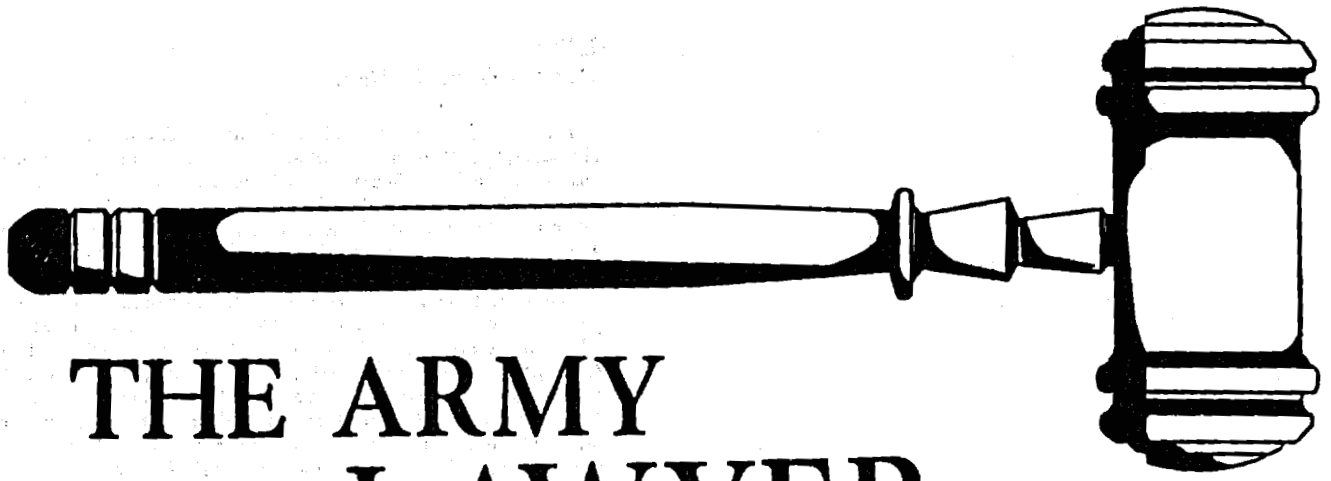

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The Delivery of Legal Services in USAREUR: Lessons for All Staff Judge Advocates

*Colonel M. Scott Magers**
Staff Judge Advocate, U.S. Army Training & Doctrine Command, Fort Monroe, Virginia

Introduction

In response to allegations of unfairness in the imposition of military justice in some units in the United States Army, Europe (USAREUR), the Commander in Chief, USAREUR, on 27 January 1984 appointed[1] Colonel James E. Noble, Chief Judge, Fifth Judicial Circuit "to conduct an informal inquiry into the organization of USAREUR Judge Advocate Offices, minus Berlin and SETAF, to deliver command legal advice."[2] Specifically included in the letter of appointment were directions to Colonel Noble to inquire into incidents concerning mass apprehensions of suspected drug offenders. In a three-month investigation, he interviewed commanders and their military lawyers at most major USAREUR installations. The more than 100 interviews were tape recorded and then transcribed verbatim. Colonel Noble's report contained hundreds of pages of facts, findings, recommendations, and statements that not only respond to his letter of appointment, but also provided a wealth of information concerning the management of military legal offices in USAREUR. Colonel Noble found that "USAREUR Judge Advocate Offices are better organized, better staffed and more appropriately located to provide command legal advice than ever before."[3] Nevertheless, enough weaknesses were noted in the management of the legal offices to require consideration and analysis by all judge advocates (JAs) about how improvements might be made. Of particular value in determining how the delivery of legal services might be improved are the views of the commanders interviewed by Colonel Noble.

With some limited exceptions, the findings and recommendations in Colonel Noble's report were approved on 8 August 1984 by the Commander in Chief, USAREUR.[4] Subsequently, The Judge Advocate, USAREUR, provided the staff judge advocates (SJAs) of the general court-martial convening authorities in USAREUR with a copy of the report, minus the verbatim statements. At that time, SJAs were asked to review their office organization and management to include the possible consolidation of legal assets, rating schemes, job statements and standing operating procedures (SOPs), and the training of the JAs advising special court-martial convening authorities.[5] As would be expected, Colonel Noble's report was the topic of much conversation within the USAREUR legal community and was the formal and informal subject of discussion at subsequent conferences attended by USAREUR JAs. Based on the situation in their individual commands, SJAs throughout USAREUR made necessary changes in their office organization and management as suggested by the report.

