keystone Trial Judicial Circuit, Okinawa, Japan

"It ain't over 'til its over." Yogi Berra

In my limited experience on the bench here in The Keystone Circuit, it seems that there is one area of advocacy to which counsel more often that not pay too little attention; that of the providence inquiry subsequent to the accused's guilty plea. While defense counsel usually have schooled their clients, it is common to find an accused stumbling through providence. And on occasion I have had to reject an accused's pleas as improvident. Looking to the right side of the courtroom (no pun intended), it is a rare occasion when the trial counsel aggressively follows the military judge's providence inquiry.

The Defense

At the outset, the accused has the right to plead guilty.[1] Whatever the accused's motivation may be in exercising this right, I believe that principal responsibility falls upon his or her agent (spelled "defense counsel") to help him or her do that. Accordingly, a defense counsel who is doing his or her job prior to trial will: read and explain to the accused the elements of the offense; ask questions that the judge will likely ask; ensure that areas which the judge may perceive to be a defense are covered (*e.g.,* the issue of voluntary intoxication if the accused is pleading guilty to a specific intent crime involving alcohol-related misconduct); and, finally, rehearse all of the above.

I have known lawyers who boast of their "technique" for getting their clients through providence. Such techniques range from "yes sir" and "no sir" flash cards; through pointing to a "yes" or "no" scribbled on a legal pad in front of the accused; to a continuous dialogue with the accused during the judge's questioning, wherein the accused simply parrots the voice of his or her defense counsel. I suggest that all of these are wrong, and a poor substitute for properly preparing the one for whom the occasion is being held.

[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910 [hereinafter R.C.M.].

A defense attorney has a fiduciary duty to his client.[2] If the accused is in fact guilty and desires to plead guilty, his or her lawyer is charged with the mission to see that his or her pleas are accepted as provident by the military judge. A defense attorney whose client "busts" providency should be professionally embarrassed. Too, as a matter of courtesy to the accused, the defense counsel should ensure that the client understands the proceedings and participates in them. No one expects an accused to feel good about being court-martialed. The accused should, however, feel good about the procedure.

On a separate issue, the defense counsel should be ever-alert to a judge's mistakes during his or her inquiry. (Yes, Virginia, judges make mistakes too). I know of no fiduciary loyalty that the defense owes to the military judge. It well may be that the judge incorrectly advises the accused or omits an element of the offense. Should this occur, and should the prosecutor miss it, the defense has an instant appellate issue. Remember, your duty is to get your accused providently through the guilty plea, not to ensure that the judge does it right. I do not mean to imply that the defense should attempt to "plant error"; that is both improper and unethical.[3] Rather, I suggest that there is nothing improper or unethical in keeping one's mouth shut if the judge errs. But, the military judge may as part of the providence inquiry ask the defense counsel whether he or she is aware of the deficiency in the inquiry that may render it inadequate to support a finding consistent with the accused's plea.

The Government

So very often, after the defense enters a guilty plea, the government counsel goes into a buzz mode until time for presenting the case in aggravation. The prosecutor should aggressively follow the judge throughout providency to ensure that the judge covers all the elements with his or her inquiry and does not miss any possible defenses. (In regard to this last area, remember that an inconsistency raised by the accused during his or her sworn or unsworn statement may "bust" providency). I suggest the best way to ensure that the judge does it right is to use your trial checklist. Should the judge omit an element or fail to inquire into a relevant area, do not be too bashful to stand and suggest further inquiry. The judge will appreciate your thoroughness and professionalism. A little embarrassment in the courtroom is far preferable to losing a case on appellate review because of an inadequate inquiry.

A guilty plea is usually negotiated. When the judge shifts from the providence inquiry to an explanation of the pretrial agreement, the prosecutor must continue to monitor the judge. A mistake here can usually be remedied by a proceeding in revision, but it should not come to that if the government lawyer is helping the judge think. Too, if an area of the "deal" is particularly esoteric or ambiguous, your judge will appreciate a "heads up" at a pretrial conference.[4] No one likes to be surprised.

A prosecutor should be diligent throughout the trial. Ensure that the accused pleads correctly, that findings are correctly announced by the court, and that all the filler between is done right, including (in the Naval Service) the judge's obligatory *Williamson/Hoaglin* blessing.[5] Remember that a prosecutor's duties are varied, but one of his or her more important duties is to protect the record of trial. If the prosecutor allows the military judge to bungle the providence inquiry, the best that can result is a trip back to court at a future date and do it again; the worst is appellate reversal. A prosecutor who gets a conviction at the trial level, but who has the case reversed on appeal, has unsuccessfully prosecuted. He or she has lost. So what is the bottom line? Be aggressive; monitor the judge; protect the record.

The Judge

As I mentioned previously, the accused has the statutory right to plead guilty. The government usually is saved time and money by the plea, and judicial economy is enhanced. During a guilty plea, all parties have an interest in a successful providence inquiry. Accordingly, I work very hard with the accused to help him or her through. I am inclined to view his or her responses in the light most favorable to accepting the pleas. I realize that the accused's responses to my questions will likely be smoother if he or she knows what I am going to ask. Though most of the questions can be anticipated (*i.e.*, "Did anyone give you the authority to be absent on 1 January 1986?"), some cannot. Along these lines, my providency questions are not classified documents. Anyone may have a copy for the asking. I suggest that most military judges probably feel this way. Defense Counsel—ask the judge for a copy of his or her questions so that you can properly rehearse providency with your client. Prosecutors—ask the judge for a copy so that you can study his or her line of inquiry prior to trial for possible omissions. (Remember, you know the factual predicate; the judge does not). After trial, both counsel should file the questions for future reference. Note that the providence questions will vary depending on your judge, so file your questions in the appropriate "book".

Summary

A guilty plea is not as demanding on counsel as is a contested case. It is, however, from the accused's perspective, just as consequential. Counsel's responsibilities do not end when the accused decides to plead guilty. The Military Justice Reporter is replete with decisions that never would have been there but for someone's second-rate performance during a guilty plea. No one is perfect. We all make mistakes. But a plea of guilty is one of those rare occasions in our adversarial system where a concerted effort can produce a result that is satisfactory and satisfying to all parties.

Follow-Up Congratulations to Fort Leonard Wood

Another recent example of why Fort Leonard Wood was selected to receive the Commander-in-Chief's award for Installation Excellence (see *The Army Lawyer*, June, 1986, at

[2] Model Code of Professional Responsibility EC 4–1 (1980).

[3] Model Code of Professional Responsibility EC 7–22 (1980).

[4] R.C.M. 802.

[5] United States v. Williamson, 4 M.J. 708 (N.C.M.R. 1977); United States v. Hoaglin, 10 M.J. 769 (N.C.M.R. 1981).

24) has come to the attention of The Judge Advocate General. Attorneys in the Fort Leonard Wood SJA office discovered a gap in the Missouri statutory scheme that allowed persons convicted of driving while intoxicated on post to retain their state drivers' licenses. Through the efforts of the Fort Leonard Wood SJA, Lieutenant Colonel Richard Black, and his staff, the Missouri Legislature recently passed a bill that allows the State of Missouri to assess points and suspend or revoke one's driver's license for traffic convictions committed on federal military installations.

In recognition of the SJA office's initiative in having the law passed, representatives from the SJA office were in attendance at ceremonies when the Governor of Missouri signed the bill into law. Major General Overholt again extends his commendation to the Fort Leonard Wood SJA office for its innovative legal initiatives.

USALSA Report

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Assessing the *Substantive Use* of Prior Inconsistent Statements

Since their adoption into military law, the Military Rules of Evidence have proven to be a boon to the thoughtful and imaginative prosecutor. The decisions of the Court of Military Appeals construing these rules of evidence, however, consistently reflect that the admissibility of crucial evidence depends upon the prosecutor's ability to fully understand their subtle and intricate relationship.[1] This reality is made clear by comparing two recent Court of Military Appeals decisions, *United States v. Dodson*[2] and *United States v. Powell,*[3] where the court examined the critical difference between the evidentiary impact of a prosecution witness's prior inconsistent statements introduced as impeachment and their use as affirmative evidence of the accused's guilt, and suggested that devastating consequences may await a prosecutor either at trial or on appeal by his or her failure to understand this difference.

In *Dodson,* the accused was charged with attempted robbery, conspiracy to commit robbery, premeditated murder, felony, murder, robbery, and wrongful communication of a threat. Despite these numerous charges, there was only one victim, and the case against the accused was entirely based upon circumstantial evidence. The facts of the case reveal that the victim, Corporal Murphy, became a tempting target for robbery as on an evening of "liberty" he was seen by the accused and two other Marines in a bar, somewhat intoxicated, carrying a large amount of money and offering to pay for drinks. After offering Lance Corporal Chupp (who was white) and Private First Class Garrett (who was black) a drink and being rebuffed by both, Corporal Murphy became upset and went outside the bar. A few moments later, Garrett, Chupp, and a third Marine (a taller black male) were observed by a witness outside the bar threatening Corporal Murphy. The taller black male was observed waving a silver pointed object in Corporal Murphy's face and saying, "I'm going to get you man." A few moments later, other witnesses observed Corporal Murphy reenter the bar and

[1] *See, e.g.,* United States v. Watkins, 21 M.J. 224 (C.M.A. 1986); United States v. Maxwell, 21 M.J. 229 (C.M.A. 1986).

[2] 21 M.J. 237 (C.M.A. 1986).

[3] 22 M.J. 141 (C.M.A. 1986).

heard him say that the three men were wielding a knife, a pipe, and a stick, and that they were trying to rob him. Several hours later, Corporal Murphy's body was discovered near the bar. An autopsy report revealed that someone had stabbed him in the back, puncturing one of his lungs and his aorta, which in turn caused his death. PFC Garrett and the other taller black male were seen by a witness in the vicinity of where Corporal Murphy's body was found at or near the time of his death.

During his case-in-chief, the prosecutor presented the testimony of Garrett, who had previously been convicted of similar offenses. The prosecutor sought to establish through Garrett's testimony that the taller black male who had been his companion on the evening of Corporal Murphy's murder was the accused. Also on direct examination, the prosecutor asked Garrett if he had been carrying a knife at the time of the murder of Corporal Murphy. As he had testified at his own trial, Garrett denied that he had been carrying a knife. Despite vehement objection by the accused's defense counsel, the prosecutor was then allowed to "impeach" Garrett's testimony through the use of another witness, Private Robbins, who testified that Garrett had, before his trial, made two statements confirming that he had a knife with him on the evening of Corporal Murphy's death.

On appeal, the accused alleged, among other things, that the government used the testimony of Robbins, "in the guise of impeaching PFC Garrett, as a ruse to bring impermissible hearsay before the members."[4] The Navy-Marine Court of Military Review did not view Robbins' testimony as hearsay, observing that

> The fact that PFC Garrett's prior statements were unsworn, would only be relevant if the government were attempting to enter them under Mil.R.Evid. 801(d)(1)(A) when the prior statement was 'given under oath subject to the penalty of perjury.' It is only when the extrajudicial statement is offered 'to prove the matter asserted' that hearsay considerations control.[5]

Instead, the Navy-Marine court found that Robbins' testimony was "extrinsic evidence of prior inconsistent statements under Mil.R.Evid. 613(b)"[6] and therefore was admissible to impeach Garrett's credibility. The court reasoned that Robbins' testimony concerning Garrett's two prior statements about possessing the knife were directly related to a factual matter probative of the guilt or innocence of the accused. According to the Navy-Marine court, this was a proper use of impeachment "so long as the military judge instructs the members to view the impeachment evidence not as substantive evidence, but rather, as being determinative of the credibility of the witness."[7] The Navy-Marine court found that the military judge had properly instructed the members *despite the fact that trial counsel erroneously referred to the statements as substantive evidence during his closing argument.*

On further review by the Court of Military Appeals, Judge Cox, writing the opinion for the court, affirmed the Navy-Marine court's view that the impeachment of Garrett was proper. In his concurring opinion, however, Chief Judge Everett observed that even though it was important that the prosecutor establish that Garrett was the accused's companion on the evening of the murder, he was not fully convinced that the prosecutor needed to ask Garrett whether he had been carrying a knife. In this regard, Chief Judge Everett also observed that

> [A] reading of the entire record might suggest that trial counsel asked this question solely to provide a basis to have Garrett's prior statements introduced as impeachment evidence, *see* Mil.R.Evid. 613(b), and in the hope that the court members would consider this evidence for a substantive purpose, for which it would be *inadmissible, see* Mil.R.Evid. 801(d)(1)(A).[8]

Indeed, the fact that the prosecutor erroneously referred to this evidence of impeachment as substantive evidence during his closing argument before findings *at least* suggests that the prosecutor may have misunderstood the applicability of the impeaching evidence. Even so, on a petition for reconsideration of this specific issue, the Court of Military Appeals held that there was no evidence of "bad faith" or prosecutorial misconduct on the part of the prosecutor in impeaching Garrett.[9]

Clearly, the benefit of the doubt was accorded the prosecutor in *Dodson.* This may have been because, as noted by the court on the petition for reconsideration, a second government witness had earlier testified to the accused's own admission of guilt to the charged offenses. Without this additional evidence, the seeming unnecessary impeachment by the prosecutor may very well have resulted in reversal.

In contrast to *Dodson,* the *Powell* case demonstrates a more accomplished prosecutorial effort. In *Powell,* Private Gloria Hernandez was a crucial witness for the government. She had first attracted official notice when she was discovered unconscious in a locked stall in a woman's latrine at a U.S. Army hospital. Two days following her discovery and treatment, Private Hernandez made a sworn, written statement to Army Criminal Investigation Division (CID) agents in which she admitted having obtained heroin from the accused. She also stated that the accused had used heroin with her in his room. These statements formed the basis of an investigation of the accused and subsequent charges against him for wrongful transfer and possession of heroin.

At the accused's trial, Private Hernandez' story changed when called as a prosecution witness. She denied acquiring drugs from the accused or seeing him use drugs. She testified that she bought the drugs from an unknown source and took them to the accused's room. Despite having been reminded of her prior sworn statements to the CID, Private Hernandez insisted that her trial testimony was the truthful version of what happened. In accounting for her previous

[4] United States v. Dodson, 16 M.J. 921, 927 (N.M.C.M.R. 1983).

[5] *Id.* at 927.

[6] *Id.* at 928.

[7] *Id.*

[8] 21 M.J. at 239 (Everett, C.J., concurring).

[9] United States v. Dodson, 22 M.J. 257, 259 (C.M.A. 1986).

statements given to the CID, Private Hernandez claimed that she had been harassed and threatened by CID agents and that she wanted to mask her own expertise in preparing and injecting heroin. Rather than seeking the admission of her prior statements as impeachment, the prosecutor offered the statements as affirmative evidence of the accused's guilt. The military judge initially accepted the statements as substantive evidence under Military Rule of Evidence 801(d)(1)(A)[10] but later expanded his ruling to include the admissibility of the statements under Military Rule of Evidence 803(24)—the "residual hearsay" exception.

On appeal, the Army Court of Military Review held that Private Hernandez' statements could not be admitted under Rule 801(d)(1)(A) because the court was "unwilling to hold that M.R.E. 801(d)(1)(A) extends to a statement made in a policeman's office during a non-advocatory, inquisitorial police investigation merely because an oath was administered."[11] The Army court sustained the trial judge's ruling that admitted the statements as substantive evidence under Rule 803(24). The Court of Military Appeals affirmed this ruling, holding that there were a number of factors justifying the conclusion that Private Hernandez' pretrial statements were sufficiently trustworthy and reliable to be considered "equivalent to the traditional hearsay exceptions."[12] According to the court, these factors included

> Hernandez' adm[ission] that she made the pretrial statement; that she was available for cross-examination regarding it; that the substance of her pretrial statement was independently corroborated by another prosecution witness . . .; that her trial testimony was internally inconsistent; that the reasons she gave for changing her story were improbable; and that she misled trial counsel as to the nature of her testimony up to the moment of trial.[13]

It is clear from reading *Dodson* and *Powell* that evidence of the prior inconsistent statements of a "hostile" prosecution witness as affirmative evidence of the accused's guilt will almost always be more desirable and effective. Although the path for gaining admission of prior inconsistent statements under Military Rule of Evidence 613 is tempting because of the seeming ease of facilitating its admission under the rule, prosecutors should consider that evidence of impeachment applies *only* to the credibility of the witness and deserves a narrowly drawn instruction by the military judge in this regard.[14] Moreover, because the potential consequence of having panel members errantly consider such evidence of impeachment as substantive evidence is nearly always present, suppression of such evidence at trial under Military Rule of Evidence 403 or reversal of the case on appeal is also a frequent possibility. Additionally, a prosecutor who relies on the potential for errant consideration of impeachment evidence as substantive evidence by the court members out of a mistaken or purposeful design risks the same results but under the color of "bad faith" or, worse, prosecutorial misconduct.

Both *Dodson* and *Powell* also clearly demonstrate that prosecutors must *anticipate* the possibility of having a critical prosecution witness testify in a manner inconsistent with his or her pretrial statements. Anticipating such a result should be routine, especially where a witness is a coaccused, co-conspirator, or bears a similar relationship to the accused. The prosecutor should determine the basis by which the prior statements of the witness would be admissible as affirmative evidence of the accused's guilt rather than as impeachment evidence. Absent a specific evidentiary rule that would permit the introduction of a prior inconsistent statement as affirmative evidence of the accused's guilt, such as Military Rule of Evidence 801(d)(1)(A), the prosecutor should utilize the reasoning of *Powell,* as well as the framework of Military Rule of Evidence 803(24), in advancing the admissibility of prior inconsistent statements.

Would such an approach have assisted the prosecutor in *Dodson?* The answer is yes. Prior to trial, while in pretrial confinement, Garrett made two statements, both in the presence of Robbins. In his first statement, Garrett stated, "It does look bad because I did have a knife with me that night." On the second occasion, Robbins overheard a jail cell soliloquy of Garrett in which he stated, "I wish I wouldn't have brought the knife that night . . . nobody was supposed to get hurt." Obviously, these statements were crucial evidence, particularly in view of the fact that the prosecution in *Dodson* did not have other direct evidence that any of the three soldiers charged with the murder of Corporal Murphy were carrying a knife. The statements were also material and probative to the charges of conspiracy and felony murder pending against the accused. The central problem in admitting these statements, however, was that, apart from their potential for evidence of impeachment, they amounted to hearsay *as to the accused's case.* And, there was no clear exception to the hearsay rule upon which to otherwise base their admissibility. Even so, but for the fact that Garrett was available as a witness, these statements would have clearly met the recognized hearsay exception as a statement against interest outlined in Rule 804(b)(3).

Additionally, there were other factors surrounding Garrett's pretrial statements. First, there was no motive to fabricate the statements as shown by the circumstances under which they were uttered. Second, the statements

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[10] Mil. R. Evid. 801(d)(1)(A) provides that a statement is *not* hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, as was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

[11] United States v. Powell, 17 M.J. 975, 976 (A.C.M.R. 1984).

[12] 22 M.J. at 145.

[13] *Id.*

[14] The instruction on "Prior Inconsistent Statements" set forth in Dep't of Army, Pam. No. 27–9, Military Judge's Benchbook, para. 7–11 (1 May 1982) provides that:

> You have heard evidence that (name of witness) made a statement prior to trial that (may be) (is) inconsistent with his/her testimony at this trial. Specifically, that (highlighted materially significant inconsistencies). If you believe that an inconsistent statement was made, you may consider the inconsistency in *evaluating the believability of the testimony (name of witness). You may not, however, consider the prior statement as evidence of the truth of the matters contained in the statement.*

(Emphasis added.)

were corroborated by the evidence establishing the accused's cause of death. Finally, Garrett was present and available for cross-examination. In both *Powell* and in another similar case, *United States v. Medico,*[15] the Court of Military Appeals and the Second Circuit Court of Appeals, respectively, determined that when a particular statement but for some fact met all of the specific requirements for admission under a specific recognized exception to the hearsay rule and additionally contained other indicia of reliability, the statement satisfied the requirement of "equivalent guarantee of trustworthiness" necessary for introduction of the statement under Rule 803(24). Consequently, had the prosecutor pursued this approach in *Dodson,* he quite likely would have gained the admission of Garrett's statements as affirmative evidence of the accused's guilt.

Yet, because *Dodson* was convicted and his conviction sustained on appeal, it is fair to ask whether this different approach is really a distinction without a difference. Indeed, when the Navy-Marine Court of Military Review analysed the impact of the evidence of Garrett's prior statements upon the court members, the court observed that the court members could have believed that Garrett "either possessed a knife that evening or supplied one to [Dodson] or LCPL Chupp."[16] This observation misses the mark with regard to the obvious legal limits to which evidence of impeachment was used in *Dodson* and, moreover, demonstrates why such evidence may have just as likely have been held to have been substantially prejudical to the accused under Rule 403. For example, once Garrett was impeached, the court members could have also concluded that Garrett was lying when he stated that the accused was with him on the evening of the murder and that he alone was responsible for the murder of Corporal Murphy. Of course, what prevailed against this conclusion was the additional evidence of Dodson's own admissions. Without this latter evidence, the impeachment of Garrett may well have been more harmful than helpful in perfecting a case against Dodson.

Ultimately, the critical distinction between these two approaches is in understanding how such evidence really applies to the case from the vantage point of its critical importance, its admissibility, and its instructional value. Similarly, without understanding that the Military Rules of Evidence are primarily vehicles for trial planning, a prosecutor will nearly always put them to their least advantageous use—reacting to evidence as it develops—which has led to the reversal of similar types of cases.[17] Major James B. Thwing.

Rape Trauma Syndrome: Another Step Forward

The Army Court of Military Review recently issued another opinion on the admissibility of rape trauma syndrome evidence. In *United States v. Carter,*[18] the accused was charged with rape and defended on the theory that the victim consented to having intercourse with him. After the accused presented his defense, the government introduced the expert testimony of a Dr. Thompson, who testified about post traumatic stress disorder and particularly about rape trauma syndrome. Dr. Thompson provided information concerning the symptoms associated with rape trauma syndrome to members of the court and compared these symptoms to those exhibited by the victim in the accused's case. He did not testify as to whether he believed the victim had consented to intercourse, or whether a rape had occurred at all. Furthermore, the military judge gave an instruction on the limited use of Dr. Thompson's testimony.[19]

In determining that Dr. Thompson's testimony was admissible, the Army court also set forth a history of the use and development of rape trauma syndrome evidence. While *Carter* provides prosecutors much needed guidance on its proper use at trial, it is also a logical continuation of the Army court's efforts to define the parameters for using rape trauma syndrome evidence. A superficial view of the *Carter* decision might indicate that it conflicts with its earlier view in *United States v. Tomlinson,*[20] where the court refused to permit the use of evidence of rape trauma syndrome. A comparative analysis of the opinions, however, reveals that they are reconcilable and ultimately apply the same standard for the admission of this form of expert testimony.