The purpose of this article is to highlight a few of the findings in the report as a vehicle to discuss managing a military legal office. My access to the complete report of investigation allowed me to review the many statements from commanders and JAs at several levels of responsibility and experience. Although only a few of these statements are specifically cited in this article, it was my observation that the responses to Colonel Noble's questions fell into consistent patterns depending on who was being interviewed: SJAs found it difficult to manage their personnel who are spread over a large geographic area; OICs felt a need for more contact with their SJAs; first and second term captains felt a need for more experience and supervision; and brigade level and below commanders, although generally pleased with the legal advice they were receiving, recognized the inexperience of their legal advisors. As a military lawyer who recently served as an SJA in USAREUR, I believe the insights gained from the report will benefit those responsible for managing military lawyers and delivering legal services. This article is not intended to be a comprehensive treatment about how to manage an SJA office or a thorough discussion of current management theory, but it will hopefully stimulate thought and discussion on this important subject. I recognize that some JAs consider their management responsibilities to be less a priority than providing sound legal advice. I suggest, however, that a busy legal office that is not well organized and managed will soon experience a degradation in the quality of the legal advice provided. I also anticipate that some JAs will disagree with suggestions I make in office organization and management as there is clearly "no one way to run an office." Any such disagreement will only enhance the discussion, study, and analysis that is needed to improve the management abilities of individual JAs. The findings of Colonel Noble's report do indicate that insufficient emphasis has been placed on the management training of SJAs and other military lawyers in management positions.

Although the focus of this article will be the organization and management of an office headed by the SJA of a general court-martial convening authority, the findings from Colonel Noble's report and my discussion should prove helpful for military lawyers managing at all levels of responsibility. Colonel Noble's findings concerning mass

*This article was originally prepared as an individual study project while Colonel Magers was a student at the United States Army War College.

[1] The appointment was made pursuant to Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977).

[2] Colonel James E. Noble, Army Regulation 15–6 Investigation of USAREUR Legal Offices, 6 May 1984, TAB A [hereinafter Noble Investigation].

[3] *Id.* FACTS, Section III. Colonel Noble continued in this section by saying: "The assigned lawyers are also better trained and have more experience collectively, than any group of lawyers previously assigned to USAREUR. The offices are generally well located to support troop population centers."

[4] Colonel Noble had recommended that "consideration be given to designating OSJA Branch Office OICs [officers-in-charge] as Staff Judge Advocates to reflect properly their duties and to enhance their status as supervisory lawyers in the JAG Corps." This recommendation was disapproved and changed to read as follows: "OSJA Branch office OICs have many responsibilities similar to those of SJAs and must be trained accordingly." *Id.*, Section VIII Form 1573, TAB B.

[5] Letter from Brigadier General Ronald M. Holdaway, Judge Advocate USAREUR to author (Aug. 1984).

apprehensions in USAREUR will not be discussed. Issues involved in some of those apprehensions are presently in litigation that will likely result in guidance from the Court of Military Appeals on this important subject. The problems that arose from the procedures followed by commanders and criminal investigators while conducting specific mass apprehensions may indicate questionable legal advice, but any comment on those incidents would be beyond this more general discussion of management issues highlighted by the investigation. It is the thesis of this article that the SJA who is applying widely recognized management principles and theories will decrease the likelihood of his or her personnel providing improper legal advice on any subject.

Serving the Client

A fundamental question faced by managers of all organizations is how well the organization is providing the service or product for which it was created. Thus, the SJA must be concerned about whether commanders, their staffs, legal assistance clients, and others eligible for legal support are receiving the high quality advice they deserve. Feedback on this issue is available through client satisfaction surveys, comments from commanders on Officer Efficiency Reports, and informal statements from those receiving advice. The Noble report reflects that commanders are generally very pleased with the legal support and advice they are receiving in USAREUR. Nearly all commanders stated that they often conferred with "their lawyer" and considered the JA a full member of their staff. This is not a new development nor is this appreciation for the military lawyer's advice confined to USAREUR. A commander's willingness to follow the advice of a JA is likely based on an understanding that command and installation problems have become increasingly complex over the years. The Judge Advocate General's School (TJAGSA) course, Senior Officer Legal Orientation, has made a significant contribution in convincing commanders of the importance of legal advice to mission accomplishment.