In *Tomlinson,* the Army court found that rape trauma syndrome evidence, although relevant, was inadmissible under Military Rule of Evidence 403. There, the court found that the expert's testimony not only compared the symptoms exhibited by the victim with those of other victims of rape, but also intimated that a rape had in fact occurred. The court reached this conclusion because the expert testified that it was unlikely that the victim had faked the symptoms.[21] Such testimony, as pointed out by the court, constituted an implied opinion that the victim was telling the truth.[22] Indeed, in *United States v. Wagner,*[23] the Air Force Court of Military Review held that other than character testimony intended to impeach a witness, and, absent unusual circumstances, opinion testimony on whether to believe a particular witness' testimony is not permissible because this is a matter for the factfinders. Furthermore, the expert in *Tomlinson* testified that the victim

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[15] 557 F.2d 309 (2d Cir. 1977).

[16] United States v. Dodson, 16 M.J. 921, 928 (N.M.C.M.R. 1983).

[17] *See, e.g.,* cases cited *supra* note 1. *See generally* United States v. Jones, 592 F.2d 1038 (9th Cir. 1979); United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977).

[18] 22 M.J. 771 (A.C.M.R. 1986).

[19] The military judge's instruction was as follows:
You have heard the testimony of Dr. Thompson concerning rape trauma syndrome. Captain Thompson did not tell you that Specialist [D] was raped. What Dr. Thompson told you was that she had symptoms that are similar or consistent with rape trauma syndrome. The question of whether or not Specialist [D] was raped is the question you have to decide.
Id. at 772.

[20] 20 M.J. 897 (A.C.M.R. 1985).

[21] 20 M.J. at 901. The expert offered this opinion in response to a member's question. Prosecutors must not only use care in tailoring their questions but should also be alert to questions by members that concern the expert's personal beliefs.

[22] *Id.*

[23] 20 M.J. 758 (A.F.C.M.R. 1985).

in fact suffered from rape trauma syndrome. In comparing this testimony to that of the expert's in *Carter*, the difference revealed is that the expert in *Carter* avoided any judgmental language that indicated an opinion either as to whether the victim was raped or was telling the truth.[24]

Accordingly, it seems clear in viewing the *Carter* and *Tomlinson* opinions that there are two basic instances when evidence of rape trauma syndrome can be used. The first is its substantive use to prove an element at issue. The second is its use to bolster the victim's credibility once it has been specifically attacked.

The logical use of rape trauma syndrome and substantive evidence has recently been discussed by the Air Force Court of Military Review in *United States v. Eastman.*[25] There, the Air Force court suggested that if the qualified expert can show the existence of symptoms of rape trauma syndrome and that those symptoms tend to show nonconsensual sex and were not present before the alleged rape, then the expert testimony concerning rape trauma syndrome should be admitted. Even so, it should be noted that the expert's testimony must be restricted to the relevant issue and to the area of his or her expertise. That is, the expert must be confined to describing the symptoms observed in the victim and the symptomology established under the rubric, "rape trauma syndrome." The connection between the two must be left to the trier of fact. As demonstrated in *Tomlinson,* testimony by the expert that indicates his or her opinion that a rape has actually occurred is not permitted.

There is also support for the admissibility of evidence of rape trauma syndrome with regard to bolstering the victim's credibility. In *United States v. August,*[26] the Court of Military Appeals stated that once the victim's credibility had been attacked, such evidence may be admitted to explain an inconsistency in the victim's post-rape behavior or in her testimony. Consequently, in situations where the victim delays reporting the assault and there is an attack on her credibility at trial as a result, the government should be allowed to rehabilitate the victim through the testimony of an expert explaining that such behavior is consistent with the symptomology described by rape trauma syndrome. Indeed, this procedure was approved in *Tomlinson* where the Army court stated "testimony that emotional trauma may cause lapses or inconsistencies in recollection would [be] proper rebuttal evidence to show that the inconsistencies in [the victim's] statement could have been caused by the trauma rather than untruthfulness."[27]

This language was cited with approval by the Court of Military Appeals in *United States v. Cameron.*[28]

It is also important to note that because expert testimony concerning rape trauma is admissible under Rule 702, prosecutors should further secure its relevancy as "helpful" evidence through an effective voir dire of court members establishing whether they have had experience with victims of sexual assault. This should be accomplished whether the prosecutor intends to introduce rape trauma syndrome evidence as substantive evidence or to bolster the victim's credibility. Although the Court of Military Appeals and the respective military appellate courts that have considered the issue of the admissibility of rape trauma syndrome evidence have made it clear that the expert cannot render an opinion concerning whether a victim has been raped or that the victim is telling the truth, they have found that evidence of rape trauma syndrome is properly admissible under Rule 702 when it serves to aid the court members in their findings as to both these issues.[29]

The *Carter* opinion has unquestionably served to clarify the issue of rape trauma syndrome. Properly used by the prosecutor, this evidence can add an extra dimension to complex sexual assault cases, especially where the victim has acted in a manner inconsistent with "normal expectations." Even so, prosecutors must recognize that this evidence requires careful use and must seek to tailor the foundational questions for the expert's opinion within the confines of relevant case law. Finally, prosecutors should be prepared to assist the military judge in drafting an appropriate limiting instruction for the court members.[30] Captain Stephen B. Pence.

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[24] *Tomlinson,* 20 M.J. at 901; *Carter,* 22 M.J. at 772.

[25] 20 M.J. 948 (A.F.C.M.R. 1985); *See also* Child, *Effective Use of Rape Trauma Syndrome Evidence,* The Army Lawyer, Oct. 1985, at 11, 12 n.8, 13–14.

[26] 21 M.J. 363, 364 n.3 (C.M.A. 1986).

[27] 20 M.J. at 902.

[28] 21 M.J. 59 (C.M.A. 1985).

[29] *See, e.g.,* United States v. Snipes, 18 M.J. 172 (C.M.A. 1984).

[30] Suggested instructions are contained in TCAP Memorandum #11, dated 1 July 1986.

Problems in Immunity for Military Witnesses

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Introduction

The evolution of military law regarding immunity has historically been distinct from, but related to, that applicable to civilian federal prosecutions.[1] In 1970, Congress repealed all previous statutory authority for grants of immunity by various federal instrumentalities[2] and enacted a single comprehensive scheme for grants of immunity in federal courts[3] and agency proceedings.[4] The only reference Congress made to the military justice system was to include the Court of Military Appeals in the definition of "court of the United States;"[5] it did not otherwise address prior military practice. This absence of reference has been interpreted as a tacit ratification of the status quo to the extent that military practice was not in conflict with the federal statutory scheme.[6]

In *United States v. Kirsch,*[7] the Court of Military Appeals held that in Articles 30, 44 and 60, Uniform Code of Military Justice,[8] Congress implicity conferred upon convening authorities the power to grant immunity.[9] The Manuals for Courts-Martial[10] and regulations[11] of the services have continued to rely on that holding. The result is a military practice that is a hybrid of federal civilian practice, uniquely military practice, and provisions governing the relationship between these two judicial systems in which the United States conducts criminal prosecutions.

The purpose of this article is to outline the provisions of law governing grants of immunity in the military, discuss problems inherent in the provisions, particularly those caused by the imperfect relationship of the two systems, and propose workable means by which a military defense counsel can best protect the client's interests.

Basic Provisions—Types of Immunity

Immunity is a mechanism created as an accommodation of two fundamental but opposing interests: the constitutionally guaranteed protection against compulsory self-incrimination[12] and the need of the government to be able to compel testimony " 'to secure information for effective law enforcement.' "[13] There are in theory two types of immunity: transactional, which immunizes one from prosecution for the offense or transaction testified about, and use (or testimonial), which immunizes one from the government subsequently using against the witness the evidence compelled or evidence derived from the compelled testimony. Prior to the enactment of 18 U.S.C. §§ 6001–6005 in 1970, one who was compelled to testify under a grant of immunity was effectively granted transactional immunity.[14] In 1970, however, Congress repealed

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[1] *See generally* United States v. Kirsch, 15 C.M.A. 84, 35 C.M.R. 56 (1964); Green, *Grants of Immunity and Military Law,* 53 Mil. L. Rev. 1 (1971), [hereinafter Green I]; Green, *Grants of Immunity and Military Law, 1971–1976,* 73 Mil. L. Rev. 1 (1976) [hereinafter Green II].

[2] Organized Crime Control Act of 1970, Pub. L. No. 91–452, Title II, § 201(a), 84 Stat. 927, (codified at 18 U.S.C. § 6001–6005 (1982)).

[3] 18 U.S.C. § 6003 (1982).

[4] 18 U.S.C. § 6004 (1982).

[5] 18 U.S.C. § 6001(4) (1982).

[6] Department of Justice Memorandum of the Assistant Attorney General, Office of Legal Counsel (William H. Rehnquist), subject: Grants of Immunity by Courts-Martial Convening Authorities (Sept. 22, 1971, *reprinted in* Coast Guard Law Bull. No. 413, *summarized in Grants of Immunity,* The Army Lawyer, Dec. 1973, at 22–23. *But see* Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation,* 101 Mil. L. Rev. 1, 32–33 (1983); Green I, *supra* note 1, at 29–31.

[7] 15 C.M.A. 84, 35 C.M.R. 56 (1964).

[8] 10 U.S.C. § 830, 844, 860 (1982) [hereinafter UCMJ].

[9] *See* Gilligan & Lederer, *supra* note 6, at 33:

> In *Kirsch,* the court reasoned that, inasmuch as the Uniform Code provides the convening authority the power to overturn a conviction, and thus through the right against double jeopardy the power to absolutely protect an accused from criminal sanction, a convening authority need not actually try an accused and overturn a conviction to grant immunity to a service member. The court also noted that Congress was well aware of the various Manuals for Courts-Martial and requlations providing for immunity and had failed to object to the military's interpretation of the law. Although expressly recognizing the power of a convening authority to grant immunity, the court made it clear that immunity could not be granted for offenses over which military courts lack jurisdiction and thus, implicitly, a convening authority cannot grant immunity to persons not subject to trial by court-martial.

(Footnotes omitted.)

[10] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 68*h* [hereinafter MCM, 1969], Dep't of Army, Pam No. 27–2, Analysis of Contents, MCM, 1969 (rescinded); Manual for Courts-Martial, United States, 1984 Rule [for Courts-Martial 704 hereinafter MCM, 1984, and R.C.M., respectively]; appendix 21, R.C.M. 704 analysis, MCM, 1984, at A21–34.

[11] *See, e.g.,* Dep't of Army, Reg. No. 27–10, Legal Services-Military Justice, para. 2–4 (1 July 1984) [hereinafter AR 27–10].

[12] U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.")

[13] Pillsbury Co. v. Conroy, 459 U.S. 248, 252 (1983).

[14] *See id.* at 253; New Jersey v. Portash, 440 U.S. 450, 457 (1979); Counselman v. Hitchcock, 142 U.S. 457 (1892).

authority for transactional immunity[15] and instead authorized only grants of use immunity.[16]

In contrast, in the military justice system, both types are still authorized. The Court of Military Appeals has held that authority to grant transactional immunity, as provided in the 1969 Manual,[17] derived implicitly from Articles 44 and 60 UCMJ.[18] It is still specifically authorized by the Manual in R.C.M. 704(a), but it is limited to immunity from trial *by court-martial,* presumably so as not to exceed the implicit statutory basis articulated in *Kirsch* or to conflict with the limitations of 18 U.S.C. § 6002. Unlike Paragraph 68*h* of the 1969 Manual, however, R.C.M. 704(a) now also specifically provides for a grant of "immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial." The use immunity provision of R.C.M. 704(a) is coextensive with the provisions of 18 U.S.C. § 6002, except that the protection afforded is limited: R.C.M. 704(a) only precludes use in a subsequent court-martial, not "any criminal case."[19] A convening authority's grant of use immunity applies to prosecution in federal district court only if specifically approved by the Attorney General under 18 U.S.C. § 6004.[20] Under R.C.M. 704, only a general court-martial convening authority is authorized to issue grants of immunity, and then only in accordance with that rule. It thus precludes issuance of immunity by a military judge under authority of 18 U.S.C. § 6003, even if it could be argued that courts-martial were intended to fall within that provision.[21]

A third form of "immunity" is a promise to forego prosecution made in exchange for which, or in reliance on which, one provides self-incriminating evidence.[22] Such *de facto* immunity resulting from government promises is based alternatively on theories that due process requires the government to act with integrity in conducting prosecutions,[23] or that such promises render the statements made involuntary, thus requiring their suppression.[24] The latter rationale is even more easily applied when military authorities rather than civilians elicit evidence pursuant to such a promise because the rights warning requirement of Article 31, UCMJ, is triggered merely by statements or actions intended to reasonably elicit a response,[25] even without the custody requirement for *Miranda*[26] warnings under the fifth amendment.

Problems, Issues and Solutions

Exposure to Prosecution in Civilian Courts

As previously noted, R.C.M. 704 limits a general court-martial convening authority's grant of immunity to not prosecute at, or use compelled evidence in, a subsequent court martial. Only when he or she grants immunity under 18 U.S.C. § 6004, and thus has obtained approval of the Attorney General or his designee, is a declarant protected from use in a subsequent prosecution in federal court of evidence which was compelled at a court-martial. Should a defense counsel advise the client, then, to refuse to testify absent immunity approved by the Attorney General?

The case of *Murphy v. Waterfront Commission*[27] illustrates the ramifications of limited immunity. In *Murphy*, witnesses in a state prosecution had refused to comply with an order to testify because the grants of immunity by New Jersey and New York did not apply to federal prosecutions.

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[15] Pub. L. No. 91-452, Title II, §§ 202-259, 84 Stat. 927.

[16] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 42, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4018 ("The proposed provision is not an immunity bath. . . . This statutory immunity is intended to be as broad as but no broader than the privilege against self-incrimination. . . . It is designed to reflect the case immunity concept of Murphy v. Waterfront Commission, 84 S. Ct. 1594, 378 U.S. 52, [sic] 12 L.Ed.2d 678 (1964) rather than the transaction immunity concept of Counselman v. Hitchcock, 142 U.S. 547 (1892)"); *see also Pillsbury Co.*, 459 U.S. at 253; United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973).

[17] MCM, 1969, 68*h*.

[18] *Kirsch*, 15 C.M.A. at 92, 35 C.M.R. at 64. At the time *Kirsch* was decided, what is now Article 60 was Article 64.

[19] 18 U.S.C. § 6002 (1982).

[20] R.C.M. 704(c)(1). 18 U.S.C. § 6004 provides that in any proceeding before any agency of the United States, the agency may, with the approval of the Attorney General, issue the order to testify under immunity. "Agency of the United States" includes military departments. 18 U.S.C. § 6001 (1982). Under Murphy v. Waterfront Commission, 378 U.S. 52 (1964), however, the Constitution may require extending the protection of a grant of immunity issued only under R.C.M. 704 to prosecution in federal district court and even state court. In *Murphy*, the Court held that the constitutional protection against compulsory self-incrimination rendered a grant of immunity by a state applicable to subsequent prosecution in federal court (a different sovereign). Certainly, then, the same rationale should apply to prosecutions in different courts of the same sovereign. Immunity under R.C.M. 704 alone would protect against use of evidence in prosecution of offenses not subject to prosecution in federal district court, such as uniquely military offenses prosecutable only under the UCMJ, or offenses committed outside the territorial jurisdiction of the United States and not violative of statutes of extraterritorial applicability.

[21] 18 U.S.C. § 6003 authorizes judges of "courts of the United States" to grant use immunity upon request of the U.S. Attorney, but no Article I courts are included in the definition of "courts of the United States" at 18 U.S.C. § 6001. Military judges are thus not empowered to issue grants of immunity.

[22] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982) (due process required enforcement of a promise of no prosecution made by a staff judge advocate and impliedly ratified by the convening authority where the accused incriminated himself in reasonable reliance on that promise, to the government's benefit). *See also* Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347 (1963) (admission given in reliance on investigator's promise of leniency is involuntary, but if admission elicited is a misrepresentation, then reliance is unreasonable and promise of immunity is effectively withdrawn); United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981), *cert. denied,* 460 U.S. 1011 (1983); *In re* Corrugated Container Antitrust Litigation, 662 F.2d 875, 887 n.27 (D.C. Cir. 1981); Mobley v. Meek, 531 F.2d 924, 926 (8th Cir. 1976); United States v. Carter, 454 F.2d 426 (4th Cir. 1972); Rowe v. Griffin, 497 F. Supp. 610 (M.D. Ala. 1980), *aff'd,* 676 F2d 524 (11th Cir. 1982); United States v. Pellon, 475 F. Supp. 467, 479 (S.D.N.Y. 1979), *aff'd,* 620 F.2d 286 (2d Cir. 1979). *Cf.* Trother v. United States, 359 F.2d 419, 420 (2d Cir. 1966) (bad faith promises of suspended sentence to induce guilty plea may be flagrant trickery violating the Constitution); United States v. Wilkins, 281 F.2d 707, 712 (2d Cir. 1960).

[23] *See, e.g., Rowe; Cooke.*

[24] *See, e.g., Shotwell Mfg. Co.*, 371 U.S. at 347; *Mobley*, 531 F.2d at 926.

[25] *See generally* Mil. R. Evid. 305.

[26] Miranda v. Arizona, 384 U.S. 436 (1962).

[27] 378 U.S. 52 (1964).

The Court held that the Constitution required that a state grant of immunity effectively be applied to preclude use of compelled evidence derived therefrom in any subsequent *federal* prosecution as well. It concluded that the witnesses could therefore be ordered to testify. Because an order to testify compels forfeiture of the constitutional right against self-incrimination, to be valid the order must be accompanied by a grant of immunity providing protection coextensive with that of the right forfeited.[28] It can be argued that *Murphy* would require suppression of compelled testimony in a later federal (or state) trial, even if the grant of immunity extended only to courts-martial. Indeed, this is presumably the reason underlying the requirement that, before granting any immunity, a convening authority should determine that the Department of Justice has no interest in the case.[29] In *Pillsbury Co v. Conroy*, however, the Supreme Court specifically rejected the idea that such protection afforded by application of the exclusionary rule in a subsequent prosecution was sufficient to justify *compelling* self-incrimination.[30] Accordingly, the discussion of R.C.M. 704(c)(1) recognizes that "[e]ven if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grants of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a Federal civilian offense."[31] Because of the applicability of the Assimilative Crimes Act,[32] virtually any crime, unless uniquely military in nature, committed on a military reservation in the United States with exclusive or concurrent jurisdiction[33] is subject to civilian federal prosecution. Indeed, many common law crimes directed against the United States are also subject to civilian federal prosecution,[34] although they may be committed outside of the United States. The inescapable conclusion, then, is that in many instances a convening authority's grant of immunity under only R.C.M. 704, not approved by the Attorney General under 18 U.S.C. § 6004, is inadequate to protect a witness against prosecution in federal court, or thus inadequate to compel a witness to provide incriminating evidence.

Military counsel representing clients immunized pursuant to only R.C.M. 704 and not under 18 U.S.C. § 6004 should take the following steps. First, investigate whether the client's expected testimony will admit facts which tend to prove, even by leading to the discovery of other evidence,[35] any federal crime over which a federal court has jurisdiction.

Second, determine whether such a prosecution is barred by the statute of limitations,[36] or by double jeopardy if the client has already been prosecuted at court-martial for violation of a substantive criminal provision of the UCMJ, the underlying facts of which would be the only basis for any possible subsequent prosecution. If the facts to be admitted would tend to prove a crime prosecutable in federal court, advise the client that compliance with the order to testify about those facts will expose him or her to the possibility of such a prosecution, including the inconvenience, time, and cost of litigation, even if a suppression motion thereon would be successful, and the client's right to refuse to testify as to such facts.

Next, fully explore the possible testimony with the client, and clearly define what facts the client may refuse to admit. To do this, first ascertain from trial counsel the content of the potential examination, and be present during the testimony to counsel the client as to the most responsive, non-incriminatory answers possible. Consultation with trial counsel may yield the ancillary benefit of avoiding the problem. Conscientious trial counsel confronted with the possibility of testimony limited by invocation of the privilege may obtain a grant of immunity approved by the Attorney General.[37] This is the optimal resolution of the problem because it avoids the possibility of allegations of contempt or wrongful refusal to testify and the attendant exposure to incarceration. Finally, if the military judge initiates contempt proceedings, pursue an extraordinary writ either of mandamus or of habeas corpus.

Promises To Not Prosecute: Validity and Compliance.

The Problem. One empowered with prosecutorial discretion may induce the cooperation of one who might otherwise invoke the privilege against self-incrimination by extending a promise to not prosecute in return for cooperation.[38] But such a promise is not a sufficient basis on which

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[28] *Id.* at 54 (citing Hitchcock, 142 U.S. at 585.

[29] AR 27–10, para 2–4*b*. This is done with reference to the Memorandum of Understanding Between the Department of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes [hereinafter MOU], *reprinted with DOD Supplementary Guidance* at AR 27–10, para. 2–7, as implemented by Dep't of Defense Directive No. 5525.7, Implementation of the Memorandum of Understanding Between the Department of Justice and Department of Defense Relating to the Investigation and Prosecution of Certain Crimes (Jan. 22, 1985), *reprinted in* MCM, 1984, app. 3.

[30] 459 U.S. at 261–62. The witness had been held in civil contempt for refusing to answer a question asking him to adopt almost verbatim his grand jury testimony which had been immunized. *Cf.* Burdick v. United States, 236 U.S. 70 (1915) (offer of pardon is not an adequate substitute for immunity because it must be voluntarily accepted to be effective; absent acceptance no evidence can be compelled).

[31] R.C.M. 701 (*c*) (1) discussion. An earlier comment similarly concluded that "grants of transaction immunity [by a convening authority pursuant to the UCMJ] are only effective in courts-martial for offenses cognizable only by courts-martial." Green I, *supra* note 1, at 27.

[32] 18 U.S.C. § 13 (1982).

[33] 18 U.S.C. § 7 (1982). For a discussion of the Assimilative Crimes Act, see Lonergan, *Defense Strategies and Perspectives Concerning the Assimilative Crimes Act*, The Army Lawyer, Aug. 1986 at 57.

[34] *See e.g.*, 18 U.S.C. § 641 (1982) (larceny); 18 U.S.C. § 1001 (1982) (making or using a false statement, or concealing or covering up a material fact); 18 U.S.C. § 1341 (1982) (using the mail in a scheme to defraud). *See generally* U.S. Army Criminal Investigation Command Pamphlet 1958, *Common Violations of the United States Code in Economic Crimes Investigations*, (15 Nov. 1983).

[35] Testimony that may even possibly tend to prove an offense is subject to the privilege against self-incrimination. Hoffman v. United States, 341 U.S. 479 (1951).

[36] The principal federal statute of limitations for most criminal offenses is five years. 18 U.S.C. 3482 (1982). If prosecution of an offense is barred by the statute of limitations, the privilege against self-incrimination may not be asserted. Brown v. Walder, 161 U.S. 591 (1896).

[37] The procedures for this are set forth in AR 27–10, para. 2–4.

[38] *See supra* notes 22–26 and accompanying text.

to *compel* self-incriminating cooperation,[39] and the benefits inuring to a witness are limited to the terms of the promise.[40]

In the military justice system, only the general court-martial convening authority can validly make such a promise. Only persons authorized to administer punishment under Article 15, UCMJ or to convene courts-martial may dispose of charges by dismissal.[41] A decision not to prefer charges or even dismissal of them by a subordinate commander does not bar prosecution, however.[42] A superior court-martial convening authority can refer or forward those charges[43] (presumably after they have been repreferred). Thus a general court-martial convening authority can preempt or reverse a referral or dismissal action by a subordinate convening authority or commander, and refer to summary, special or general court-martial any charges.[44] Therefore, only the general court-martial convening authority has the actual power to make a valid promise to not prosecute.[45] Any such promise by subordinate commanders or law enforcement authorities is *ultra vires*.[46] But promises to merely recommend actions such as administrative disposition are not.[47]

Promises not to prosecute arguably cannot bind an authority for whom the promisor is not an agent. Only if circumstances (such as bad faith) undermine constitutional considerations of due process or the integrity of the military justice system will a court possibly enforce such a promise. For instance, it is not settled that a promise by a U.S. Attorney in one district binds one in another.[48] Thus, the promise of a convening authority may not preclude prosecution in federal district or state court unless agents of those jurisdictions acting within at least apparent authority also ratify the promise.

A promise not to prosecute made in exchange for some consideration by an accused is essentially a pretrial agreement. These "pretrial agreements" are interpreted according to general principles of contract law,[49] but only if consistent with considerations of due process, the right to a fair trial, and maintenance of integrity of the military justice system.[50] In particular, the principle of promissory estoppel has been applied to bind the government to promises where an accused detrimentally relied on such a promise by an agent of the convening authority acting within apparent authority, to the government's benefit.[51] "[D]etrimental reliance may include any action taken by an accused in reliance on a pretrial agreement which makes it significantly more difficult to contest his guilt on a plea of not guilty."[52] The detriment can consist of incriminating admissions that are not excluded, detailed information not previously available to the government that materially aids its case and is difficult to segregate from evidence otherwise available, or the practically and psychologically inferior bargaining position resulting from having made self-incriminatory disclosures.[53] In *Cooke v. Orser*, benefits to the government were even held to include the capability of assessing the damage of the accused's espionage, the confession of the accused (even if suppressed), and the continued possibility of prosecution.[54]

Despite this broad characterization of detriment, reliance alone may not be sufficient to require specific performance, at least in cases of *ultra vires* promises to not prosecute. In

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[39] *See, e.g., Pillsbury Co.*, 459 U.S. at 261–62; United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 101 (1983).

[40] *See, e.g.*, Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963); United States v. Guiterrez, 696 F.2d 753 (10th Cir. 1982) (accomplice named by witness could be used against witness in prosecution for crimes other than those covered by immunity grant); United States v. Phipps, 600 F. Supp. 830 (D. Md. 1985) (use of immunized evidence in prosecution for subsequent crimes held permissible); United States v. Skolsky, 600 F. Supp. 676 (D.N.J. 1985) (breach of promise to testify truthfully permitted subsequent use); *but see* United States v. Carpenter, 611 F. Supp. 768 (N.D. Ga. 1985) (because of fifth amendment, government must prove no derivative use after even informal promise of no prosecution); United States v. Hossbuch, 518 F. Supp. 759 (E.D. Pa. 1981) (interrelationship of crimes required government to prove evidence used in prosecution of second crime was not derived from promise not to prosecute first).

[41] R.C.M. 401(a).

[42] *See, e.g.*, United States Werthman, 5 C.M.A. 44, 18 C.M.R. 64 (1955) (announced decision of non-prosecution by squadron commander not binding on wing commander for lack of actual authority and in absence of induced detrimental reliance).

[43] R.C.M. 401(a).

[44] United States v. Blaylock, 15 M.J. 190, 194 (C.M.A. 1982); UCMJ arts. 22(b), 23(b), 24(b).

[45] *See, e.g.*, United States v. Brown, 13 M.J. 253, 258 (C.M.A. 1982).

[46] *See, e.g.*, United States v. Werthman, 5 C.M.A. 44, 18 C.M.R. 64 (1955). *Compare Cooke*, 12 M.J. at 554 (staff judge advocate's negotiation of conditions of promise of non-prosecution done at behest of general court martial convening authority) *with Brown*, 13 M.J. at 258 (promise of staff judge advocate to recommend administrative discharge in lieu of court-martial plus representation that he was influential with the convening authority plus convening authority's authorization of staff judge advocate to negotiate agreement bound government to specific performance of bargained-for evaluation of accused's assistance and recommendation by that staff judge advocate; and frustration of performance by illness of staff judge advocate rendered dismissal the only adequate remedy).

[47] United States v. Brown, 13 M.J. 253 (C.M.A. 1982).

[48] Cases in which the promise was held binding include United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (government is single entity), and United States v. Lieber, 473 F. Supp. 884 (E.D.N.Y. 1979) (inherent authority found where defendants were reasonably led to believe authority existed). To the contrary are United States v. Alessi, 544 F.2d 1139 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976) and United States v. Boulier, 359 F. Supp. 165 (E.D.N.Y 1972), *aff'd on other grounds*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). *See generally*, Annotation, *Plea Bargains By Federal Agents*, 55 A.L.R. Fed. 402 (1981).

[49] United States v. Hannan, 17 M.J. 115, 120 (C.M.A. 1984) (citing Shepardson v. Roberts, 14 M.J. 354, 358 (C.M.A. 1983)).

[50] *See generally* Restatement (Second) of Contracts §§ 34d, 344, 349 (1973), *cited with approval in Shepardson*, 14 M.J. at 358.

[51] *Hannan*, 17 M.J. at 120 (citing *Shepardson*); *Shepardson, 14 M.J. at 358; Cooke*, 12 M.J. at 241, 345.

[52] *Shepardson*, 14 M.J. at 338, 343–44.

[53] *Id.* at 358.

[54] 12 M.J. at 345–46; *cf.* United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981) (company commander's promise of Article 15 punishment in exchange for cooperation did not preclude subsequent court-martial where accused claimed no detrimental reliance); *Shepardson*, 14 M.J. at 358 (different convening authority permitted to withdraw from pretrial agreement where military judge negated any possible detriment by excluding incriminating admissions induced by agreement).

cases prior to *Cooke*, the Court of Military Appeals declined to grant specific performance of the promise as a remedy, and instead merely granted suppression of self-incriminatory statements as having been unlawfully induced.[55]

These earlier cases are distinguishable on two bases, however. First, "these cases did not address prosecutorial conduct by a general court-martial convening authority and his staff judge advocate nor their responsibilities under Article 6(b) UCMJ, 10 U.S.C. § 806(b)."[56] In *Cooke*, the court found prosecutorial misconduct by the staff judge advocate in "fail[ing] . . . to provide for the fair and orderly prosecution" of the accused while acting as the main point of contact between the command and the OSI in the investigation,[57] knowingly making a false representation promising immunity in exchange for self-incriminatory statements verified by polygraph examination which was not authorized by the general court-martial convening authority,[58] and knowingly failing to correct investigators' failure to give rights advisements, and to deny their representations to the accused that he had been granted immunity.[59] This prosecutorial misconduct was held to be violative of due process.[60] Similarly, the convening authority was held to have committed prosecutorial misconduct by failing to communicate directly with his staff judge advocate, as required by Article 6(b), UCMJ, to repudiate representation of immunity of which he was informed but which he did not authorize or desire.[61]

The second factor distinguishing *Cooke* from preceding cases is that the promisor, the staff judge advocate, acted at the behest of, and with the knowledge of, the convening authority. Although Judge Fletcher incorporated this fact into his analysis of the convening authority's prosecutorial misconduct, Chief Judge Everett in his concurring opinion relied on an agency theory to justify imputing to the convening authority the promises made by his staff judge advocate.[62]

Thus, prosecutorial misconduct violative of due process, and knowledge by the convening authority of a specifically authorized agent's promises, distinguish *Cooke* from prior cases involving only *ultra vires* promises of immunity. It would appear that under *Cooke* either factor would be sufficient to mandate specific performance of a promise inducing detrimental reliance.[63] Indeed, Chief Judge Everett's analysis of contract principles suggests that specific performance is required when the factors of promissory estoppel alone are present, if the promise is made by one with actual authority, or by the authorized agent on behalf of such a person.

The holding of the court in *United States v. Brown*[64] suggests that, even without detrimental reliance, specific performance is required when the government derives the benefit of its bargain. When such performance is frustrated even by unavoidable circumstances, a comparable remedy of at least equivalent benefit to the accused is required.[65] In *Brown*, the staff judge advocate, with the concurrence of the convening authority, induced the accused's cooperation in pursuing drug investigations by promising to recommend an administrative discharge if he determined that the accused's assistance was of substantial value. Because the staff judge advocate thereafter became seriously ill, he was unable to make such a determination or recommendation. The staff judge advocate of a substitute convening authority performing a post trial review did not perform such an evaluation or make a recommendation. The court held "not only fair play but also legitimate law enforcement interests require ungrudging enforcement of [such] agreements."[66] Because performance of the benefit promised to the accused was frustrated by the promisor-staff judge advocate's illness and because his recommendation would have been, as he had represented, highly persuasive,[67] the only adequate remedy was to provide the same benefit as the most favorable operative effect of the administrative discharge promised: dismissal of the charges.[68]

The court did not amplify whether it relied on a contract theory or due process theory to require a remedy equivalent to enforcement of the promise. These two possible bases were referred to only as "fair play." It did clearly state, however, that because investigations often depended on such promises, the interest of law enforcement also required specific performance or better. In *Brown*, however, as in *Cooke*, the staff judge advocate made the promise not to prosecute at the behest and with the knowledge of the convening authority.

It is clear, then, that promises not to prosecute (or to make a highly persuasive recommendation tantamount

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[55] *See, e.g.*, United States v. Kazena, 11 M.J. 28, 33, 35 (C.M.A. 1981) (convening authority could withdraw from pretrial agreement due to unchallenged good cause referral of additional charge, where there was no detrimental reliance, preparation of defense was not hindered and accused was allowed to withdraw offered guilty pleas); *Joseph*, 11 M.J. 333 (C.M.A. 1981); United States v. Caliendo, 13 C.M.A. 405, 32 C.M.R. 68 (1962); United States v. Thompson, 11 C.M.A. 252, 29 C.M.R. 68 (1960); United States v. Werthman, 5 C.M.A. 440, 18 C.M.R. 64 (1955).

[56] *Cooke*, 12 M.J. at 339 n.9.

[57] *Id.* at 340.

[58] *Id.* at 341.

[59] *Id.* at 342.

[60] *Id.* at 343.

[61] *Id.* at 344–45.

[62] *Id.* at 354 (Everett, C.J., concurring).

[63] *Id.* at 353–54.

[64] 13 M.J. 253 (C.M.A. 1982).

[65] In contrast, the remedy required for a due process violation without a contractual breach is not necessarily specific performance but rather is tailored to what is needed to neutralize the taint. United States v. Breucher, 15 M.J. 755, 758–59 (A.F.C.M.R. 1983), *petition denied*, 18 M.J. 21 (C.M.A. 1984) (citing *Cooke*, 12 M.J. at 345).

[66] *Brown*, 13 M.J. at 259.

[67] *Id.* at 258.

[68] *Id.* at 259.

thereto) made by a general court-martial convening authority or an authorized agent will be enforced by contract law principles as applied to pretrial agreements, by constitutional requirements of due process and a fair trial especially in the face of prosecutorial misconduct, and by the interest of law enforcement itself in ensuring the efficacy of such promises. It is almost equally clear that promises not to prosecute made by one not so authorized, such as in *United States v. Joseph,*[69] *United States v. Caliendo,*[70] and *United States v. Thompson,*[71] or even statements of intent not to prosecute by a convening authority that do not induce detrimental reliance by an accused, such as in *United States v. Werthman,*[72] are not enforceable when no prosecutorial misconduct or similar considerations exists. In such cases contract principles alone, including detrimental reliance, were insufficient to bind the government to the terms of the promise in the face of only apparent authority;[73] actual authority was required. The remedy fashioned in these cases was suppression of self-incriminating evidence induced by the promise as involuntary. The government retained other benefits induced, such as recovery of property, damage assessment, apprehension of other criminals, and use of a promisor's testimony at trials of other perpetrators.[74]

Several issues remain unsettled after *Cooke* and *Brown.* First, will the government be bound by an *ultra vires* promise to not prosecute if its agents demonstrate prosecutorial misconduct such as in *Cooke* or when the interests of law enforcement might require specific performance, such as in *Brown?*[75] Do those considerations overide the infirmity of lack of actual authority or ratification? The vehemence of the court's condemnation of the bad faith and professional misconduct in *Cooke* suggests that anything even similar to such conduct requires enforcement even absent actual authority. Second, it is unclear whether public policy considerations analogous to those in *Brown, i.e.,* where a type of promise affirmatively benefits a specific, important public interest (law enforcement in drug cases), will require enforcement of *ultra vires* promises to not prosecute. Because the court's focus was on the benefit, and because such a benefit to the public is the same regardless of whether it is a case of breach due to a convening authority reneging or the promisor lacking authority to make the promise, the same result should obtain: public interest demands enforcement. Third, it is also not clear that after *Cooke* lack of actual authority will necessarily preclude enforcement of a promise when prosecutorial misconduct violative of due process and public interest militating in favor of enforcement are both absent. The contract analysis in Chief Judge Everett's concurring opinion in *Cooke*[76] suggests a greater importance to contract principles than accorded in prior cases, and that an *ultra vires* promise by one with apparent authority may bind a convening authority.[77]

Defense Counsel's Tactics. Defense counsel should do at least the following to best serve their clients: determine whether any promises exist; ascertain detrimental reliance and benefits derived; and reduce the promise to writing.

Upon first contact with a client, inquire whether anyone has promised the client anything. Who? What? In exchange for what? Who is to determine whether the client has complied? By what standard? Was the promise written down? What were the circumstances of the making? Who witnessed the offer? Was the client competent? Did the client accept, or admit anything on which the promise was predicated? Who witnessed that? What has the client done in reliance on the offer? Who knows of that? How? Write down what the client's understanding was. Second, contact any witnesses to the promises. Verify the answers.

Next, contact the promisor. Ask first about whether the client has been cooperative since being notified of potential charges. How satisfied is the promisor with the cooperation? How useful has it been? To what has it led? What superiors or others know of the cooperation? Of the promise? How satisfied are they? Has there been any negative feedback? By whom? When? What was it? What has the promisor done as a result? What, if anything, has the promisor said to the client? Is he or she going to comply with the promise? If not, why? Contact the law enforcement personnel. Using the same format, determine what the client has

[69] 11 M.J. 333 (C.M.A. 1981) (company commander was claimed to have promised disposition by nonjudicial punishment in exchange for accused's cooperation).

[70] 13 C.M.A. 405, 32 C.M.R. 405 (1962) (civilian supervisor promised no adverse action if stolen items were returned).

[71] 11 C.M.A. 252, 29 C.M.R. 68 (1960) (squadron commander promised no prosecution in exchange for accused's cooperation).

[72] 5 C.M.A. 440, 18 C.M.R. 64 (1955) (squadron commander, with concurrence of wing commander, unilaterally stated intent to not prosecute, but succeeding squadron commander preferred charges after accused went AWOL).

[73] Although the court in *Cooke* made reference to the "staff judge advocate as acting under apparent authority," 12 M.J. at 339, it clearly found that the convening authority knew and approved of that conduct and impliedly ratified it.

[74] Because the fifth amendment and Article 31 rights are personal to an accused, their violation by unlawful inducement of self-incrimination requires suppression only in that accused's trial. That evidence once acquired can be introduced at trials of others, presumably by validly immunizing the declarant.

[75] In United States v. Joseph, 11 M.J. 333 (C.M.A. 1981), the appellant pled guilty, represented to the military judge during the providence inquiry that no *sub rosa* agreements existed, and only after trial claimed that his company commander had promised to not prosecute. *Id* at 333–34. The government contested that such a promise had been made. The court ruled that absence of actual authority rendered any such promise unenforceable. It also noted that even performance would not have barred a court-martial, because nonjudicial punishment poses no such bar. *Id.*

[76] 12 M.J. at 354 (Everett, C. J., concurring). Chief Judge Everett specifically opined that a subordinate's offer of immunity could be ratified by a convening authority and that silence in the face of a duty to repudiate, such as is caused by a receipt of benefits, established ratification. *Id.* at 354–55 n.7.

[77] Agency law imposes liability on a principal for acts by his agent within the agent's apparent authority. The general rationale for this appears to be based on the legal identity of the principal and agent, that it is the principal who enables the agent to even perform the act, and the implied warranty of good conduct a principal projects for his agent. *See generally* 3 Am. Jur. 2d *Agency* § 261 (1962). But one is not liable for representations of another who is not in fact an agent, though he represents himself to be. *Id.* at § 262. Thus, the focus must be on who is actually an agent of the convening authority for purposes of administration of military justice or law enforcement. That is, who has an identity of interest with the convening authority? Officials on his or her staff, such as the staff judge advocate, provost marshall, and their subordinate personnel, perform their duties for the convening authority as directed. They would therefore be his or her actual agents in such matters. In contrast, subordinate *commanders* perform independent *discretionary* functions in the administration of military justice and thus do not have a unity of interest and are not his or her actual agents. Their promises thus could not bind the convening authority under agency law alone.

done to cooperate and what has resulted. Explore the evidence developed to the end of the causal chain.

If the promise was made prior to the first client contact, elicit the information above first so as not to spook the promisor. *Otherwise, and especially if counsel are involved in negotiating the promise, reduce it to writing as soon as possible.* Ensure that it is signed or initialled by the convening authority, or at least the staff judge advocate or provost marshal. If they decline to obtain the convening authority's written endorsement, at least incorporate their written assurance that the agent has been authorized to negotiate such promises with binding effect, or that they have notified the convening authority of its terms and he or she has not repudiated it. Should the promisor refuse to agree to a written promise, advise the client that his or her cooperation guarantees nothing except that it will be evidence in mitigation and it may possibly lead to more favorable disposition. In either case, advise the client: what incriminatory evidence, if any, may result from his or her cooperation; the relative strength and likely disposition of his or her case with and without that evidence; the likely impact of the cooperation on the disposition of his or her case and the punishment imposed; and your recommendation.[78]

Prosecution After a Grant of Immunity: The Independent Source Requirement

The scope of protection afforded by immunity must be coextensive with the scope of the privilege compelled to be forfeited.[79] Such immunity must protect a witness against use of compelled evidence "and its fruits . . . in any manner . . . in connection with a prosecution against him."[80] Thus the Court in *Murphy* held that the constitutionally guaranteed privilege required prohibiting "making such use of compelled testimony and its fruits."[81] That holding resulted from applying the earlier holding in *Counselman v. Hitchcock,*[82] in which the Court held constitutionally inadequate an immunity statute that did not

> prevent the use of . . . testimony to search out other testimony to be used in evidence against him . . . prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted . . . and [affords] no protection against use . . . which consist in gaining therefrom a knowledge of the details of a crime and sources of information which may supply other means of convening the witness.[83]

These, then, are the "uses" and "fruits" against which a constitutionally adequate statute must protect.

The Organized Crime Control Act of 1970 prohibits the use of compelled testimony or "any information directly or indirectly derived from such testimony or other information."[84] In upholding the constitutionality of compelling self-incriminating testimony so immunized, the Court held in *Kastigar v. United States*[85] that the statute barred "the use of compelled testimony as an 'investigatory lead' and also bar[red] the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."[86] The Court then held that the statute "affords the same protection [as the privilege] by assuring that the compelled testimony can *in no way* lead to the infliction of criminal penalties."[87] "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[88]

The Court amplified:

> A person accorded this immunity . . . and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. . . . This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.[89]

In formulating the statute, Congress had intended[90] the derivative nature of evidence to be evaluated according to a "fruit of the poisonous tree" analysis embraced in *Wong Sun v. United States.*[91] That analysis is arguably constitutionally inadequate, however. In *Wong Sun,* the constitutional violation was an illegal apprehension, a

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[78] Counsel are reminded of their ethical responsibilities in cases of continuing criminal activity. *See, e.g.,* Model Code of Professional Responsibility DR 4–101(c) and 7–102 (1980).

[79] *Murphy,* 378 U.S. at 77–78.

[80] *Id.* at 79.

[81] *Id.*

[82] 142 U.S. 547 (1896).

[83] 142 U.S. at 564, 586.

[84] 18 U.S.C. § 6002 (1982).

[85] 406 U.S. 441 (1972).

[86] *Id.* at 460.

[87] *Id.* at 461 (emphasis added).

[88] *Id.* at 460 (citing *Murphy,* 378 U.S. at 54).

[89] *Id.*

[90] H.R. Rpt No. 1549, 91st Cong. 2d Sess. 42, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4018.

[91] 371 U.S. 471, 488 (1963). The Court stated that the test was "[w]hether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of the primary taint." The Court rejected adoption of a "but for" test.

fourth amendment violation. As the court in *United States v. Kurzer*[92] reasoned

> [T]he principal function of the Fourth Amendment exclusionary rule is to deter unlawful police conduct . . . and it can be argued that it serves little deterrent purpose to exclude evidence which is only indirectly and by an attenuated chain or causation the product of improper police conduct. The Fifth Amendment, in contrast, is by its terms an exclusionary rule, and as implemented in the immunity statute it is a very broad one, prohibiting the use not only of evidence, but of "information," "directly or indirectly derived" from the immunized testimony. The statute requires not merely that evidence be excluded when such exclusion would deter wrongful police or prosecution conduct, but that the witness be left "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." *Kastigar v. United States.*[93]

The military courts adopted the concept that the statute conferred absolute protection from *any* use of the compelled evidence. In *United States v. Rivera,*[94] the Court of Military Appeals quoted extensively from *Murphy* and *Kastigar* and applied those principles to reverse a conviction because the government had failed to prove at trial that the testimony against the accused by his accomplice had been developed independently and not as a result of the accused's statement previously compelled pursuant to a grant of immunity.[95] Then in *United States v. Eastman,*[96] the Army Court of Military Review reversed a conviction because the government had failed to meet its "heavy burden" at an evidentiary hearing to prove that its evidence was derived independently. The two co-actors at whose Article 32 investigation Eastman had previously provided immunized testimony were prosecution witnesses at Eastman's trial. The Article 32 investigating officer, drafter of the pretrial advice, and staff judge advocate providing the pretrial advice, had all read Eastman's immunized testimony. The prosecutor had read one page of that testimony. That court held that the minimum guidelines which must be followed in trials by courts-martial to prove independence of prosecution evidence include:

> a. No use, direct or derivative, can be made of the immunized testimony. . . . [Such] [p]rosecutorial use of testimony could include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain interpreting evidence, planning cross-examination, and planning trial strategy. . . .
>
> b. The government should be confined to evidence which was certified by the court before testimony was compelled [or some] . . . procedures that would accomplish the same substantive result. . . .
>
> c. [N]o one involved in the prosecution of an accused may read his immune testimony [including] . . . all personnel involved in pretrial activities such as the Article 32 investigating officer, all personnel involved in pretrial advice to the convening authority and the convening authority himself [and the prosecutor].[97]

Most recently, in *United States v. Gardner,*[98] the Court of Military Appeals upheld a conviction adjudged after the accused provided immunized testimony where the following factors were present: all evidence had been adduced before the immunized testimony was given; the prosecutor who elicited that testimony was excused from the accused's prosecution, and had not discussed the testimony with the trial counsel; the trial counsel explained all of his notes; and the transcripts of the testimony had been sealed and locked in a safe and not reviewed by any other military justice personnel.[99]

Gardner illustrates the types of use that must be proven not to have occurred and the measures necessary to effectively do so. Such uses have been characterized as developing investigatory leads,[100] focusing an investigation,[101] and impeaching the witness at trial.[102] Immunized testimony may arguably be used to merely provide psychological confidence to a prosecutor on re-trial.[103] In contrast to *Gardner* and *Eastman,* federal civilian jurisdictions appears to be in conflict as to whether immunized testimony

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[92] 534 F.2d 511 (2d Cir. 1976); *see also In Re* Grand Jury Proceedings, 497 F. Supp. 979 (E.D. Pa. 1980) (taint exists if only lead from testimony was a direction to initiate a criminal investigation; a strict "but for" test applies); *cf.* United States v. Gutierrez, 696 F.2d 753 (Cir. 1982), *cert. denied,* 461 U.S. 909 (1983) (The defendant had been promised no prosecution for any robberies in which she implicated an accomplice of hers in the robbery for which she was being prosecuted. She voluntarily provided a statement. The accomplice thereafter testified against the defendant in the current prosecution. The court held that such testimony was not "derivative" because the scope of the immunity had been limited to other robberies.)