Although commanders generally expressed confidence in the advice they were receiving, many expressed to Colonel Noble a concern for the lack of military experience by many of the junior JAs who were providing advice at the special court-martial convening authority level and below. One senior officer felt the junior JA providing him advice did not understand "the functioning of a large organization or the soldiering aspects of a large organization," nor did he believe the lawyer understood the life style of the soldiers the company level commanders dealt with when taking disciplinary action.[6] Concern about the depth of a junior JA's experience can quickly turn into a question concerning the officer's competency and a subsequent reluctance by the commander to either seek or follow legal advice.

The need to provide experienced JAs to advise commanders at the special court-martial convening authority level and below is a particular problem in USAREUR where the wide dispersion of troops results in many SJAs being forced to place inexperienced officers in branch offices near commanders and soldiers, but many miles from the main legal office serving the area general court-martial convening authority's jurisdiction. Often these branch offices are staffed by only one or two JAs who are serving in their first or second tour of duty. The importance of this problem was stated by Colonel Noble in his report:

> The one-JAG branch office is the most significant management problem in USAREUR JA operations. It represents a great potential for providing inadequate legal advice to commanders, for insensitive feedback of information to the SJA and for poor management, supervision and training of inexperienced lawyers... Despite the hard work and dedication to duty of the JAG officers assigned to one-JAG branch offices they practice in a situation of peril that would mandate a civilian law firm increasing considerably its malpractice liability insurance limits.[7]

The issue of experience is one primarily of training and the responsibility for that training belongs with the SJA. One of the general officers who provided a statement to Colonel Noble complimented a corps SJA by stating this particular SJA did a great job because he "trained lawyers."[8] The training responsibilities of the SJA are fundamental to his or her duty to ensure that all of his or her subordinates are providing the highest quality legal advice.

The SJA as a Trainer

The SJA who is concerned about training his or her subordinates faces a difficult task. The SJA has military lawyers, enlisted soldiers, and civilian personnel of varying degrees of talent, education, experience, and commitment, who are performing a variety of duties within the office. Certainly it can be expected that each individual has a basic level of knowledge and competency. A direct commission JA recently graduated from the Basic Course at TJAGSA, however, will have a limited understanding of the Army and the lawyer's role in the Army at best. This particular problem received good analysis in an article by Major Jack B. Patrick, where he stated: "Supervisors must evaluate the personal and professional needs of subordinates and then give them the training and tools to do their jobs."[9]

This need to train or teach subordinates is a part of the concept of mentoring that is so much a topic of conversation in today's Army. The Chief of Staff of the Army, General John A. Wickham, Jr., wrote in a letter to his subordinates, "All leaders are teachers, and teaching is a part of mentoring." He went on to state that "mentoring is a key way in which we exercise leadership and strengthen Army values. Giving of ourselves by sharing our knowledge and

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[6] Noble Investigation, *supra* note 2, Exhibit 4, p. 17. This commander also stated in reference to this JA:
> I felt less comfortable with his advice because, very truly, he was—I think he was uncomfortable. My perception is that he was uncomfortable with criminal law and that his comfort was more in administrative law, tax law. . . . My commanders, from the bottom up, were telling me that they weren't getting consistent advice, battery-level commanders. He just wasn't as well prepared to be a special court-martial advisor as was Captain [X].

[7] *Id.*, Paragraph 6, FINDINGS, Section III.

[8] *Id.*, Exhibit 147, p. 4.

[9] Patrick, *Judge Advocate Training and Learning: "Newbees" and the Boss*, The Army Lawyer, Oct. 1985, at 7, 8.

experience is the most important legacy we can leave to those who follow."[10]

One individual who certainly needs the benefit of the SJA's experience and teaching is the deputy staff judge advocate (DSJA). Several years ago, I wrote in *The Army Lawyer* that "the job of deputy staff judge advocate is neither understood nor popular."[11] It is my opinion that the position of DSJA is now much sought after as a career rewarding and enhancing assignment that is of great value to those seeking to serve as SJAs. Clearly the position is key to the successful management of a busy legal office and the delivery of high quality legal advice and services. Each SJA will define the role of his or her deputy differently. There are some basic principles concerning the role of the DSJA, however, that should be considered by all SJAs. Because the SJA will periodically be absent from the office for leave, temporary duty, or even illness, the DSJA must be prepared at all times to serve as acting SJA. This means that the DSJA must be familiar with all actions within the office and that he or she must not concentrate exclusively in one area of the law or management of one section of the office. To gain the experience that prepares the DSJA for the role of acting SJA and for future assignment as an SJA, the DSJA should see virtually all actions that require the SJA's signature and most actions that leave the office without the SJA's signature. Within the guidelines established by the SJA, it should be the responsibility of the DSJA to make those personnel and administrative decisions that are necessary for the smooth operation of the office. If the DSJA does not have this responsibility, his or her authority and prestige within the office will be such that he or she will be of little value to the SJA.