[93] 534 F.2d at 516 (citations omitted).

[94] 1 M.J. 107 (C.M.A. 1975).

[95] *Id.* at 110.

[96] 2 M.J. 417 (A.C.M.R. 1975).

[97] *Id.* at 419 (citations omitted).

[98] 22 M.J. 28 (C.M.A. 1986).

[99] *Id.* at 31.

[100] *Kastigar,* 406 U.S. at 460; *In Re* Grand Jury Proceedings No. 84–4, 757 F.2d 1580 (5th Cir. 1985); United States v. Quartermain, 467 F. Supp. 782 (E.D. Pa. 1979).

[101] *In Re* Folding Carton Antitrust Litigation, 465 F. Supp 618, 626 (N.D. Ill. 1979), *rev'd on other grounds,* 661 F.2d 1145 (7th Cir. 1981), *aff'd,* 459 U.S. 248 (1983).

[102] New Jersey v. Portash, 440 U.S. 450 (1979) (immunized testimony compelled at grand jury hearing not admissible for impeachment because order to testify was "the essence of coerced testimony"); *cf.* Harris v. New York, 401 U.S. 222 (1971) (statements involuntary only due to inadequate *Miranda* warning were admissible for impeachment); *see also* Mil. R. Evid. 304(b)(1), adopting *Harris.*

[103] United States v. Pantone, 634 F.2d 716 (3d Cir. 1980) (testimony given after first trial); *cf.* United States v. Semkiw, 712 F.2d 894, 895 (3d Cir. 1983); *Rivera,* 1 M.J. at 110 (trial counsel's reading immunized testimony was prima facie use prohibited by *Murphy*) (citing United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973)).

can be used in making the decision whether to prosecute [104] or in formulating trial strategy and cross-examination. [105] Prohibition of such uses is made consistent with the absolute prohibitions expressed in *Murphy* and *Kastigar*. Accordingly, the Court of Military Appeals found in *Gardner* that the prophylactic procedures followed precluded any such uses. [106] In federal cases where the government proved no derivative use, similar or even greater precautions were taken. [107]

Thus any prosecution after a defendant has given immunized testimony will be difficult. It will effectively require proof that all investigatory leads and all admissible evidence was developed previously and kept from investigators and prosecutors, and probably also from authorities making the decisions to prosecute or not.

Although *Kastigar* characterized the burden of proof as "heavy," it did not use language such as "by a preponderance," "by clear and convincing evidence," or "beyond reasonable doubt." Recently, the court in *Byrd* ruled that the "heavy" burden is actually proof by a preponderance. [108] Analogizing the exclusionary rule of *Counselman, Murphy,* and *Kastigar* to that required for other violations of constitutional privilege against self-incrimination [109] supports the use of a preponderance standard.

Rulings by the military judge as to facts on the issue of independence of source are reviewable on a clearly erroneous standard. [110] Reversal is required only if erroneous admission is not harmless beyond a reasonable doubt. [111]

Conclusion

The Manual provisions for immunity are constitutionally inadequate to *compel* self-incriminating testimony. Case law applications of the Constitution, however, will probably operate to protect a witness against use of immunized evidence in any subsequent prosecution, although he or she might have to endure the inconvenience and cost of litigating the suppression of that evidence.

Promises not to prosecute or not to use evidence, given in exchange for cooperation, are valid only if made by an actual agent of the authority with prosecutorial discretion, and only if made within at least that agent's apparent authority. Prosecutorial authorities not represented cannot be bound by promises of another.

Promises not to prosecute, or for other benefits, made by authorized agents and ratified by absence of repudiation and presumptive knowledge, will be enforced by military courts under requirements of due process when prosecutorial misconduct occurs, when strong public interest dictates, and probably even when only contract principles, such as promissory estoppel, would require. The obligations incurred by promisors are strictly limited by the terms of the promise; evidence derived from voluntary statements is not excludable unless so provided by the terms of the promise. Incriminatory evidence induced by *ultra vires* promises and evidence derived from it is suppressable as involuntary under the fifth amendment, Article 31, UCMJ, and Mil. R. Evid. 305. Defense counsel should negotiate a written agreement, signed by prosecutorial officials with authority, which specifically addresses these issues.

Prosecution of a witness after giving testimony pursuant to a grant of immunity or a promise of no use is difficult. A total lack of causal connection between the immunized testimony and the evidence to be admitted must be proven by a preponderance. Cases in which this has been done suggest the evidence to be admitted must be shown to have been obtained before the testimony, and by personnel without knowledge of the testimony. The prosecution should be conducted by persons without knowledge of the substance of the immunized evidence. Defense counsel should vigorously litigate any such prosecution and move to suppress all evidence developed after immunized evidence was provided as being both involuntary and within the scope of the grant of immunity or promise not to prosecute.

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[104] United States v. Byrd, 765 F.2d 1524, 1531 (11th Cir. 1985) (because immunity protects only against evidentiary use, immunized evidence can be considered in the exercise of prosecutorial discretion). *Contra, Semkiw,* 712 F.2d at 895; *McDaniel,* 482 F.2d at 311; United States v. Smith, 580 F. Supp. 1418 (D.N.J. 1984); United States v. Anderson, 450 A.2d 446, 453 (D.C. App. 1982).

[105] *McDaniel,* 482 F.2d at 311; *Anderson,* 450 A.2d at 453.

[106] *Gardner,* 22 M.J. at 31.

[107] Other cases where the government proved independent source and derivative use include United States v. Rogers, 722 F.2d 557 (9th Cir. 1983); United States Seregos, 655 F.2d 33 (2d Cir.), *cert. denied,* 455 U.S. 940 (1981); United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980), *cert. denied,* 449 U.S. 899 (1982); United States v. King, 560 F.2d 122 (2d Cir.), *cert. denied,* 434 U.S. 925 (1977); United States v. Bianco, 534 F.2d 501 (2d Cir.), *cert. denied,* 429 U.S. 822 (1976); United States v. Smith, 580 F. Supp. 1418 (D.N.J. 1984); United States v. Gerace, 576 F. Supp. 1185 (D.N.J. 1983); United States v. Beachner Const. Co., Inc. 538 F. Supp. 718 (D. Kan. 1982).

[108] *Byrd,* 765 F.2d at 1529 (citing United States v. Seiffert, 501 F.2d 974, 982 (5th Cir. 1974); United States v. Gregory, 730 F.2d 692, 698 (11th Cir. 1984), *cert. denied,* 105 S.Ct. 1170 (1985)).

[109] Mil. R. Evid. 304(e) (Prosecution must prove voluntariness of accused's statement or non-derivative nature of evidence by a preponderance of evidence).

[110] *Provenzano,* 620 F.2d at 1005.

[111] *Byrd,* 765 F.2d at 1529 n.8 (citing *Gregory,* 730 F.2d at 698).

The Jencks Act "Good-Faith" Exception: A Need for Limitation and Adherence

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Introduction

The criminal law discovery principle established in *Jencks v. United States,*[1] requiring the production of a written statement concerning matters to which a witness has testified,[2] has undergone many changes over the years. In the same year that the *Jencks* decision was issued, Congress passed what is now known as the Jencks Act[3] in an attempt to protect government files from needless disclosure, prevent any broad or blind fishing expeditions by the defense, and stabilize the federal discovery procedures that were distorted by misinterpretations and misapplications by courts as to what the *Jencks* ruling meant.[4] The Act provides that

> [a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter which the witness has testified.[5]

If the government elects not to comply with these provisions, the Act requires the court to strike the testimony of the witness from the record or grant a mistrial.[6] In 1980, Congress attempted to apply the mechanisms established under the Jencks Act to both the prosecution and the defense by codifying the Supreme Court's decision in *United States v. Nobles*[7] in Federal Rule of Criminal Procedure 26.2.[8]

The applicability of the *Jencks* decision and the Act to military case law has long been established.[9] Recently, the military adopted Federal Rule of Criminal Procedure 26.2 by including it in the 1984 Manual for Courts-Martial as Rule for Courts-Martial 914.[10] Even with this heightened emphasis on the Jencks Act in the military, the stability intended[11] through the use of this mandatory disclosure principle has been severely limited by a liberal use at both trial and appellate levels of what has become known as the "good faith exception."

THE GOOD FAITH EXCEPTION

The Killian *Decision*

The good faith exception was created by the Supreme Court in *Killian v. United States*[12] to justify the destruction of an investigator's notes in accordance with routine practice. The Court refused to grant Jencks Act relief when an agent's notes were made only for the purpose of transferring the data to a later report, and, after serving that purpose, were destroyed in good faith.[13] The Court followed a two part analysis in determining good faith: whether the destruction (or loss) of the statement was in good faith (in accordance with normal practice); and whether the contents of those statements were substantially incorporated into a later statement that is in the possession of the defense ("Harmless error").[14]

Although it is unclear from the opinion that a test for harmless error must necessarily follow a finding of good faith, it is clear that the Court justified the good faith destruction of the notes on the basis that the defense possessed a report containing the contents of the destroyed notes.[15]

The Jarrie *Decision*

The Court of Military Appeals first tangled with this judicially created "good faith exception" in *United States v. Jarrie.*[16] In *Jarrie,* an investigator's notes taken during a conversation with an informant were destroyed after they

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[1] 353 U.S. 657 (1957).

[2] *Id.* at 363–69.

[3] 18 U.S.C. § 3500 (1958) [hereinafter "Jencks Act" or "the Act"].

[4] *See* 1957 U.S. Code Cong. & Ad. News 1861.

[5] 18 U.S.C. § 3500(b) (1982).

[6] 18 U.S.C. § 3500(d) (1982).

[7] 422 U.S. 225 (1975) (compelling production of defense statements other than statements of the defendant does not violate the defendant's right against self-incrimination).

[8] Fed. R. Crim. P. 26.2 (1980).

[9] United States v. Heinel, 9 C.M.A. 259, 26 C.M.R. 39 (1958); United States v. Jackson, 33 C.M.R. 884 (A.F.B.R. 1963); United States v. Parks, 27 C.M.R. 829 (N.B.R. 1958).

[10] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 914 [hereinafter R.C.M.].

[11] 1957 U.S. Code Cong. & Ad. News 1861. *See also* West, *The Significance of the Jencks Act in Military Law,* 30 Mil. L. R. 83 (1965).

[12] 368 U.S. 231 (1961).

[13] *Id.* at 242.

[14] *Id.* at 242–43.

[15] *Id.* at 243.

[16] 5 M.J. 193 (C.M.A. 1978).

were incorporated into a final statement.[17] The authenticity and correctness of the original notes had been verified by the government informant.[18] In preparing the final statement, the investigator only incorporated those matters that he did not consider extraneous.[19] The original notes were destroyed pursuant to the discretion provided to each agent under the organization's asserted practice.[20]

The Court of Military Appeals found that the *government* had failed to show that the notes were destroyed prior to contemplation of litigation and noted that the final statement deviated substantially from the notes.[21] The court also refused to equate an "optional practice of discretionary destruction" with "routine administrative procedures designated as being in good faith"[22] and noted that, without the preservation of the requested materials for the record, a finding of harmless error could not be made.[23]

"Good Faith" Considerations

The good faith exception to the Jencks Act is a judicial attempt to balance three important but conflicting interests: the government's interest in avoiding burdensome documentation and filing practices; the court's interest in obtaining all relevant evidence; and the defendant's interest in effectively cross-examining prosecution witnesses.

The government's interest involves the prosecution's ability to present all incriminating evidence to the court and to control the production of materials to the defense. A blind application of the Jencks Act would result in an unfair advantage for the defense. The good faith exception is a method of protecting the prosecution from defense abuses. When balancing the government's interests against those of the defendant, however, an important consideration is that the material must have been in the possession of the prosecutorial arm of the government before it qualifies as a Jencks Act statement.[24] Therefore, because the statement, by definition, is under the government's control, any loss or destruction of the statement, through negligence or otherwise, is necessarily the government's responsibility.

The court's primary interest is to hear or review all relevant evidence and make an informed decision. Courts are, by nature, hesitant to blindly strike relevant evidence from the record, thus preventing its consideration, simply because the prosecution has failed to follow certain discovery guidelines. In situations where an application of Jencks Act sanctions would offend common sense and the fair administration of justice, the good faith exception allows a court to consider the evidence.

Finally, the defendant's interest involves the sixth amendment right to the effective cross-examination of a prosecution witness and the effective assistance of counsel. The codification of the *Jencks* discovery principle was in itself the promotion of these important constitutional rights. "[I]t would be idle to say that the commands of the Constitution were not close to the surface of the [*Jencks*] decision."[25] A balancing of these constitutional rights with the prosecutorial and judicial interests is necessary for the proper application of the good faith exception to the Jencks Act.

The definition of "good faith" under this exception has never been clear. The *Killian* Court stated that destruction of documents in accordance with normal practices amounted to good faith.[26] In *Jarrie,* the Court of Military Appeals indicated that materials destroyed "prior to the contemplation of the prosecution of the appellant" or through "routine administrative procedures" was in good faith, but that an optional practice of "discretionary destruction" could not be so equated.[27] Thus the standard appeared to be that if the prosecutorial arm of the government did everything procedurally required to preserve the statements but somehow lost or destroyed them, the good faith exception applied.

In a recent case, *United States v. Marsh,*[28] the Court of Military Appeals appears, however, to have greatly expanded the boundaries of the good faith exception. The court expanded the definition of good faith to include "some negligence." It stated that the loss of tape recordings of a witness' testimony at an Article 32 investigation,[29] despite a good faith effort by the government to preserve them in accordance with office policy, constituted "some negligence" and was within the good faith exception. The court further stated "gross negligence amounting to an election by the prosecution to supress these materials"[30] would be outside the definition of good faith. This liberal expansion of the good faith exception may severely limit the effectiveness of the Jencks Act.

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[17] *Id.* at 194.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 195.

[22] *Id.*

[23] *Id.*

[24] For a complete analysis of a "statement" under the Jencks Act, see Kesler, *The Jencks Act: An Introductory Analysis,* 13 The Advocate 391 (1981). *See also* United States v. Albo, 22 C.M.A. 30, 46 C.M.R. 30 (1972); United States v. Bosier, 12 M.J. 1010 (A.C.M.R.), *petition denied,* 13 M.J. 480 (C.M.A. 1982).

[25] Palermo v. United States, 360 U.S. 343, 362–63 (1959) (Brennen, J., concurring). *But see* United States v. Augenblick, 393 U.S. 348, 356 (1969) ("Indeed, our *Jencks* decision and the Jencks Act were not cast in constitutional terms").

[26] 368 U.S. at 240.

[27] 5 M.J. at 195.

[28] 21 M.J. 445 (C.M.A. 1986), *petition for cert. filed,* 54 U.S.L.W. 3811 (U.S. May 27, 1986) (No. 85–1946).

[29] Uniform Code of Military Justice art. 32, 10 U.S.C. 832 (1982) [hereinafter UCMJ].

[30] 21 M.J. at 452.

An Alternative Approach to Analyzing Good Faith

An analysis under the existing good faith exception necessitates an examination of such undefined terms as "some negligence", "discretionary destruction" and "routine administrative procedures." The ambiguity created from the use of such terms results in an analysis that lacks structure and predictability. While the good faith exception is necessary to protect the integrity of the Jencks Act from a blind application of its mandatory discovery sanctions, an abuse of this exception will limit the effectiveness of the Act. It is therefore necessary to develop a more structured analysis for the good faith exception. Rather than relying on such undefined terms to provide a means for a court to forgive the government's inability to produce materials under the mandatory disclosure provisions of the Jencks Act, a more effective approach would be to systematically analyze each individual good faith problem under a negligence formula.[31] This approach would more effectively balance the various interests of all parties. Such an approach would require an examination of the following criteria:

Was there a duty on the part of the government to preserve and produce the statement?

Did the government breach that duty?

Was the breach of that duty reasonably foreseeable?

Was the breach of that duty the direct cause of the loss of the statement?

Harmless error, *i.e.*, Was the defense actually damaged?

Existence of a Duty

The extent of the government's duty to preserve Jencks Act materials remains unresolved, although the Supreme Court has implied that, under some circumstances, a duty to preserve may exist.[32] Most experienced prosecutors are aware that certain statements are discoverable under the Jencks Act and should be preserved for that purpose. In addition, a defense counsel may frequently advise a prosecutor in advance that he or she intends to request the production of certain qualified statements.[33] Sanctioning the "good faith" loss or destruction of such statements tends to undermine the effectiveness of the penalties under the Act. The defense would bear the burden to prove such actual duty to preserve these materials, but would not be required to prove the contents of the statements or their impeachment value.

In the military, a duty to preserve material arises from administrative regulations and various standard operating procedures.[34] The breach of such duty should not be excused, even if in "good faith," under normal conditions. A failure to preserve materials that normally must be retained should only be excused under circumstances involving acts of God or situations that are not reasonably foreseeable. The burden of proof in those circumstances should rest with the government.

A "constructive" duty to preserve materials based solely on the demands of the Jencks Act is unmanageable and unenforceable. Such a duty would overburden the prosecution with the preservation of every relevant statement under its control and would result in the elimination of the "good faith" exception. Such a result would overemphasize the defendant's interests and would severely inhibit the court from hearing all relevant evidence.

Breach of Duty

Upon a determination that, although a duty existed, the materials were lost or destroyed, a conclusion that there has been a breach of the duty to preserve the Jencks Act materials would usually follow. One exception to this rule would be where the destruction of the materials was by an act of God. Clearly, such a destruction would be beyond the control of the parties and falls within the good faith exception regardless of the duty that has been breached.

Due Care

This analysis, as in a typical negligence analysis, would next determine whether the government's conduct fell below the standard imposed by society to protect the materials from unreasonable loss or destruction: the reasonable person standard. This standard falls far below an intentional destruction of the materials. It encompasses, however, a risk that is sufficiently foreseeable to allow a reasonable person in a similar position to anticipate and avoid that risk. "The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent to one in the position of the actor."[35]

This standard can only be applied on a case-by-case basis by a fact finder. Whether certain actions were reasonable would depend upon the type of duty imposed or the circumstances surrounding the loss or destruction of the materials. Although at first seemingly vague, this standard would be applied with much greater uniformity than the present good faith exception because the terms upon which this standard are based are commonly applied by the courts.

Causation

Regardless of the degree of duty that has been breached by the prosecutorial arm of the government, if the government was not the direct cause of the loss or destruction of the materials, it should not incur Jencks Act sanctions for that loss or destruction. The involvement of an intervening cause (*e.g.*, loss of the materials in the mail) should result in a finding of good faith.

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[31] *See* W. Prosser, Handbook on the Law of Torts 30 (3d ed. 1964).

[32] *Killian*, 368 U.S. at 242.

[33] *See Marsh*, 21 M.J. at 452.

[34] An example of an administrative duty to preserve statements can be found in Dep't of the Army, Reg. No. 27-10, Legal Services-Military Justice, para. 3-37(a) & (g) (1 Aug. 1984) (requiring all written statements and other documentary evidence considered by the commander imposing nonjudicial punishment under Article 15, UCMJ, to be transmitted with the original Dep't of the Army Form 2627 for filing on the restricted fiche of the Official Military Personnel File).

[35] Prosser, *supra note* 31, at § 31 (citation omitted).

The failure of any element of this analysis would result in a finding of good faith, and would preclude a court from imposing Jencks Act sanctions. Administrative sloppiness and carelessness would be eliminated from the good faith exception. Instead, the emphasis would be placed upon the existence and nature of the duty to preserve the materials. Such an analysis would more effectively balance the various competing interests than does existing military case law.

Harmless Error

The last stage of this proposed good faith analysis requires an evaluation of the damage to the defense, or a test for "harmless error." The Court in *Killian* recognized that the "harmless error" rule for a Jencks Act issue was unique because of the presumption that only the defense counsel is in a position to determine the precise use to be made of the demanded materials.[36] This rule must be considered in light of the fact that "only the defense is adequately equipped to determine the effective use [of the materials] for the purpose of discrediting the government's witness and thereby furthering the accused's defense."[37] The Supreme Court has also noted that a judge should not determine the relevancy of the materials, but should only determine whether the materials relate to the testimony of the witness.[38]

In *Rosenberg v. United States*,[39] Justice Brennan, in his dissenting opinion, discussed the issue of harmless error:

> Although we need not go so far as those courts which have suggested that the harmless error doctrine can never apply as to statements producible under the statute, fidelity to the principle underlying *Jencks* and the Jencks statute requires, I think, that when the defense has been denied a statement producible under the statute, an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous. In that determination, appellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement. This must necessarily be the case if the appellate court is to give effect to the underlying principle of *Jencks*, affirmed by the statute, which, I repeat, is that "only the defense is adequately equipped to determine [its] . . . effective use for purpose of discrediting the Government's witness. . . ." Indeed, another consideration which should move the appellate court to be especially hesitant to substitute its judgement as to trial strategy for that of defense counsel is that, under the procedure established by the statute, the defense does not see the statement and has no opportunity to present arguments showing prejudice from its withholding.
>
> In short, only a very strict standard is appropriate for applying the harmless error doctrine in these cases.[40]

Justice Brennan suggested that the harmless error exception should only apply in the following situations: when the statement withheld from the defense merely duplicates information already in the possession of the defense; when the witness' testimony is unimportant to the proofs necessary for conviction; and when the statement in question is *wholly* void of possible use for impeachment.[41]

An adoption of the Brennan analysis for harmless error would simplify the analysis required by the courts. It limits the possibilities for abuse because a court would not test for "prejudice" or "impeachment value," but would only determine whether the statement conformed with one of the above categories.

The first category is the most frequently used and easiest to understand. It merely requires proof that the lost or destroyed statements were identical[42] or substantially identical[43] or merely a duplication of materials already in the possession of the defense. The government bears the burden to prove duplication;[44] a mere allegation that the materials were substantially identical,[45] without further proof, will be insufficient to meet that burden. The prosecution must prove that the statements were identical, or substantially similar[46] to qualify for a harmless error analysis.

The second category has been cited once in military case law,[47] and logically requires a finding of harmless error when the witness' testimony was unimportant in proving the elements of the offense of which the accused has been convicted. This situation may arise when a prosecutor introduces character evidence in rebuttal of good character evidence introduced by the defense. If that testimony is unimportant to the proofs necessary for conviction, it would "offend common sense and the fair administration of justice"[48] to institute Jencks Act remedial sanctions.

The final category requires a court to determine whether a statement is wholly void of impeachment possibilities.

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[36] 368 U.S. at 243. A typical harmless error rule can be found in Fed. R. Crim. P. 52.

[37] *Jencks*, 353 U.S. at 668–69.

[38] *Id.* at 669.

[39] 360 U.S. 367 (1959).

[40] *Id.* at 375–76 (Brennan, J., dissenting) (citations omitted).

[41] *Id.* at 376–77.

[42] United States v. Durden, 14 M.J. 507 (A.F.C.M.R. 1982) (statement in possession of defense was identical to the testimony on the lost tapes); United States v. Price, 15 M.J. 628 (N.M.C.M.R. 1982) (verbatim transcripts made of lost tapes).

[43] United States v. Meyers, 13 M.J. 951 (A.F.C.M.R. 1982).

[44] United States v. Bufalino, 576 F.2d 446, 449 (2d Cir. 1978), *cert. denied*, 439 U.S. 928 (1978).

[45] United States v. Patterson, 10 M.J. 599 (A.F.C.M.R. 1980).

[46] United States v. Strand, 21 M.J. 912 (N.M.C.M.R. 1986).

[47] United States v. Barber, 20 M.J. 678 (A.F.C.M.R. 1985).

[48] *Killian*, 368 U.S. at 244.

This category stands the most chance of abuse, and, in conformance to the principles set forth in *Jencks*, requires a strict compliance with the term "wholly void." Such a determination should be evident from the face of the document, and should not require close scrutiny as to its impeachment value. Two military courts have made such an inquiry at the appellate level but have failed to substantiate the reasons that the Jencks Act statements in question were "wholly void" of impeachment value.[49]

If the government can bear the heavy burden to prove that the Jencks Act statement falls within one of these categories,[50] a court can properly determine that the error was harmless and that the defense has not been damaged or prejudiced. Strict compliance with the terms of each of these categories is important to the overall strength of the Jencks Act.

In *United States v. Albo*,[51] The Court of Military Appeals ruled that not every Jencks Act error was prejudicial and that the circumstances of the particular case must be considered to determine the extent to which the error may have affected the result. The court further held that, because the notes in question were not attached to the record of trial, it was impossible to determine whether impeachment could have occurred.[52] Courts of military review have cited *Albo* as authority for an appellate court to "test for prejudice,"[53] test the value of statements for prejudice,[54] test the impeachment value of statements,[55] and determine the credibility of the witness.[56] The Army Court of Military Review has gone so far as to adopt a balancing analysis in determining harmless error.[57] The court held that courts should "weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice."[58]

A court that tests the impeachment value of a statement or the credibility of the witness has already tipped the balancing process towards the government. It places the defense counsel in the position of proving the contents of a statement he or she has never seen. Requiring a defendant to prove prejudice without having ever seen the document is an insurmountable burden. Findings of harmless error outside of the three circumstances set forth in Justice Brennan's analysis discussed above have clearly limited the effectiveness of the Jencks Act and have jeopardized the accused's sixth amendment rights.

Conclusion

Any accurate application of the "good faith" exception should require adherence to the principles set forth in the *Jencks* decision and the adoption of the Brennan analysis in *Rosenberg*.[59] The application of these principles would reduce the complexity of litigation of the good faith and harmless error exceptions that has resulted from the continuous judicial expansions of these exceptions. An adherence to the *Jencks* principles is a more effective method of balancing all interests involved than the current standards followed by the courts. Because R.C.M. 914 now makes the Jencks Act a cross-examination tool that can be used by the defense and the prosecution, a stricter enforcement of the *Jencks* principles will benefit all parties.

[49] United States v. Strand, 17 M.J. 839 (N.M.C.M.R. 1984); United States v. Dixon, 7 M.J. 556 (A.C.M.R. 1979).

[50] *Bufalino*, 576 F.2d at 449.

[51] 22 C.M.A. 30, 46 C.M.R. 30 (1972).

[52] *Id.* at 35, 46 C.M.R. at 35.

[53] United States v. Derrick, 21 M.J. 903 (N.M.C.M.R. 1986).

[54] United States v. Barber, 20 M.J. 678 (A.F.C.M.R. 1985).

[55] United States v. Jones, 20 M.J. 678 (A.F.C.M.R. 1985).

[56] United States v. Bosier, 12 M.J. 1010 (A.C.M.R. 1982).

[57] *Id.* at 1014 (citing United States v. Bryant, 439 F.2d 642, 653 (D.C. Cir. 1971)).

[58] *Id.*

[59] 360 U.S. at 373–77.

DAD Notes

A Substance Abuse Death That Is Not Negligent Homicide

The seminal case on negligent homicide resulting from substance abuse is *United States v. Romero*.[1] In *Romero*, the accused, himself a drug user who was generally familiar with the potential effects of dangerous drugs and who specifically heard warnings that the amount of heroin to be injected was excessive, nevertheless assisted the soon-to-be deceased victim in injecting the heroin.[2] The Court of Military Appeals, in upholding his conviction for negligent homicide, held that the accused was negligent. The court found that the accused by his actions failed to exercise the due care that a reasonably prudent person would have exercised under the same or similar circumstances.[3]

[1] 1 M.J. 227 (C.M.A. 1975)

[2] *Id.* at 229.

[3] *Id.* at 229–30.

The Army Court of Military Review recently decided *United States v. Gargus,*[4] which provides further guidance on the due care aspect of a negligent homicide charge. In *Gargus,* the accused obtained a bottle of halothane, an inhalation anesthetic that is a nonscheduled, noncontrolled, nonrestricted, legend (*i.e.,* intended for prescription use) substance.[5] The accused inhaled the halothane, put the bottle down, and left his room. His roommate then inhaled halothane vapors and died as a result.[6] Looking at the totality of the circumstances, including the fact that many legend medications are not dangerous and that halothane is not known or labeled as dangerous, the Army court ruled that the negligent homicide conviction could not stand.[7] The court was "not satisfied that the government has shown that an ordinary person would know, or that appellant knew, of halothane's potentially deadly effect," and thus found that the accused's "acts or omissions did not exhibit the requisite lack of care."[8] While *Gargus* does present a unique set of facts, it is nonetheless instructive if defense counsel is faced with a drug-related death where the drug can be shown to be not reasonably known as dangerous.

Trial defense counsel in *Gargus* assured that all the factors that militated against foreseeability were stipulated to. If presented with a negligent homicide charge where the issue of foreseeability might arise, it would be useful for defense counsel to establish those factors on the record, for argument both at trial and, if necessary, on appeal. Captain Annamary Sullivan.

The "Limits" of Fair Comment?

Defense counsel should be prepared for vigorous attacks on their clients by trial counsel during sentencing argument as a result of the opinion published by the Army Court of Military Review in *United States v. McPhaul.*[9] After using the other assigned errors to issue supervisory comments to the field,[10] the court considered the defense claim that trial counsel's argument was inflammatory. The accused was charged with aiding and abetting the multiple "gang" rape and sodomy of an unconscious fifteen year old girl. One of the other parties used a camera to record several of the criminal acts, and the resulting photos not only led to the discovery of the crimes[11] but also provided significant aggravation evidence during the sentencing proceedings. Trial counsel argued that the crime was "filled with depravity and perversion," and that "the Army did not tolerate 'degenerate scum' like PFC McPhaul; that McPhaul might be a good worker but he was a 'miserable human being,' and that his actions were 'subhuman.' "[12] He further characterized the accused as a Dr. Jekyll and Mr. Hyde, and questioned whether the accused's appearance in the photos indicated remorse or instead was that of "some slavering animal."[13] Defense counsel did not object during the argument, and used rebuttal to argue that some of the characterizations were without foundation in the evidence. Only after instructions to the members did defense counsel move for a mistrial, which was denied.

The Army court found that the accused waived his objection to the argument by not objecting prior to the sentencing instructions.[14] Furthermore, the court held that the argument, while "somewhat inflammatory" and containing "inartful terms," did not exceed permissible fair comment, was not prejudicial even if error was assumed, and did not cast substantial doubt on the fairness of the sentencing process so as to justify a mistrial.[15] Some of the trial counsel's remarks were viewed as rebuttal to favorable defense characterizations of the accused. The court described the offenses as "barbaric" acts, as "continuing and despicable sexual attacks," and as "a sordid gang rape" of a "depraved" nature.[16]

This decision gives trial counsel wide latitude in permissible comment. Defense counsel may be able to restrain trial counsel from reaching the new limits by vigorous objection during the argument, however. The concern that defense counsel not emphasize matters by objection seems easily outweighed by the need to minimize trial counsel's appeal to the emotions of the court members by "loaded" terminology.[17] One well-executed objection stressing the human dignity of the accused should subdue the trial counsel before bloodlust escalates the argument into something like that in *McPhaul.* More than ever, defense counsel in aggravated cases need to listen carefully and object promptly when trial counsel begin calling names under the rubric of "fair comment." Captain Stephen W. Bross.

To Credit or Not To Credit, That Is the Question

The judicial determination that pretrial restriction is tantamount to confinement does not warrant additional

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[4] CM 447605 (A.C.M.R. 24 June 1986).

[5] *Id.*, slip op. at 2–3.

[6] *Id.*, slip op. at 2.

[7] *Id.*, slip op. at 3.

[8] *Id.*

[9] 22 M.J. 808 (A.C.M.R. 1986).

[10] The court indicated that military judges should use Dep't of Army, Pam. No. 27–9, Military Judges' Benchbook (1 May 1982) (C1, 15 Feb. 1985) in advising accused as to their rights to trial forum, and that convening authorities should avoid appointing military policemen as court members when possible. The court reserved its opinion whether responses from *counsel* would satisfy the requirement that the judge personally advise the accused of his rights, and did not impose any burden on the government to show justification on the record when military policemen are used as court members.

[11] An employee at the firm to which the film had been delivered for processing apparently suspected that the photos displayed criminal acts and contacted the civilian authorities. United States v. McPhaul, Record of Trial, Investigating Officer's Report, dated 9 July 1985, at 3, 6, 7 (Exhibits 2, 4) (allied papers).

[12] United States v. McPhaul, 22 M.J. at 813.

[13] *Id.*

[14] *Id.* at 813–14.

[15] *Id.* at 814.

[16] *Id.* at 812, 814.

[17] The court acknowledged that trial counsel's argument in this case "was designed to arouse the emotions of the court members." *Id.* at 814.

sentence credit for the failure to comply with Rule for Courts-Martial 305,[18] a panel of the Army court of Military Review has held. In so holding, the court ruled contrary to the decision in *United States v. Gregory*,[19] in which a panel of the same court held that the provisions of R.C.M. 305 applied to pretrial restrictions that were tantamount to confinement.[20]

In *United States v. Amos*,[21] the Army court limited its analysis to a construction of the term "confinement" pursuant to R.C.M. 305(a). It found initially that the term had once been defined as "the physical incarceration of a person"[22] and secondly that "incarceration" was defined as the "imprisonment or confinement in a jail or penitentiary."[23] Recognizing that its construction should not be limited to dictionary definitions, the court then defined confinement in terms of whether it existed to sustain a conviction for a charge of escape from confinement, pursuant to Article 95.[24] The court applied the Article 95 construction to R.C.M. 305, finding that the article contemplated some physical means to oppose an unauthorized departure.[25] Finding further that the *Gregory* decision distinguished restriction from confinement in terms of moral versus physical restraint, and that the issue of restriction equivalent to confinement set out in *United States v. Schilf*[26] was omitted from the drafters' discussion of R.C.M. 305, the *Amos* court held that R.C.M. 305 was limited to those situations where an accused was actually locked in a confinement facility or was under the control of a guard who had the duty to physically oppose an unauthorized departure by the accused.[27]

By limiting its analysis to a construction of the term confinement, the *Amos* court virtually ignored the effect of a restriction tantamount to confinement as a basis for triggering R.C.M. 305(k). The court explained, however, that as long as an accused is physically able to disregard the limits of his or her restriction, no matter how onerous the conditions are, he or she is not entitled to the protections of R.C.M. 305.

The *Gregory* court ruled otherwise. It was convinced that the President in promulgating R.C.M. 305 was more concerned with the effect of a given kind of pretrial restraint than with how it was labeled.[28]

The *Amos* opinion is troublesome for several reasons. First, it disregards the effects of a restriction tantamount to confinement and how this restriction can be so onerous as to warrant sentence credit but yet so insignificant that a neutral and detached officer need not timely review the decision to restrict. Second, it ignores the significance of the term "tantamount." The term itself signifies that the types of restraint are equivalent and therefore treating them differently requires a finding of a significant distinction. Third, it erroneously assumes that a restricted accused is only morally obligated to comply with the terms of his or her restriction rather than finding that the command will physically ensure compliance.

Because *Gregory* has been certified, the Court of Military Appeals will be addressing the issue of whether a restriction tantamount to confinement is a form of confinement to which R.C.M. 305 applies. Until the court decides the issue, defense counsel should continue to move for additional administrative credit pursuant to R.C.M. 305(k) and *Gregory*. Captain Brian R. St. James.

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[18] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305 [hereinafter R.C.M.].

[19] 21 M.J. 952 (A.C.M.R.), *cert. for review filed*, 22 M.J. 177 (C.M.A. 1986). For a discussion of *Gregory*, see Note, *New Developments*, The Army Lawyer, Mar. 1986, at 45.

[20] *Gregory*, 21 M.J. at 955–56.

[21] SPCM 22008, (A.C.M.R. 30 June 1986).

[22] *Id.*, slip op. at 4 (citing United States v. Acireno, 15 M.J. 570, 571 (A.C.M.R. 1982)).

[23] *Id.*, slip op. at 4 (citing Black's Law Dictionary 685 (5th Ed. 1979)).

[24] Uniform Code of Military Justice art. 95, 10 U.S.C. § 895 (1982).

[25] *Amos*, slip op. at 4–5.

[26] 1 M.J. 251 (C.M.A. 1976).

[27] *Amos*, slip op. at 3.

[28] *Gregory*, 21 M.J. at 956 n.10.

Death—An Excessive Penalty for Rape of a Child?

Lieutenant Colonel Robert T. Jackson, Jr.
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[W]ith respect to rape of an adult woman . . . [w]e have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.[1]

It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim.[2]

Introduction

Nearly nine years ago the Supreme Court decided *Coker v. Georgia.* In that case, a four-judge plurality eliminated rape of an adult woman as a capital offense. The petitioner in that case escaped from a penal institution while serving three life terms, two twenty year terms, and one eight year term for the rape and murder of a young woman and the rape of a sixteen year old girl. After his escape he raped another sixteen year old girl for which he received a capital sentence.[3]

Before determining whether the death penalty was excessive for the crime of rape of an adult woman the Court reviewed its prior decisions concerning the constitutional imposition of the death penalty. Writing for the plurality, Justice White observed that previous decisions settled questions about the constitutionality of capital punishment[4] and established that "the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment", nor "always disproportionate to the crime for which it is imposed."[5] He also observed that the Court established that death could be imposed for the crime of murder if discretion was guided in a manner similar to that prescribed in the Georgia statutes.[6] Moreover, he noted that the Court previously instructed[7] that the Eighth Amendment prohibited not only barbaric punishments, but excessive punishments as well,[8] and that excessive punishment was punishment that "makes no measurable contribution to the accountable goals of punishment . . . or is grossly out of proportion to the severity of the crime."[9]

In reaching its decision, the plurality indicated that in order to properly make a determination as to whether a punishment was excessive, the Court should look to objective factors such as "public attitudes concerning a particular sentence-history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions."[10] At the time *Coker* came before the Court, only Georgia authorized the death penalty for rape of an adult.[11] The plurality interpreted this as evidence of legislative rejection by the states of capital punishment for rape of an adult woman.[12]

In 1984, the capital sentencing provisions of the Manual for Courts-Martial were revised as a matter of policy in order to better protect the rights of service members.[13] Included in this revision was a capital sentencing provision for rape under certain aggravating circumstances; where the victim was under the age of twelve or where the accused maimed or attempted to kill the victim.[14] In the analysis of this provision, the drafters did not provide any discussion other than to merely cite *Coker,* implying that *Coker* did not preclude the imposition of the death penalty for rape, where the victim is unharmed.[15] It is apparent that the drafters also held the view that *Coker* does not prohibit the death sentence for rape of a child. One commentator agreed with this view:

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[1] *Coker v. Georgia,* 433 U.S. 584, 592 (1977).

[2] *Id.* at 600.

[3] *Id.* at 587. *See also id.* at 605 (Burger, C.J. dissenting).

[4] *Id.* at 591 (citing Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Furman v. Georgia, 408 U.S. 238 (1972)).

[5] *Coker,* 433 U.S. at 591.

[6] *Id.* (citing Furman v. Georgia, 408 U.S. 238 (1972)).

[7] *Id.* at 591–92 (citing Gregg v. Georgia).

[8] *Id.* at 592.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 595–96.

[12] *Id.* at 596.

[13] Manual for Courts-Martial, United States, 1984, analysis, at A21–66 [hereinafter cited as MCM, 1984].

[14] MCM, 1984, Rule for Courts Martial 1004(c)(9)(A) and (B) [hereinafter cited as R.C.M.].

[15] R.C.M. 1004(c)(9) analysis.

> No reliable inference can be drawn from the Court's restriction of the holding to the rape of adults, since this may simply have resulted from a desire to avoid passing on an issue which had not been argued before the Court. However, it is conceivable that the rape of children may be distinguished from that of adults on the ground that it is typically more harmful to the victim and involves a higher degree of moral depravity. While only two other jurisdictions other than Georgia authorized death for the rape of children at the time *Coker* was decided the number may be greater when the issue reaches the Court. It also may be expected that juries will impose the death penalty in a relatively high proportion of such cases, as compared with the rape of adults.[16]

Another commentator held the view that *Coker* would prohibit the imposition of the death penalty for rape of a child:

> The Court in *Coker* left unanswered the question of the validity of the death sentence for the rape of a child; however, because a "life for a life" equation apparently is crucial to the Court's application of the disproportionality test, the Court would also find the death penalty disproportionate for rape of a child.[17]

The imposition of the death penalty for rape of a woman based solely on the aggravating circumstances specified in R.C.M. 1004(c)(9)(B) would be prohibited by *Coker*. Accordingly, this article will only examine the proportionality of the death penalty for rape based solely on the aggravating circumstances specified in R.C.M. 1004(c)(9)(A), and examine the proportionality of the death penalty for rape where the death sentence is based on the aggravating circumstances specified in both R.C.M. 1004(c)(9)(A) and (B).

This article will examine the current status of the death penalty for rape of a child in this country and examine the reported cases to determine the frequency in which juries impose the death sentence for child rape. This examination will reveal the current public attitude toward the imposition of the death penalty for child rape and indicate the strength of an eighth amendment proportionality argument against the military death penalty provision for rape of a child. Further, this article will review and discuss the views of the Justices expressed in *Coker* regarding subjective proportionality determinations as a further indication of whether a death sentence for rape based solely on R.C.M. 1004(c)(9)(A), or based on both R.C.M. 1004(c)(9)(A) and (B), is likely to withstand constitutional challenge based on the eighth amendment.

Child Rape—Status of Death Penalty Statutes

At the time *Coker* was decided, only Florida and Mississippi had death penalty provisions for child rape.[18] Nine years later, the most recent U.S. Department of Justice Report on the status of death penalty statutes reveals that only Mississippi has a death penalty provision for the rape of a child out of the thirty-seven states that authorize the death penalty.[19] Florida abolished the death penalty for sexual battery of a female child under the age of eleven in 1981.[20] Certainly one can argue that these facts indicate legislative rejection of death as an imposable punishment for rape of a child by most of the country.

Sentencing Behavior in the States Authorizing the Death Penalty for Rape of a Child

An examination of the reported Mississippi cases involving rape of a child indicates that the death sentence is rarely imposed. Moreover, the sentencing experience in Florida was similar in the period from the time of the *Coker* decision until it abolished the death penalty.

A review of reported cases in Mississippi since *Coker* indicates that the Mississippi Supreme Court has upheld the death penalty for rape of a child only once. Moreover, none of those reported cases involved brutality or serious injury to the victim. In *Upshaw v. State*,[21] the Mississippi Supreme Court upheld the death penalty for the rape of a child under the age of twelve, stating that the death penalty for that offense was not violative of the eighth amendment. *Upshaw* was decided after *Coker* and, in reaching its decision, the Mississippi Supreme Court reasoned that the determination of an appropriate punishment for an offense was a matter for state legislatures. The victim in *Upshaw* was an eight-year-old girl. There was no indication in the case of any physical injury apart from that occasioned by the sex act itself. In a later case, *Williams v. State*,[22] a life sentence was imposed where the appellant raped an eleven-year-old girl and threatened to kill her if she told anyone. In that case again there was no physical injury to the victim other than to her private parts occasioned by the rape. The district attorney in that case waived the death penalty with the approval of the trial judge, changing the maximum imposable punishment to life imprisonment instead of death. In *Jackson v. Mississippi*,[23] the offender convicted of the rape of a six-year-old escaped the death penalty where the victim sustained no physical injury other than injury to her private parts resulting from slight penetration occurring

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[16] Comment, Coker v. Georgia: *Disproportionate Punishment and the Death Penalty for Rape*, 78 Colum. L. Rev. 1714, 1727–28 (1978). *See also Coker*, 433 U.S. at 614 (Burger, C.J. dissenting) (The dissent indicated that the failure of more states to enact death penalty provisions for rape of an adult woman reflected confusion and hasty compromise following *Furman* rather than a deliberate decision to remove the death penalty as a permissible punishment for rape. Chief Justice Burger suggested that those states that did not enact such statutes might have elected to wait to see the experience of the states that did enact such statutes, or wait for better guidance from the Court.).

[17] Note, *The Unconstitutionality of the Death Penalty For Rape: A Life Only for a Life*, 24 Loy. L. Rev. 314, 322 (1978).

[18] *Coker*, 433 U.S. at 595.

[19] *Capital Punishment* 1983, NCJ–99561 4/86; *Capital Punishment* 1984 (bulletin), NCJ–98399, 8/85. Oklahoma had a death penalty provision for rape of a female under 14 years of age by a male 18 or older, but this provision was recently revised and the death penalty was abolished for this offense. *See* Okla. Stat. Ann. tit. 21 §§ 1114–1115 (West 1983). *See also Capital Punishment* 1984 (bulletin), NCJ–98399, 8/85; *Capital Punishment*, 1983, NCJ–99561, 4/86.

[20] *Buford v. Florida*, 403 So. 2d 943 (Fla. 1981).

[21] 350 So. 2d 1358 (Miss. 1977).

[22] 427 So. 2d 100 (Miss. 1983).

[23] 452 So. 2d 438 (Miss. 1984).

during the rape. In *Minor v. State,*[24] a more egregious case, a twenty-three year-old raped a two-year-old female and received a life sentence.

An examination of the Florida cases decided before the death penalty for child rape was abolished further illustrates a reluctance by juries and judges to impose death for child rape. In *Purdy v. State,*[25] following the appellant's conviction for involuntary sexual battery of a child under eleven years, the jury recommended death and the trial judge imposed the death penalty. The Florida Supreme Court in a per curiam opinion affirmed the conviction, but directed the sentence be reduced to life. The court observed that the victim was not physically harmed except for the injuries sustained by the act of intercourse. In *Huckaby v. State,*[26] the appellant was convicted of rape and incest with his three daughters. For five of his offenses he received a life sentence. For the rape of a child under the age of eleven the jury recommended and the trial judge imposed death. These sex acts occurred over a period of fourteen years and began when the youngest child was six years old. In reducing the sentence to life, the Florida Supreme Court found that the trial judge erroneously ignored medical testimony that showed that the appellant's mental illness was the motivating factor in the crimes. In *Shue v. State,*[27] the Florida Supreme Court vacated the death penalty imposed by the trial court for the rape of a nine-year-old and an eleven-year-old. The trial judge imposed death despite a jury recommendation for a life sentence. The court stated that it was cruel and unusual punishment to impose death based on the facts of the case.

An examination of the Florida experience in the time period after the *Coker* decision and before Florida abolished the death penalty demonstrates that the death penalty for child rape was vacated in every instance that it was imposed for child rape. Moreover, like the Mississippi experience, no child rape cases were reported involving excessive brutality and severe injury.

The Implication of Current Legislative Attitude and Jury Behavior

In Mississippi, in three of the four reported cases since *Coker,* the offender escaped the death penalty for child rape. Moreover, as noted earlier, in all of those cases there was no brutality resulting in serious injury to the victims. In Florida, after *Coker* and before the death penalty was abolished for child rape, the jury recommended death in only one of three reported cases; however, the trial judge imposed death in each of the three cases and all of those death sentences were vacated by the Florida Supreme Court. Again, as noted earlier, none of these cases involved any brutal acts that caused serious injury to the victims. Recognizing that in the nine years since the *Coker* decision only one state has a statute that authorizes the death penalty for child rape, it would appear that defendants in child rape cases referred capital, where the sole aggravating factor is that the victim was a child under the age of twelve, can articulate a persuasive argument at trial and on appeal, using *Coker* and eighth amendment analysis that death is cruel and unusual punishment and disproportionate for the crime of rape of a child. One commentator has taken the position that neither public attitude nor jury behavior are proper measures of whether a punishment is constitutionally proportionate.[28] This view is akin to the view expressed in the dissenting opinion of Chief Justice Burger in *Coker.*[29]

Subjective Proportionality of The Death Penalty For Rape Under Aggravating Circumstances Specified in R.C.M. 1004(c)(9)(A) or R.C.M. 1004(c)(9)(A) and (B)

The plurality in *Coker* noted that, with respect to the death penalty, a proportionality determination under the eighth amendment involved not only an examination of current public attitude regarding the offense as reflected in legislative enactments and jury behavior, but also included the Court's own subjective judgment of whether the death penalty was disproportionate to the crime committed. "These recent events evidence the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. . . ."[30]

The plurality opinion in *Coker* did not set out any standards for the Court to follow in making a subjective proportionality judgment; however, Justice O'Connor, dissenting in another case, noted that *Coker* instructs that eighth amendment proportionality involves comparing the magnitude of the punishment imposed to the degree of the harm inflicted on the victim and the defendant's blameworthiness.[31]

The Court in its current ideological configuration would be inclined to reach the subjective determination that the death penalty is disproportionate for child rape where there was no physical harm to the victim, but not inclined to reach the subjective determination that death was disproportionate for child rape if the rapist maimed or attempted to kill the victim. The Court in *Coker* was only faced with deciding whether the death penalty was disproportionate to the rape of an adult woman. Moreover, the victim in *Coker* was not harmed in any way aside from the act of rape itself. Justice Powell in his separate opinion, specifically noted that there was "no indication that petitioner's offense was

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[24] 396 So. 2d 1031 (Miss. 1981).

[25] 343 So. 2d 4 (Fla. 1977).

[26] 345 So. 2d 29 (Fla. 1977).

[27] 366 So. 2d 387 (Fla. 1978).

[28] Note, *Constitutional Law-Criminal Law—Eighth Amendment—Death as a Penalty for Rape is Cruel and Unusual Punishment,* 1978 Wis. L. Rev. 253, 258.

[29] *Coker,* 433 U.S. at 613–15 (Burger, C.J., dissenting).

[30] *Id.* at 597.

[31] Enmund v. Florida 458 U.S. 782, 815 (O'Connor, J., dissenting). (There the Court held that the death penalty was disproportionate where a person aids and abets in a felony, but does not actually kill, attempt to kill, intend to kill, or intend that lethal force be used. This is the only other category of offense where the Court has held that capital punishment is always a disproportionate penalty.)

committed with excessive brutality or that the victim sustained serious or lasting injury."[32]

As noted previously, the plurality opinion in *Coker* did not explain how it arrived at the subjective determination that death was disproportionate for rape of an adult woman under an eighth amendment analysis. The plurality did state, however, that its subjective judgment was influenced by "the legislative rejection of capital punishment for rape."[33] It would appear then that until the Court adopts some methodology for making subjective proportionality determinations, the Justices remaining on the Court who joined in the *Coker* plurality opinion will base their determinations in large part on the public attitude as reflected by legislative enactments and jury behavior. As only one state authorizes the death penalty for rape of a child, this circumstance might strongly influence Justices White, Blackman and Stevens to reach the subjective determination that death is disproportionate where there is no harm to the victim. As noted earlier, in the reported cases since *Coker* where a defendant was convicted of child rape in each case there was no serious physical harm to the victim.

Justice Powell indicated in his separate opinion in *Coker* that he would be inclined to find the death penalty appropriate if there was excessive brutality and serious harm to the victim in a rape case. Moreover, he stated that, unlike the plurality, he did not draw a "bright line between murder and all rape regardless of the degree of brutality of the rape or the degree of brutality on the victim."[34] If there was no physical harm to a child rape victim, Justice Powell's position is uncertain because his opinion places considerable emphasis on the degree of physical harm to the victim and does not discuss other factors that might figure in his subjective determination of proportionality.

Chief Justice Burger, who wrote the dissenting opinion in *Coker*, is leaving the Court. Chief Justice-nominee Rehnquist joined in Chief Justice Burger's dissenting opinion in *Coker*. In that opinion, Chief Justice Burger wrote that the eighth amendment does not "so narrowly [limit] the factors which may be considered in determining whether a particular punishment is grossly excessive."[35] While criticizing the subjective proportionality determination of the plurality opinion, the Chief Justice stated:

> As a matter of constitutional principle that test can not have the primitive simplicity of "life for life, eye for eye, tooth for tooth." Rather States must be permitted to engage in a more sophisticated weighing of values in dealing with criminal activity which consistently poses serious danger of death or grave bodily harm. If innocent life and limb are to be preserved I see no constitutional barrier in punishing by death all who engage in such activity, regardless of whether the risk comes to fruition in any particular instance.[36]

Inasmuch as Justice Rehnquist joined in Chief Justice Burger's dissent, it is fair to presume that he would not consider death disproportionate for rape of a child with or without accompanying brutality amounting to maiming or where the rapist attempted to kill the child.

Justices Brennan and Marshall, in their separate concurring opinion in *Coker*, expressed the view that the death penalty is prohibited by the eighth and fourteenth amendments. No doubt they would find death disproportionate to rape of a child in all circumstances.[37]

Justice O'Connor replaced the late Justice Stewart on the Court and Judge Scalia has been appointed to fill Justice Rehnquist's seat. Although neither participated in *Coker*, both Justice O'Connor and Judge Scalia are likely to vote with Chief Justice-nominee Rehnquist.

After examining the views of the Justices who remain on the Court who participated in the *Coker* decision, it would appear that they would hold similar positions if confronted with a death penalty proportionality determination for child rape. Clearly, there are obvious factual distinctions between rape of an adult female and rape of a child. Reasoning by analogy, however, it would appear that it is more likely that imposition of death would be considered appropriate in circumstances specified in R.C.M. 1004(c)(9)(A) and (B); rape of a child under twelve where the offender maimed or attempted murder. The Court is least likely to find death appropriate in the circumstances specified in R.C.M. 1004(c)(9)(A); rape of a child under twelve without violence or injury to the child.

Conclusion

After examining the objective evidence available concerning the current public attitude toward the imposition of death for the rape of a child, and noting that only one state authorizes the imposition of the death penalty for rape of a child where the child is not killed, and noting that juries in the reported cases tended to impose life rather than the death penalty, there is serious question as to whether R.C.M. 1004(c)(9)(A) can withstand constitutional challenge based on an objective proportionality analysis. Further, because there are no reported cases since *Coker* involving child rape with aggravating circumstances resembling those specified in R.C.M. 1004(c)(9)(B), it would appear that a death sentence based on the aggravating factors specified in R.C.M. 1004(c)(9)(A) and (B) is likewise vulnerable to eighth amendment challenge. Moreover, when the views of the Justices expressed in *Coker* regarding subjective proportionality are examined, it is apparent that additional arguments surface in favor of not imposing death for child rape where the child is unharmed. Of course, because some of the Justices who joined in the plurality opinion in *Coker* may change their views concerning rape with aggravating circumstances, and because of the change in membership in the Court, just how the Court would decide a child rape case where there is extreme brutality and serious physical harm to the victim is uncertain. We will have to await further cases.

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[32] *Coker*, 433 U.S. at 601 (Powell, J., concurring in part and dissenting in part).

[33] *Id.* at 597.

[34] *Id.* at 603 (Powell, J., concurring in part and dissenting in part).

[35] *Id.* at 608 (Burger, C.J., dissenting).

[36] *Id.* at 620.

[37] *Coker* at 600 (Brennan and Marshall, JJ. concurring).

Social Security Account Numbers

As occasionally happens, two digits in the accused's SSAN had been transposed by the time the charge sheet arrived in the SJA office. It was an easy mistake for the unit to make, typing 2556 instead of 2565. No one checked the SSAN, although accompanying enlistment papers and personnel records all showed it to be 2665. Sure enough, at the outset of sentencing proceedings, the trial counsel read "2556" aloud from the charge sheet. The defense affirmed the correctness of the information read, thereby establishing "on the record" somebody else's SSAN for this accused.

Fortunately, an alert someone in the SJA office caught the error; the convening authority's action and the initial promulgating order each reflected the correct SSAN. That does not end the story, however. Appellate courts are left with a conflict, for promulgating orders have been known to be incorrect and not even personnel records are always correct.

In such cases, additional papers, perhaps even a certificate of correction by the trial judge, may have to be filed with the appellate court. (Avid readers of the Court of Military Appeals' Daily Journal may have observed that court ordering appellate defense counsel to supply the correct SSAN.) In this case, the cost was six telephone calls involving two clerks of court, appellate defense counsel, the accused, and West Publishing Company.

The accuracy of the accused's SSAN is essential not only to the correctness and completeness of military and national crime records, but also to the computer-assisted appellate processing of courts-martial. It takes less time to check the SSAN than it does to correct it later. Please do your part.

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT

RATES PER THOUSAND

Second Quarter Fiscal Year 1986; January-March 1986

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	0.41 (1.63)	0.33 (1.31)	0.60 (2.39)	0.47 (1.86)	0.14 (0.55)
BCDSPCM	0.40 (1.62)	0.42 (1.68)	0.42 (1.69)	0.30 (1.19)	0.21 (0.83)
SPCM	0.07 (0.29)	0.08 (0.32)	0.07 (0.29)	0.04 (0.15)	0.00 (0.00)
SCM	0.47 (1.88)	0.49 (1.95)	0.49 (1.96)	0.34 (1.34)	0.41 (1.66)
NJP	37.60(150.42)	39.46(157.83)	37.19(148.78)	32.41(129.62)	37.73(150.94)

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

Regulatory Law Office Note

Administrative Penalties Under the Resource Conservation and Recovery and Clean Air Acts

The issue of federal facility liability for state-imposed fines and penalties for noncompliance with environmental statutes is one of growing interest and concern, especially for those installations facing the potential for heavy levies due to pollution control problems. The commonplace observation that Congress has waived sovereign immunity in this area is only the starting point for an analysis of any liability question that may arise. Proper methodology requires a close examination of the specific waiver language Congress employed in enacting the applicable statute, followed by a review of the principles announced in *Hancock v. Train*, 426 U.S. 167 (1976).

The following article discusses the Department of the Army's policy position on this issue under the Resource Conservation and Recovery Act and the Clean Air Act. In explaining the rationale for this policy, the article also demonstrates a model approach for analyzing liability questions when they arise in the context of other statutes.

A recurrent issue for Department of the Army installations with facilities regulated under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6991 (1982 & Supp. II 1984), is whether state and local authorities can subject these installations to administrative penalties for violations. The answer is no. The United States has not waived its sovereign immunity for such administrative penalties.

The statute states, in pertinent part:

> Each department . . . of the executive . . . branch of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting *or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief*), respecting control and

abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirement. . . . *Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.*

42 U.S.C. § 6961 (1982 & Supp. II 1984) (emphasis added).

Some state officials administering federally approved RCRA programs have interpreted the quoted language as a waiver of sovereign immunity for payment of administrative penalties. The Supreme Court held in *Hancock v. Train*, 426 U.S. 167, 179 (1976), however, that in order for Congress to waive the sovereign immunity of the United States, it must do so in clear and unambiguous terms. It is clear that Congress has waived sovereign immunity under RCRA for sanctions that may be imposed by a court to enforce injunctive relief. It is equally clear, however, that Congress has not waived sovereign immunity for administrative penalties; in fact, 42 U.S.C. § 6961 does not even mention administrative penalties.

While there are no cases that address this specific point, the United States Court of Appeals for the Ninth Circuit held in *California v. Walters*, 751 F. 2d, 977, 979 (9th Cir. 1985), that Congress had not waived sovereign immunity for criminal sanctions under RCRA. The court stated, "Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions." *Id.* The same reasoning applies to Congress' failure to waive immunity for administrative penalties.

One state has argued that the "state requirements" language of § 6961 is a waiver of sovereign immunity for damages imposed under a state statute. In *Florida Dept. of Envir. Reg. v. Silvex Corp.*, 606 F. Supp. 159, 161 (M.D. Fla. 1985), the State of Florida used this argument in an attempt to hold the United States Navy liable for damages caused when a Navy contractor spilled some hazardous waste. The court examined the legislative history of RCRA, reviewed case law interpreting other similarly worded federal environmental statutes, and determined that the requirements language of RCRA referred to objective regulations such as state pollution standards or limitations, compliance schedules, emissions standards or control requirements. *Id.* at 161–64. The court reasoned that the Florida statute which simply imposed liability for spilling hazardous waste was not an objective regulation and thus not a requirement. *Id.* at 163–64. The court therefore held that the United States had not waived its sovereign immunity for liability under the "state requirements" language of § 6961. *Id.* at 164.

The same reasoning would apply to a state statute that allowed the imposition of an administrative penalty for a RCRA violation. Such a statute would not itself be a "state requirement" within the meaning of § 6961 because it would not be an objective regulation. It would merely allow the imposition of a penalty when an objective regulation, or requirement, had been violated. Therefore, the "state requirements" language of § 6961 is not a waiver of sovereign immunity for the imposition of administrative penalties.

Other states have argued that Executive Order 12,088, 43 Fed. Reg. 47,707 (1978), *reprinted in* 42 U.S.C. § 4321 app. at 514–15 (1982) is a waiver of sovereign immunity for the payment of administrative penalties under RCRA. This order requires, in part, that each executive agency comply with pollution control standards established pursuant to RCRA. *Id.* at § 1–102(f). Pollution control standards are defined as "the same substantive, procedural, and other requirements that would apply to a private person." *Id.* at § 1–103. The order also provides that its procedures for resolving conflicts between executive and state, interstate, or local agencies are in addition to, and not in lieu of, sanctions for the enforcement of pollution control standards.

The simple answer to this argument is that only Congress, and not the President, can waive sovereign immunity for the United States. Executive Order 12088 is not intended to waive sovereign immunity where Congress has not chosen to do so. It simply allows the payment of sanctions to the extent that sovereign immunity has been waived. Thus, Executive Order 12088 does not require the payment of administrative penalties under RCRA, because Congress has not waived sovereign immunity for the payment of such penalties.

Moreover, it is not all clear that the Executive Order even purports to address sovereign immunity. Rather, it merely describes how federal agencies will comply with applicable federal statutes and those state laws and regulations that were implemented in accordance with the federal laws. Therefore, the Order cannot be used by states to argue for the imposition of any duty not clearly established by federal laws; the Order simply does not create any supplemental requirement to comply with state law.

The General Counsel to the Secretary of Defense has also opined that 42 U.S.C. § 6961 does not contain a waiver of sovereign immunity for administrative penalties. Letter from Mr. Chapman B. Cox, General Counsel, Office of the Secretary of Defense, to Mr. Harry R. Van Cleve, General Counsel, General Accounting Office (Mar. 19, 1985). Copies are available from Regulatory Law Office upon request.) Therefore, the Department of the Army does not have the authority to pay for such administrative penalties levied by state and local governments.

The payment of penalties under the Clean Air Act (CAA), 42 U.S.C. § 7418 (1982), has also come under recent scrutiny. In the past, this office has advised installations to pay small CAA fines, rather than run the risk of injunction. Most such fines were for considerably less than the $25,000 per day statutory maximum—usually $50 to $250 total. Recently, however, the State of Ohio sued the Department of the Air Force demanding over $1,000,000 for past CAA penalties which the Air Force had refused to pay. Defendant's Motion To Dismiss or For Summary Judgment at 1–7, *Ohio v. U.S. Department of the Air Force*, Civ. No. 86–CV–01–366 (S.D. Ohio filed March 28, 1986). The United States Department of Justice, representing the Air Force, has filed a motion to dismiss, arguing forcefully that the United States has not waived its sovereign immunity under the CAA. *Id.*, at 7–19. As yet there

has been no decision in this case, but hopefully a favorable one will be forthcoming.

In light of the Air Force's current litigation, the Regulatory Law Office requests that it be consulted concerning all attempts by state and local governments to impose administrative penalties under the CAA. This office also requests that it be advised of any and all attempts by state and local governments to levy administrative penalties under RCRA or any other federal or state environmental statute.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Contract Law Note

The Comptroller General Narrowly Interprets the "Interested Party" Definition Under the Competition in Contracting Act

Section 3551 of the Competition in Contracting Act of 1984, Pub. L. No. 98–369 (hereinafter CICA), defines an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." This section is implemented in the Comptroller General Bid Protest Regulations at 4 C.F.R. § 21.0(a)(1985). In decisions rendered since implementation of the statutory language, the Comptroller General has strictly interpreted this definition. This note will outline key decisions interpreting the definition of "interested parties." The Comptroller General has focused his interpretation on the phrases "actual or prospective offerors" and "direct economic interest." To date, he has rejected protests from nonbidders such as subcontractors, suppliers, trade associations, and unions, as well as from contractors who either were not "actual or prospective offerors" or could not show the necessary "direct economic interest."

Protests Denied for Lack of Direct Economic Interest

Subcontractors. In *PolyCon Corporation,* Comp. Gen. Dec. B–218304; B–218305 (May 17, 1985), 85–1 CPD ¶ 567, the Comptroller General rejected PolyCon's protest because a potential subcontractor was not an "actual or prospective bidder or offeror." He noted that this decision departed from previous holdings that allowed subcontractors standing when they could show that their interests could not be otherwise protected without access to the protest forum. *Id.* at 2. [Note, however, that some subcontractor protests may still be heard where the subcontractor is by or for the federal government, 4 C.F.R. § 21.3 (f)(10) (1985)].

Potential suppliers of goods. In *ADB–ALNACO, Inc.*, Comp. Gen. Dec. B–218541 (June 3, 1985), 85–1 CPD ¶ 633, a manufacturer who supplied equipment to potential bidders or offerors protested some overly restrictive solicitation requirements which allegedly violated CICA. The Comptroller General rejected the protest because suppliers to potential bidders did not fall within the definition of an "interested party." He held that only bidders or offerors with *direct* economic interests in the awarding of the contract had standing to protest under CICA. A potential supplier is neither a bidder nor does it have direct interest in the award of the contract. *Id.* at 1.

Trade Unions and Associations. In *Northwest Forest Workers Association; Second Growth Forest Management, Inc.*, Comp. Gen. Dec. B–218097 (June 3, 1985), 85–1 CPD ¶ 628, the Comptroller General denied a protest from a trade association that objected to the terms of an invitation for bids. He found that the "association does not itself bid upon government contracts and therefore is not 'an actual or prospective bidder.' " *Id.* at 3.

In *National Federation of Federal Employees Local 2049,* Comp. Gen. Dec. B–220838 (Oct. 23, 1985), 85–2 CPD ¶ 454, the Comptroller General found that a union local representing federal employees was not an actual or prospective bidder under the challenged solicitation. *Id.* at 2.

Third-low Offerors. In *Eastman Kodak Company,* Comp. Gen. Dec. B–220646 (Jan. 31, 1986), 86–1 CPD ¶ 113, the Comptroller General ruled that third-low offerors were not "interested parties" under CICA. There, Eastman protested the awarding of a contract alleging that a failure to look at the contractor's indirect cost factors improperly caused the

awardee's bid to be the lowest. Its protest was dismissed because Eastman was the third-low offeror. The Comptroller General reasoned that because a third-low offeror did not have a direct economic interest of a prospective bidder or offeror, it did not have standing under CICA to protest the award of the contract to the lowest bidder. *Id.* at 1.

Protests Denied Because the Protestor was not an Actual or Prospective Offeror.

Late Offer. In *Nuaire, Inc.*, Comp. Gen. Dec. B–221551, (Apr. 2, 1986), 86–1 CPD ¶ 314, the protestor asserted that the awardee's offer was nonresponsive. The Comptroller General rejected the protest because the protestor was not an "interested party." Because the protestor's offer was late, and thus not an actual offer, it had no standing to protest the award under CICA. *Id.* at 5.

Producers of Nonconforming Items. In *Endure-A-Lifetime Products, Inc.*, Comp. Gen. Dec. B–219529.2 (Oct. 11, 1985), 85–2 CPD ¶ 404, EAL, an offeror of a non-conforming product, was denied its protest of the award of a contract to another contractor. The Comptroller General found that EAL was not an interested party because the offeror of a nonconforming product was not an "actual offeror" under CICA. The Comptroller General concluded that even had the protest been found in favor of EAL, its failure to offer a conforming product caused it to fall outside the definition of an "interested party." *Id.* at 4.

Contractor Outside of Geographic Restrictions. In *Pacific Sky Supply, Inc.*, Comp. Gen. Dec. B–221375 (Apr. 3, 1986), 86–1 CPD ¶ 320, a protestor who could not comply with the geographic restrictions of a solicitation did not have standing to oppose various provisions of the solicitation. After the Comptroller General concluded that the geographic restrictions were valid, he dismissed the protest because Pacific Sky was not an actual or prospective offeror. *Id.* at 4. Prospective offerors or bidders must comply with the solicitation requirements in order to achieve standing to protest under CICA.

Caveat Concerning "Prospective Offerors."

It should be noted that, while the Comptroller General's interpretation has generally been a narrow one as shown by the preceding cases, he has recognized that a contractor who did not in fact submit a bid or offer may nonetheless be an interested party. In *Tumpane Services Corporation*, Comp. Gen. Dec. B–220465 (Jan. 28, 1986), 86–1 CPD ¶ 95, the Comptroller General, while denying a protest, held that the protestor would have been an "interested party" as defined in the Bid Protest Regulations had the basis for the initial protest been valid. Tumpane asserted that uncertainty concerning certain state leasehold taxes rendered preparation of price proposals impossible. Accordingly, because Tumpane could not prepare a price proposal, it argued that others could not properly do so either. Thus, it concluded, the awarding of the contract was improper. Although the Comptroller General denied the protest, he found that failure to submit a bid did not automatically disqualify the protestor as an "interested party." If Tumpane's argument had been valid, Tumpane's interest as a potential competitor was sufficient to make it an "interested party" under CICA. *Id.* at 2. Hence, failure to submit an offer does not disqualify the protestor under CICA when the reason for the failure to submit is the basis of the protest. Miss Valerie A. Ludlum, Summer Intern.

Criminal Law Note

Authorized Uses of Rape Trauma Syndrome Evidence

Introduction

Much has been written about the admissibility of evidence of Rape Trauma Syndrome (RTS).[1] This evidence has generally been used in two ways. In one, the expert bolsters the testimony of the victim and is used to disprove consent; in the other, the expert is used to explain some conduct or testimony of the victim and educate the members that this action of the victim is consistent with being raped. The use of rape trauma syndrome evidence to bolster the credibility of the victim is controversial and fraught with dangers.[2] An emerging trend is to use the evidence to

[1] The term "Rape Trauma Syndrome" comes from a study of rape victims conducted in 1973. Rape trauma syndrome is an umbrella terminology that includes a very broad spectrum of physical, psychological, and emotional reactions. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974).

There is considerable controversy in the courts and in the literature as to the use of rape trauma syndrome evidence. *Compare* Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Cases*, 70 Va. L. Rev. 1657 (1984) (such evidence should not be admitted) *with* Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985) *and* Comment, *Expert Testimony on Rape Trauma Syndrome*, 33 Am. U.L. Rev. 417 (1984) (evidence is reliable and should be admitted).

In the military, see Child, *Effective Use of Rape Trauma Syndrome*, The Army Lawyer, Oct. 1985, at 11; Feeney, *Complainant's Credibility: Expert Testimony and Rape Trauma Syndrome*, The Army Lawyer, Sept. 1985, at 1; Portley, *Rape Trauma Syndrome: Modifying the Rules in Rape Prosecution Cases*, The Army Lawyer, Nov. 1983 at 1; Note, *The Admissibility of Rape Trauma Evidence*, Trial Counsel Forum, Oct. 1983 at 2; Note, *Qualified Use of Rape Trauma Syndrome*, The Army Lawyer, Sept. 1985, at 31; Note, *Truthful Testimony: A Parallax View*, The Army Lawyer, Jan. 1986, at 30.

[2] One of the dangers is that the expert will be used to testify that the victim is telling the truth. Such impermissible evidence has been criticized by the courts. "[T]he danger that purported experts may be allowed to testify on a subject as to which their opinion has meager scientific basis and minimal value but has substantial potential for misleading the fact finder." United States v. Cameron, 21 M.J. 59, 65 (C.M.A. 1986). Another danger is that using RTS in such a manner opens the door for the defense. Does the absence of RTS prove consent? Can the defense demand examination of the victim by their own psychiatrist? *See, e.g.*, United States v. Owen, CM 446261 (A.C.M.R. 10 Feb. 1986), *petition granted*, 22 M.J. 178 (C.M.A. 1986).

rebut or counter an attack on the version of the facts given by the victim.[3]

This article will examine those factual situations where courts have permitted the use of testimony about rape trauma syndrome to explain the otherwise unusual or seemingly illogical actions of the victim or to rebut an attack by the defense.

Often in rape prosecutions, the defense relies upon what is purported to be "common sense." That is, something about the version of the facts given by the victim "doesn't make sense." Perhaps the victim did not escape when given the opportunity, or she returned to the scene of the rape, or she failed to report the rape at the first opportunity. To prove the crime, the government must overcome the skepticism such factual scenarios cause in the minds of the uneducated fact finder. It is here that rape trauma syndrome evidence properly educates and is most effectively used. Testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that the members may evaluate the evidence free of the constraints of popular myths.

Identification of Attacker/Faulty Memory

Rape trauma syndrome evidence has been used to explain a complainant's initial inability to identify her assailant. In *Commonwealth v. Gallagher,*[4] the victim named her attacker but at a lineup could not make a positive identification. Four years later, after a chance encounter, she was able to identify Gallagher as her attacker. Common experience would indicate that identifications closer in time would be more reliable; here the identification improved. To prove the reliability of the identification, the prosecutor used expert testimony concerning rape trauma syndrome. It is not unusual for the rape victim to block out the identification of her attacker; only after she has come to grips with the trauma is she able to positively give an identification. Here rape trauma syndrome helped explain what "common experience" could not. It has also been admitted to explain similar elements of a complainant's behavior that may be confusing to the jury. In *State v. Staples,*[5] for example, RTS was admitted to explain why the complainant might have been unable to remember clearly the events preceding her rape but vividly recalled the attack itself.

Delay in Reporting

Expert testimony can explain to the court members that a delay in reporting a sexual assault is not inconsistent with being attacked. Once again, the defense attack on the victim is built on what seems a "common sense" argument; failure to immediately report the attack indicated it did not occur. In *Delia S. v. Torres,*[6] expert testimony was used to show that feelings of fear, shame, and guilt, resulting in a failure to speak of or report the experience, are very common reactions for rape victims. The evidence "provided a background against which the jury could assess the relevance of the defense theory that her conduct was not that which was typical or expected of a rape victim."[7]

Inconsistent Actions

Rape trauma syndrome evidence can be used to counter a defense attack on the inconsistency of the victim. In *United States v. Tomlinson,*[8] the victim, in her post rape interviews with the Criminal Investigation Division, made some statements at odds with her earlier complaint to the police. Although the court overturned the conviction for improper use of rape trauma syndrome evidence, it did outline the proper role the evidence could have played in the prosecution. Rape trauma syndrome evidence could have explained to the members that a rape victim, confronted by multiple male interrogators, is placed in an unusually threatening position. It is not uncommon for some of the facts related under this stress to be inconsistent with earlier versions; not because her story is untrue, but because the interrogation is too reminiscent of the recent rape.[9]

Especially with child witnesses, it is helpful for the members to understand, through expert testimony, that inconsistencies in the story of the victim are not necessarily indicative of a lack of credibility. The guilt the child fears and the uncertainty of the right thing to do often provoke conflicting stories. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the child's credibility.[10]

To the uneducated court member, it would also seem inconsistent with being raped for the victim to have returned with the accused to the scene of the crime, or for the victim not to have struggled. In *Terio v. McDonough,*[11] the victim alleged she was raped while visiting a friend's apartment. Yet she testified that after leaving the apartment, she returned to obtain her purse and shawl. Over defense

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[3] Four states, focusing on RTS as a therapeutic device rather than a factfinding tool, have excluded evidence of RTS on the ground that it does not reliably prove rape or lack of consent. People v. Bledsoe, 36 Cal. 3d 236, 203 Cal. Rptr. 450, 681 P.2d 291 (1984); Allewalt v. State, 487 A.2d 664 (Md. 1985); People v. Pullins, 145 Mich. App. 414, 378 N.W.2d 502 (1985); State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

Four other states have ruled that expert testimony on RTS is admissible to prove lack of consent or to corroborate testimony that a rape occurred. State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982); State v. Liddell, 685 P.2d 918 (Mont. 1984); State v. Stafford, 77 N.C. App. 19, 334 S.E.2d 799 (1985); State v. Whitman, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984). In addition, Missouri will admit the evidence so long as the term "rape trauma syndrome" is not used. State v. Taylor, 663 S.W.2d 235 (Mo. 1984).

In the military, two panels of the Army Court of Review have split on the admissibility of RTS to prove consent. *Compare* United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985) (testimony of expert that victim suffered from 'rape trauma syndrome' violates Mil. R. Evid. 403) *with* United States v. Carter, 22 M.J. 771 (A.C.M.R. 1986) (Testimony of expert admissible when proper limiting instructions are given by the military judge).

[4] 510 A.2d 735 (Pa. Super. Ct. 1986).

[5] 120 N.H. 278, 415 A.2d 320 (1980).

[6] 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (2nd Dist. 1982).

[7] *Id.,* 184 Cal. Rptr. at 795.

[8] 20 M.J. 897 (A.C.M.R. 1985).

[9] *See also* State v. Pettit, 66 Or. App. 575, 675 P.2d 183 (1984).

[10] State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (inconsistent post incident statements by 14-year-old incest victim).

[11] 16 Mass. App. 163, 450 N.E.2d 190 (1983).

objection, an expert in rape trauma syndrome testified that such behavior is not remarkable in a rape victim; such an action did not mean rape did not occur.

The absence of struggle by the victim (no one heard shouts) is often used to attack the factual account of a rape victim. In *Pezez v. State,* [12] expert evidence was used to explain why the victim would carry on a conversation with the defendants in a seemingly friendly manner. It is not inconsistent with being raped for the victim to attempt passive resistance to extricate herself from the threatening situation.

Conclusion

In rape cases, much of what purports to be "common sense" is not sense at all. The role of the expert therefore becomes education. The factual situations in the cases explained above lend themselves to the specious "common sense" argument; rape could not have occurred given these facts. The prosecution must have some evidence to overcome this specious logic. Limited to the proper sphere, rape trauma syndrome evidence fulfills this important role. Major Capofari.

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.*

Special Legal Assistance Officer Program

Legal assistance officers frequently have clients with problems originating far from the military installation. Often, these problems arose either before the soldier came on active duty or at a prior duty station. These cases frequently require prompt action such as filing an answer to a complaint in a law suit or invoking the protections of the Soldiers' and Sailors' Civil Relief Act. Regardless, the distance involved often makes it more difficult to assist the client. Additionally, many Army soldiers, such as recruiters and ROTC instructors, are assigned far from an active military installation, and thus far from an active duty legal assistance office. The Army has a program designed to render assistance in these situations.

The Special Legal Assistance Officer (SLAO) Program is designed to provide a network of Reserve Component judge advocates who are available to assist soldiers and others eligible for legal assistance under AR 27–3. The SLAO need not be in a training or duty status when giving the assistance, and can provide the legal services out of his or her private law practice. There is no charge to the client; the Reservist earns retirement credit for the services rendered. The assistance provided by the SLAO can include representation in court as long as the case and the client would qualify for court representation under AR 27–3 and the case arises over forty miles from an active installation.

There are currently about 150 SLAO's appointed, and a roster of these officers was recently mailed to all Army legal assistance offices. The roster is maintained in Section III of the Army Legal Assistance Information Directory. Effective legal assistance often involves mustering all available resources for a client. Frequently, there may be a SLAO located close to the source of the client's problem who would be willing to take the case. Legal assistance officers should check the SLAO roster, which is conveniently organized by city and state, to see if the case can be referred. Legal assistance officers wishing to refer a case to a SLAO should contact the SLAO directly to coordinate referral of the case. Major Mulliken.

Legal Assistance to Survivors of Gander

The following is a synopsis of an additional message concerning assistance to the survivors of the soldiers killed in the Gander, Newfoundland crash, which some offices may not have received:

This message, dispatched 14 July 1986, has the following date-time group: P 141430Z Jul 86.

Subject: Air Crash Legal Assistance Update No. 19

1. On 10 July 1986 Judge Cristol, the Bankruptcy Judge in the Arrow bankruptcy proceedings, indefinitely extended the filing time for proofs of claim in the Arrow Air bankruptcy proceedings. It appears that the surviving family members will not be required to file any proof of claim in order to protect their claim against Arrow and AAU. Further guidance will be forthcoming once this office reviews the written order of the court.

2. The statute of limitations for a wrongful death action in Kentucky is one year. Those families that do not have civilian counsel must be made aware of this. While other jurisdictions may have a longer statute, families should not risk their potential claims. Additionally, they should note that Kentucky has one of the most generous wrongful death statutes. If necessary, legal action should be initiated prior to 11 December 1986.

Tax Notes

Proposed Repeal of Miscellaneous Itemized Deductions

The tax reform bill approved by the Senate would repeal, beginning in 1987, miscellaneous itemized deductions. While the bill is not yet law, and may not be finally enacted in its current form, some may want to consider taking action this year, based on the Senate bill, to save on taxes.

Many of those who itemize deductions have recurring expenses for such items as professional publications, dues for professional associations (Bar dues), purchase and upkeep of deductible uniforms, safe deposit box rentals, and others. These items are currently deductible as a miscellaneous itemized deduction under I.R.C. § 212. The Senate version of the tax reform bill would eliminate this deduction beginning in 1987. To the extent that one anticipates having such expenses and can accelerate the expense so that it will be incurred in 1986, the expense will be deductible. For instance, one could prepay professional association dues for 1987 or order and pay for a two year subscription to a professional

[12] 653 S.W.2d 878 (Tex. 1983) (Counselor testified that victim was following advice of rape seminar training by remaining passive and seemingly friendly.).

journal. By doing so, the expense will be deductible against 1986 income. The expense would likely not be deductible if the tax reform bill passes.

Even if the current proposal to eliminate miscellaneous itemized deductions does not appear in the final bill, if tax reform occurs, many would still be better off accelerating the deductions to 1986. Most people would be taxed at a lower rate under the Senate's proposal, thus making any deductions more valuable this year than next. This tactic of accelerating deductions is permissible as long as one does not get carried away. If more than a couple of years are paid in advance, the IRS can deny the deduction as a capital expense, requiring that the expense be prorated over the life of the item purchased. Major Mulliken.

Summer Camp Expenses

As part of a preventive law program, legal assistance officers may want to remind clients that expenses for summer camp for children may qualify for a tax credit, and that they should keep records of those expenses to support a credit against 1986 taxes. Many parents send their children to summer camp, and frequently do not entertain the possibility that these expenses may be partially recoverable on their taxes.

Section 21 of the Internal Revenue Code provides a credit against taxes for expenses incurred for the care of a dependent under the age of fifteen (or of any age if the dependent is physically or mentally incapable of caring for himself). To qualify for the credit, the expense must be incurred in order for the parent to work, or, in the case of married taxpayers, for both spouses to work or for one spouse to work and the other to go to school or to actively look for a job. The credit is generally only available to married couples if they file a joint return, though it may be available to a couple who files as married living apart. The expenses that qualify include expenses for the care of the child, including care outside the home. Summer camp can provide such care, and the expenses for camp can be the basis for a tax credit. There are, however, limitations on the amount of expenses that qualify for the credit, depending on the number of qualifying individuals for whom the care is being provided. The qualifying expenses are limited to $2400 if there is only one dependent being cared for and $4800 if there are two or more qualifying dependents. In all cases, however, the qualifying expenses are limited to the amount of the income of the spouse with the lowest amount of earned income. Legal assistance officers should remind clients of the necessity of keeping records now that will support the deduction when taxes are prepared next year. Major Mulliken.

Consumer Law Notes

The Consumer's Resource Handbook

Legal assistance officers are reminded of one of their most valuable resources—the *Consumer's Resource Handbook*. The January 1986 edition of this handbook was recently sent to each legal assistance office and it will be issued to each basic course student and to many graduate course students. The materials in this booklet not only serve as an excellent reference tool for the legal assistance practitioner but also provide the basis for classes in preventive or "proactive" law. Legal assistance officers should particularly note the "12 guides for purchasing decisions" that are contained in the handbook and reprinted below. These guides can be republished in post publications as a series of proactive legal tips or can form the basis for articles written in these areas.

12 Guides for Purchasing Decisions

1. Telephone Solicitations

a. Never give your credit card number over the phone unless you initiate the call.

b. Be cautious if the caller says an investment, purchase, or charitable donation must be made immediately.

c. Ask who is in charge of the company or organization represented. Get specific names and titles.

d. Check with your state and local consumer protection offices and Better Business Bureau to see if any complaints have been filed against the organization.

e. Be wary of offers of free merchandise or prizes. You may end up paying handling fees greater than the value of the gifts.

2. Home Improvements

a. Be sure to get more than one estimate using the same specifications and materials.

b. Be sure you have a *written* contract that includes the contractor's full name, address, phone number, and license number, a thorough description of the work to be done, the grade and quality of materials to be used, the agreed upon starting and completion dates, the total cost, and payment schedule.

c. Be sure to make a thorough inspection of the contractor's work before you make your final payment.

d. If you sign the contract away from the seller's regular place of business, such as your home, you will have a three day "cooling-off" period. This means you have the right to cancel your contract anytime before midnight of the third business day after you sign the contract. Be sure a copy of the "Notice of Cancellation" form is included with your contract.

e. Inquire whether the contractor has liability and compensation insurance to protect you from law suits in the event of an accident.

f. If the work requires a building permit, let the contractor apply for it in his name. If it is in your name and the work does not pass inspection, you will be responsible for any corrections that must be made.

g. Check with your county or city officials to see if the contractor is licensed and bonded. A bond will protect you against liens on your home if the contractor defaults with suppliers and subcontractors. Also, check with state and local consumer protection agencies and the Better Business Bureau to see if any complaints have been filed against the contractor.

3. Used Cars

a. Read carefully the "Buyers Guide" in the window of the car if buying from a dealer.

b. Ask if the car is being sold "as is" (which means you must pay all costs for repairs) or has a warranty. Make sure you get the warranty in writing and that all verbal promises are included.

c. Comparison shop carefully for price, condition, and mileage of the model you are interested in buying. Compare for total cost, including the interest rates and other terms of finance agreements.

d. If you are nonmechanical, have a mechanic or other knowledgeable person look over the car for you.

e. If you are unfamiliar with the dealer, you may want to check with your state or local consumer protection agency or Better Business Bureau to see if there are any complaints against the dealership before you sign a contract.

4. Mail Order

a. Watch out for exaggerated product claims or unrealistically low prices.

b. Check with your state or local consumer protection agency or Better Business Bureau before ordering if you are in doubt about the company.

c. Find out about the firm's return policy. If it is not stated, ask before you order. Many companies have toll-free phone numbers.

d. Complete the order as directed. If you leave out needed information such as your full address, your order may be delayed.

e. Keep a complete record of your order, including the company's name, address, and telephone number, the items you purchased, the price, the date you mailed the order, and your method of payment.

f. Understand that, under Federal law, you have more legal protection if you order by mail than if you order by telephone.

g. If you order by mail, your purchase must be shipped or a notice of delayed shipment with an option to cancel must be sent within thirty days after the company receives your completed order.

5. Credit Cards

a. Keep a record of your card numbers, expiration dates, and the phone number of each company in a secure place.

b. Watch your card, whenever possible, after giving it to a clerk. Retrieve your card promptly after using it.

c. Take the carbons along with your credit card receipt. Void or destroy incorrect receipts.

d. Avoid signing a blank receipt. Draw a line through blank spaces above the total when you sign card receipts.

e. Open credit card bills promptly and compare them with your receipts.

f. Report promptly and in writing any questionable charges to the card issuer.

g. Never give a credit card number to a telephone solicitor unless you have initiated the call.

h. Never put your card number on a postcard or on the outside of an envelope.

i. Sign new cards and destroy unwanted cards as soon as they arrive.

j. Keep infrequently used cards in a secure place.

6. Timesharing

a. Consider the true value of the "gifts" and "awards" used to promote vacation timeshare sales. Remember, it may not be a "free" gift if you must drive a long distance and endure a high-powered sales pitch. Promotional gifts can be of poor quality.

b. Check out the seller, developer, and management company with your state or local consumer protection agency or Better Business Bureau. Does the company have a record of complaints? What is its reputation for completing work as promised? Does it manage the facilities properly?

c. Do not act on impulse or under pressure. Carefully read the contract and any other written documents before you sign anything.

d. Be sure everything the salesperson promised orally is written into the contract.

e. Check with your state or local consumer protection agency to see if state law provides you with a "cooling-off" period during which you can cancel the contract and get a refund.

7. Health Clubs

a. Check out the health club carefully. Visit during hours when you would normally use it to see if it is overcrowded during that period. Check whether the facilities are well maintained and clean.

b. Ask when you will be able to use the club. It may be open all week, but limited to men or women on certain days.

c. Ask what qualifications or training the employees have.

d. Read the fine print in all contracts or special offers. You may be committing yourself to a long-term contract. Make sure that spoken promises or conditions are made in writing.

e. Find out if there is a time period in which you can change your mind and get your money back ("cooling-off" period). Ask also about the refund policy for cancellations.

f. Ask your state or local consumer protection agency or Better Business Bureau if they have received any complaints about the club. Find out also if you have any protection under state law should the club close unexpectedly.

8. Car Repairs

a. Ask for a written estimate before you authorize any major repair work.

b. Make sure the work order reflects what you asked for before you leave the car.

c. Be sure the shop understands that they must call you before doing work beyond that which you originally requested.

d. Ask for the opportunity to inspect all replaced parts.

e. Keep copies of all work orders and receipts.

9. Door-to-Door Sales

a. Make sure you are dealing with a legitimate company by asking for proper identification from the salesperson.

b. Keep a copy of any sales agreement. Be sure your copy has the company's complete name, address, phone number, the name of the salesperson, and details of the sale including correct date.

c. You will have a three day "cooling off" period, which means you have the right to cancel your contract anytime before midnight of the third business day after you sign the contract. Get a copy of the right-to-cancel notice with your contract. (This rule only applies to purchases over $25.00 made away from the seller's regular place of business.)

10. Health Fraud

a. If claims sound too good to be true, they probably are. Be especially cautious about ads offering "miracle cures" that are available only from one source.

b. Check with your doctor, pharmacist, or other health professionals before buying unfamiliar or unusual health care products or programs. For instance, medical science has not yet found a cure for arthritis.

c. If you are attempting to lose weight without exercising, you must reduce your caloric intake. If you want to "tone up," you must exercise. Be wary of products, devices, or programs that promise unrealistic or easy results.

d. Be aware that fraudulent health-care products can rob you of more than your money. They can steal your health and even your life by detouring you from appropriate health care treatment.

11. Warranties

a. Compare the terms and conditions of warranties on products or services before you buy.
Consider: —duration of the warranty;
—labor and shipping costs; and
—conditions for repair, replacement, or refund.

b. Keep your sales slip and warranty in a safe place.

12. Contracts

a. Never sign anything you do not understand.

b. Be sure that what the salesperson promises is what the contract says.

c. Do not sign a contract if a promoter or retailer is reluctant to let you have another person review it first.

d. Never sign a contract with unfilled spaces. Draw lines through blank spaces.

Legal Assistance Mailout 86–3

Materials from the Air Force, the National Consumer Law Center, and the Consumer Information Center were distributed by the Legal Assistance Branch in August 1986. These materials included several publications.

The first publication was the Summer 1986 edition of the *Consumer Information Catalog.* This publication contains a wealth of information concerning free or inexpensive consumer publications that can be ordered for legal assistance office waiting rooms or for unit preventive law classes.

Also included in this mailout were seven editions of the National Consumer Law Center Reports covering the period from January through June 1986. These helpful reports discuss current developments in the areas of consumer credit and usury, debt collection and repossessions, deceptive practices and warranties, and consumer bankruptcy and foreclosures. The Legal Assistance Branch obtained enough year end funds last year to purchase copies of the National Consumer Law Center Reports for all legal assistance offices. That was a one-time purchase, and offices that would like to receive the publication next year should budget for it. Prior to placing an order for the publication, however, offices should check with the Legal Assistance Branch as it may be able to negotiate a reduced rate for bulk orders.

The Air Force provided the Legal Assistance Branch with sufficient copies of their recent "Shortbursts" newsletters to enable us to send one copy to each office. Three newsletters were included in the August mailout, and included excellent materials on consumer law, and personal financial and estate planning, among others. The Air Force materials are organized for permanent filing in binders to enable the materials to be easily retrieved by subject matter at a later date. Our special thanks goes to the Air Force for their hard work in putting these materials together and for their generosity in sharing them with us. Major Mulliken.

Claims Report

United States Army Claims Service

Duty to Warn Trespassers on Army Lands

Mr. Joseph Rouse
Chief, General Claims Division

Suits under the Federal Tort Claims Act (FTCA) are based on duties created by the law of the place of the incident. California has abolished the distinction between a trespasser and other users of land, providing a test of foreseeability as to all classes of users. In *Henderson v. United States,* Civ. No. 83–5749 (9th Cir. 1986), the court held that the injuries were foreseeable in the case of two trespassers who entered a remote portion of Miramar Naval Air Station to steal copper wire from activated but unused power lines 1000 feet from a missile test site area where trespassing for vandalism, salvaging, shooting, and motorcycle riding had been rampant. The posted "no trespassing" signs were held to be inadequate warning of the danger existing in live power lines that were no longer in use but had been utilized up to a month prior to the incident. The court also held that the California regulations governing power lines were applicable to the United States and remanded the case to the District Court to determine whether the United States violated these regulations and whether the violation, if any, caused the injuries.

To the contrary, in *Landen v. United States,* Civ. No. 85–4438 (5th Cir. 1985), the court held that there was no duty to warn a trespasser of the danger in an impact area at Fort Polk other than to mark it as an impact area. Known scavengers had been killed at home by duds previously removed from the impact area. In *Boyd v. United States,* 631 F. Supp. 814 (E.D. Okla. 1986), a swimmer was struck and killed by a boat while snorkeling in a Corps of Engineers reservoir. Failure to mark the area with a sign designating it as one in which boats were permitted was held to be a discretionary act falling under the exception in 28 U.S.C. § 2680(h) (1982). The complaint was also barred under the Oklahoma Recreational Use Statute (Okla. Stat. tit. 20, § 1301–315(D) (1981)).

There was no discussion of the discretionary act exception in *Henderson,* nor of the applicability of the recent Supreme Court decision on 28 U.S.C. § 2680(a) (*United States v. Varig Airlines,* 467 U.S. 797 (1984)) on which the *Boyd* court relied. The application of the California Recreational Use Statute to trespasser Henderson is dubious as the danger could be argued to be a hidden one. A similar rationale would apply to reliance on Recreational Use Statutes to bar claims of scavengers in impact areas, as a dud shell could be argued to be a hidden danger and thus not covered by such a statute. Likewise, the *Henderson* decision should not be considered an anomaly in view of similar holdings by the courts in the past regarding impact areas which in some instances would be equated to the imposition of absolute liability on the United States despite the holding of *Dalehite v. United States,* 346 U.S. 15 (1953) and *Laird v. Nelms,* 406 U.S. 707 (1972). See, for example, *Williams v. United States,* 379 F.2d 719 (5th Cir. 1967 [Ga.]) (firecrackers near base); *United States v. Reilly,* 338 F.2d 225 (10th Cir. 1967 [New Mex.]) (shell on post); *United States v. Stoppelmann,* 266 F.2d 13 (8th Cir. 1959 [Ma.]) (cartridges on maneuver land); *William v. United States,* 252 F.2d 887 (5th Cir. 1958 [La.]) (fuse near base); *Stewart v. United States,* 119 F.2d 517 (7th Cir. 1952 [Ill.]) (smoke grenade on post); *Perry v. United States,* Civ. No. 71C1812 (N.D. Ill. 1974) (simulator taken from post); *Duvall v. United States,* 312 F. Supp. 625 (E.D.N.C. 1970) (bomb impact area); *Hernandez v. United States,* 313 F. Supp. 349 (N.D. Tex. 1969) (shell in former impact area); *Medlin v. United States,* 244 F. Supp. 403 (W.D.S.C. 1965) (firecracker-maneuver land); *Parrott v. United States,* 181 F. Supp. 425 (S.D. Cal. 1960) (grenade-former base); *Meara v. United States,* 119 F. Supp. 662 (W.D. Ky. 1954) (fuse near post); *Beasly v. United States,* 81 F. Supp. 518 (E.D.S.C. 1948) (shell on post). All of these cases were decided against the United States. Smaller numbers have been decided in favor of the United States.

In view of the potential claims liability faced by the government arising from explosives found on military installations, SJAs should coordinate closely with their appropriate staff counterparts to ensure that all possible preventative steps are taken and that such steps are properly documented. For example, warning signs should be explicit as to the danger involved. Terms such as "duds" should be avoided. Rather, the warning should state that the area contains "shells and other objects which may explode if touched or moved." Because many impact areas are not cleared, signs warning of the increased dangers are necessary as such areas are normally unguarded and unfenced. While efforts to keep trespassers off impact areas or areas containing dangerous items, such as electrical lines or transformers, are limited by available funds and personnel, records should be maintained demonstrating the nature and extent of such efforts. For example, the number of personnel available to keep off trespassers, the number of trespassers apprehended, and the number of warning signs replaced and the frequency thereof should be recorded. Photographs of signs in place at the time of accidents should be made and dated. Warning notices placed in the print media or broadcast locally also should be preserved. Only a continuing, conscious effort by all concerned will reduce the Army's window of liability.

Personnel Claims Tip of the Month

This tip is designed to be published in local command information publications as part of a command preventative law program.

This month's tip concerns items shipped with a privately owned vehicle (POV). Many soldiers include items that are not authorized for shipment with the vehicle, and claims for the loss of these items will not be paid. This situation occurs most often when shipping vans and camper-type vehicles. The following excerpt from the Military Traffic Management Command Pamphlet, "Shipping Your Vehicle," lists items that can be shipped with a vehicle:

What to Leave in Your POV

Anything not permanently installed must be removed from your POV before shipment. No flammable or hazardous substances may be shipped in your POV, including flares, waxes, oils, solvents, and polishes. The following items, however, may remain in your POV:

- Normal tools like jacks, tire irons, chains, fire extinguishers, tire inflators, and basic hand tools such as screwdrivers, pliers, wrenches and hammers. Tools and toolboxes may not exceed the value set by your service. (Note: In the Army, the maximum allowance on basic tools shipped with a vehicle is $100.00.)

- One spare tire and two snow tires with wheels either mounted or unmounted. POVs to Guam or Hawaii may carry only one spare due to ocean tariff restrictions.

- Cribs and childrens' car seats (permanent or removable). POVs to Guam or Hawaii may carry only a permanent crib or child's car seat.

- Thermos bottles, bottle warmers, car cushions, and other small comfort items may go with your POV only if they can be packed in a carton about 24" × 16" × 16".

- Nothing may remain in the trunk of POVs to Guam or Hawaii except one spare with wheel and minimum tools due to ocean tariffs.

- Catalytic converters, catalyst components (pellets), oxygen sensor and pipe segments used to replace converters in overseas areas.

Enlisted Update

Sergeant Major Dwight L. Lanford

As the new Corps Sergeant Major, I solicit your support and welcome your suggestions on how to improve our JAG family. In the coming months, I hope to address areas of common concern and provide you with an update of ongoing projects. I look forward to the challenge of serving you.

(Sergeant Major Gunther Nothnagel, OTJAG Sergeant Major, retired in July 1986 and was awarded the Legion of Merit by The Judge Advocate General.)

CLE News

1. Resident Course Quotas

Attendance at residence 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

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. Civilian Sponsored CLE Courses

December 1986

1–3: GCP, Competitive Negotiation Workshop, Washington, DC.

5: GICLE, Secured Lending Under the UCC, Atlanta, GA.

8–9: PLI, Current Problems in Federal Civil Practice, New York, NY.

8–10: GCP, Patents & Technical Data, Washington, DC.

8–12: GICLE, GICLE Video Replays of Previous Programs, Atlanta, GA.

11–12: FBA, American FBA/NYSBA/BNA Institute on Labor Law & Labor Relations, New York, NY.

11–12: PLI, The New Telecommunications Era, Washington, DC.

12: GICLE, Labor Law Institute, Atlanta, GA.

19: GICLE, Legal Malpractice Prevention, Atlanta, GA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1986 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
Oklahoma	1 April annually starting in 1987
South Carolina	10 January annually
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.

5. Videocassettes Available

The Media Services Office of The Judge Advocate General's School announces that videocassettes from the 22d Fiscal Law Course (May 1986), the 10th Decker Lecture (Apr. 86), the 29th Federal Labor Relations Course (May 1986), and the 29th Military Judge Course (May 1986) are available to the field. The programs are listed below with the title, running time and synopsis for each video tape. If you are interested in obtaining copies of any of these programs, please send a blank 3/4" videocassette *of the appropriate length* to: The Judge Advocate General's School, U.S. Army, ATTN: Media Services Office (JAGS–ADN–T), Charlottesville, Virginia 22903–1781.

Number Date Length	Title Synopsis

22d Fiscal Law Course (12–15 May 1986)

JA–86–0055K
May 86
42:52

Obligation of Appropriations, Part I
Speaker: Major M. Devon Kennerly, Instructor, Contract Law Division, TJAGSA. An explanation of the commitment/certification of funds and the statutory time limits on the availability of funds for obligation. Discussion of the quantum of obligation created by various contract types and the manner by which obligations are adjusted when contracts are modified or terminated.

JA–86–0055K
May 86
44:42

Obligation of Appropriations, Part II
A continuation of Part I.

JA–86–0055K
May 86
49:00

Obligation of Appropriations, Part III
A continuation of Parts I and II.

JA–86–0055K
May 86
35:20

Obligation of Appropriations, Part IV
A continuation of Parts I, II, and III.

JA–86–0056K
May 86
44:00

Control of Appropriated Funds, Part I
Speaker: Major Steven M. Post, Instructor, Contract Law Division, TJAGSA. An explanation of the statutes requiring fiscal control and agency implementation of these statutes. Identification of transactions that violate the Anti-Deficiency Act (31 U.S.C.) and the investigation and reporting requirements imposed by law.

JA–86–0056K
May 86
45:00

Control of Appropriated Funds, Part II
A continuation of Part I.

JA–86–0056K
May 86
52:00

Control of Appropriated Funds, Part III
A continuation of Parts I, and II.

JA–86–0056K
May 86
46:17

Control of Appropriated Funds, Part IV
A continuation of Parts I, II, and III.

JA–86–0057K
May 86
57:22

Budgeting for Lawyers
Speaker: Major Roger W. Cornelius, Senior Instructor, Contract Law Division, TJAGSA. An explanation for attorneys of the basic process by which a budget is presented to Congress and by which funds are made available to an installation or activity.

JA–86–0058K
May 86
35:50

Family Housing
Speaker: Major Steven M. Post, Instructor, Contract Law Division, TJAGSA. An explanation of the statutory and regulatory restraints applicable to Family Housing maintenance, repair, and construction work.

JA–86–0059K
May 86
53:00

Minor Construction, Part I
Speaker: Major M. Devon Kennerly, Instructor, Contract Law Division, TJAGSA. An explanation of the laws, regulations and procedures pertaining to approval and funding of minor construction.

JA–86–0059K
May 86
12:46

Minor Construction, Part II
A continuation of Part I.

JA–86–0060K
May 86
41:30

Multiple Year Funding
Speaker: Major M. Devon Kennerly, Instructor, Contract Law Division, TJAGSA. A discussion of the funds that are available for obligation for limited times exceeding one year and the applicability of statutory controls to these funds. Distinguishing of the special statutory authority for multi-year contracts funded with annual and multiple year funds.

JA–86–0061K
May 86
26:20

Revolving Funds
Speaker: Major M. Devon Kennerly, Instructor, Contract Law Division, TJAGSA. An explanation of the operations of various revolving funds within the Army and how such operations may result in violations of Title 31, U.S. Code. The funding problems which arise when an activity buys from a revolving fund are explained.

JA–86–0062K
May 86
59:11

Fiscal Control and the General Accounting Office, Part I
Guest Speaker: Mrs. Rollee H. Efros, Associate General Counsel, General Government Matters Division, U.S. General Accounting Office. Mrs. Efros explains the function and methodology of the General Accounting Office in deciding fiscal law questions. The interpretative principles applied by GAO are explained through discussion of recent decisions.

JA–86–0062K
May 86
49:05

Fiscal Control and the General Accounting Office, Part II
A continuation of Part I.

JA–86–0063K
May 86
54:07

Fraud, Waste and Abuse
Speaker: Major Steven M. Post, Instructor, Contract Law Division, TJAGSA. An introduction to the programs and policies implemented by DOD and the Army to improve efficiency and reduce waste in the use of resources. Explanation of the procedural aspects of investigating and correcting, both administratively and criminally, alleged waste, fraud and abuse.

10th Decker Lecture (April 1986)

JA–86–0049A
April 86
50:00

Civil Liberty and Military Necessity: Some Preliminary Thoughts on Goldman v. Weinberger, Part I
The Tenth Charles L. Decker Lecture presented by Mr. Robert M. O'Neil, President, University of Virginia. Mr. O'Neil addressed the impact of the recent Supreme Court decision in *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) on the military and the First Amendment. The case concerns a Jewish Air Force officer who was ordered not to wear his yarmulke while on duty in uniform. The case affirms the right of the military to establish appropriate dress and uniform regulations and it establishes that these regulations do not abridge the free exercise of religion. Dr. O'Neil examines the issues raised by the case and its impact on civil liberties.

Number Date Length	Title Synopsis
JA–86–0049A April 86 26:00	*Civil Liberty and Military Necessity: Some Preliminary Thoughts on Goldman v. Weinberger, Part II* A continuation of Part I.

29th Federal Labor Relations Course (May 1986)

JA–86–0050A May 86 34:26	*Merit Systems Protection Board Practice and Procedure, Part I* Guest Speaker: Mr. Stuart Miller, Labor Counselor, Fort Gordon, Georgia. Mr. Miller discusses the processing of an employee appeal to the MSPB from beginning to end. Focus is on the role of agency counsel and includes helpful hints and guidance on representing the agency before the MSPB.
JA–86–0050A May 86 62:00	*Merit Systems Protection Board Practice and Procedure, Part II* A continuation of Part I.
JA–86–0051A May 86 45:00	*The Union Perspective of Federal Labor Management Relations, Part I* Guest Speaker: Mr. Robert M. Tobias, National President, the National Treasury Employees Union. Mr. Tobias addresses the major problems involving the implementation and administration of Title VII, Civil Service Reform Act of 1978. As he offers a very pro-union perspective, most of the talk focuses on the great strides needed to fully effect the statutory mandate.
JA–86–0051A May 86 50:00	*The Union Perspective of Federal Labor Management Relations, Part II* A continuation of Part I.
JA–86–0052A May 86 56:00	*The Role of the MSPB in Federal Employment Law, Part I* Guest Speaker: Honorable Dennis A. Devaney, Member, Merit Systems Protection Board. Mr. Devaney discusses the role of the Board and the significance of several recent Board decisions on agency employment practices.
JA–86–0052A May 86 56:00	*The Role of the MSPB in Federal Employment Law, Part II* A continuation of Part I.

29th Military Judge Course (19 May–6 June 1986)

JA–86–0064C May 86 57:41	*The Judicial Role in Trial Ethics, Part I* Guest Speaker: Dean John J. Douglass, Dean of National College of District Attorneys. Dean Douglass discusses issues concerning ethics and counsel in the courtroom as well as the judicial role in trial ethics.
JA–86–0064C May 86 42:00	*The Judicial Role in Trial Ethics, Part II* A continuation of Part I.
JA–86–0066C May 86 53:26	*New Developments at Coma, Part I* Guest Speaker: Chief Judge Robinson O. Everett, Court of Military Appeals. Judge Everett addresses new developments from the Court of Military Appeals.
JA–86–0066C May 86 29:00	*New Developments at Coma, Part II* A continuation of Part I.

Current Material of Interest

1. TJAGSA Publications Available through DTIC

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–84–1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD–B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD–B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD B094235	All-States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).

AD B090988 Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).

AD B090989 Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD B095857 Proactive Law Materials/ JAGS-ADA-85-9 (226 pgs).

Claims

AD B087847 Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).

AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).

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AD B100251 Law of Military Installations/ JAGS-ADA-86-1 (298 pgs).

AD B087850 Defensive Federal Litigation/ JAGS-ADA-86-6 (377 pgs).

AD B100756 Reports of Survey and Line of Duty Determination/JAGS-ADA-86-5 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).

AD B088204 Uniform System of Military Citation/ JAGS-DD-84-2 (38 pgs).

Criminal Law

AD B100238 Criminal Law: Evidence I/ JAGS-ADC-86-2 (228 pgs).

AD B100239 Criminal Law: Evidence II/ JAGS-ADC-86-3 (144 pgs).

AD B100240 Criminal Law: Evidence III (Fourth Amendment)/JAGS-ADC-86-4 (211 pgs).

AD B100241 Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS-ADC-86-5 (313 pgs).

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD 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
AR 1-1	Planning, Programming, Budgeting and Execution System		9 Jul 86
AR 27-21	Remedies in Procurement Fraud and Corruption		15 Jul 86
AR 351-9	Interservice Training		1 Jul 86
AR 380-28	Army Special Security Officer and Officer System		15 Apr 86
AR 735-11-2	Reporting of Item and Packaging Discrepancies	Ch2	5 Jun 86
AR 600-82	U.S. Army Regimental System		1 May 86
AR 600-100	Personnel-General Army Leadership		27 May 86
AR 680-29	Military Personnel, Organization, and Type of Transaction Codes		1 Aug 86
AR 680-330	Reporting Requirements Under the Civilian Personnel Information System		30 Apr 86
DA Pam 525-14	Joint Operational Concept for Air Base Ground Defense		Jul 86
DA Pam 600-88	White Paper 86		Jun 86
DA Pam 608-41	Army Family Action Plan III		20 May 86
G.O. 25	Army National Cemeteries		30 Jun 86
UPDATE 6	Message Address Directory		25 July 86
UPDATE 10	Morale, Welfare, and Recreation		10 Jun 86

*U.S. GOVERNMENT PRINTING OFFICE: 1986-490-999:40367

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).

Bean, *Grandparent Visitation: Can the Parent Refuse?,* 24 J. Fam. L. 393 (1985–86).

Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467 (1986).

Criminal Practice and Procedure: A Symposium, 37 Mercer L. Rev. 899 (1986).

Cronin, *The Rights of Criminal Suspects—Some Recent Cases,* 71 Mass. L. Rev. 89 (1986).

Edwards, *Do Lawyers Still Make a Difference?,* 32 Wayne L. Rev. 201 (1986).

Gold, *Sanitizing Prior Conviction Impeachment Evidence To Reduce Its Prejudicial Effect,* 27 Ariz. L. Rev. 691 (1985).

Klitzman, Baab & Murphy, *Ratification of the Genocide Convention: From the Ashes of "Shoah" Past the Shoals of the Senate,* 33 Fed. B. News & J. 255 (1986).

Kotler, *Reappraising the Jury's Role as Finder of Fact,* 20 Ga. L. Rev. 123 (1985).

Lynch, *The Insurance Panic for Lawyers,* A.B.A.J., July 1986, at 42.

Murchison, *The Dual Sovereignty Exception to Double Jeopardy,* 14 N.Y.U. Rev. L. & Soc. Change 383 (1986).

Nash, *The* Lusitania *and Its Consequences,* 136 New L.J. 317 (1986).

Salsich & Fitzgerald, *Mediation of Landlord-Tenant Disputes: New Hope for the Implied Warranty of Habitability?,* 19 Creighton L. Rev. 791 (1986).

Scheible, *Marital Property in Tennessee: An Evolution, Not a Revolution,* 15 Mem. St. U.L. Rev. 475 (1985).

Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine,* 95 Yale L.J. 992 (1986).

Shafton, *The Importance of Client Education,* 4 Preventive L. Rpt. 155 (1986).

Teitelbaum, *Family History and Family Law,* 5 Wis. L. Rev. 1135 (1985).

Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth,* 99 Harv. L. Rev. 1728 (1986).

Note, *DR 1–103: Lawyer's Duty To Report Ethical Violations,* 10 J. Legal Prof. 159 (1985).

Note, *Service Connection and Drug-Related Offenses: The Military Courts' Ever-Expanding Jurisdiction,* 54 Geo. Wash. L. Rev. 118 (1985).

Note, *Submarines and Targets: Suggestions For New Codified Rules of Submarine Warfare,* 73 Geo. L.J. 975 (1985).

Commentary, *The ABM Treaty and the Strategic Defense Initiative,* 99 Harv. L. Rev. 1972 (1986).

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