In this area of office management, the DSJA can make good use of a properly developed standing operation procedure (SOP). Although SOPs will be discussed later in this article, their importance in establishing how various tasks will be performed cannot be over emphasized. Other written guidance concerning internal office management procedures or policy should be signed by the DSJA to assist in establishing his or her role in office management. Many of the junior JAs who were interviewed by Colonel Noble mentioned the importance of receiving advice from the DSJA on issues that did not require the SJA's attention or at times when the SJA was not available. Although in USAREUR the DSJA is not always in the rating scheme of the officers in charge (OICs) of the branch offices, I believe that the DSJA should be formally involved in their rating to ensure his or her effective assistance in supervising those officers. The SJA and DSJA who have systematically settled on a management philosophy and policy for their office will serve as a management team that will not only be prepared to provide the necessary training for their subordinates, but will also ensure the advice and services provided by those subordinates meet the highest professional standards. The SJA's training responsibility toward the DSJA will be served by providing the DSJA the maximum opportunity to make decisions concerning routine office administration and substantive law issues.

Some of the most significant findings of Colonel Noble's report dealt with SJA management of the OICs of the USAREUR SJA branch offices. Those findings provide suggestions on how the OICs might be better prepared to perform their responsibilities. He found that:

> Adequate recognition is not given to the true role the field grade branch OIC of a busy branch office has in providing legal services. Neither is his job description defined adequately to illustrate properly that role. Most often it is not defined at all except by understanding between the Command SJA and the Branch Office OIC. The OIC of a significant branch office who provides command legal advice to Brigadier Generals and Colonel-Brigade Commanders is essentially a Staff Judge Advocate.
>
> Failure to define clearly the duties and responsibilities of branch office OIC is a management omission. Definition of duties and responsibilities in an Officer Efficiency Report is a poor substitute for a clearly written job description implemented in a clear management framework.
>
> Briefing and preparation of JAs to be OIC of a branch office, and to provide legal advice to senior commanders, should receive more attention.[12]

Although branch offices are more prevalent overseas than in the United States, the issue of how to prepare and then manage officers assigned as OICs of branch offices deserves consideration by all SJAs who supervise JAs who are independently advising commanders and their staffs. In USAREUR, there has been a generally successful attempt over the years to increase the rank and experience level of those assigned to these rewarding, but difficult jobs. It would be preferable if all large branch office OICs were TJAGSA Graduate Course graduates. Most Graduate Course graduates serving as OICs told Colonel Noble that they felt the course had done a good job preparing them for the OIC position, although one officer specifically stated he felt least prepared in the area of management.[13] For those OICs who have not attended the Graduate Course, the lack of management training and generally shallow experience in the various areas of military law may cause a feeling of inadequacy in this difficult position.[14]

Colonel Noble's findings concerning OICs of SJA branch offices in USAREUR can be summarized by three major points: the role and responsibilities of the OIC is not clearly understood; the OIC receives inadequate preparation for

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[10] Letter from General John A. Wickham, Jr., Chief of Staff to Subordinates (May 1985) (undated).

[11] Magers, *Role of the Deputy Staff Judge Advocate*, The Army Lawyer, Sept. 1978, at 18, 21.

[12] Noble Investigation, *supra* note 2, paragraphs 3–5, FINDINGS, Section III.

[13] *Id.*, Exhibit 97, p. 16. This officer stated that:
I had done a little bit of just about everything before I came here. And then the experience in the Graduate Course helped. I felt relatively well prepared. I think where I felt the weakest was in areas of management. The kinds of things that you look to a Warrant Officer or a Senior NCO to assist in managing. I had never been involved in that and not having a Warrant Officer here, not having the depth of experience in a branch that you have in a large office. I think our weakest link is in the management or administrative area.

[14] In response to a question from Colonel Noble concerning how management instruction at TJAGSA could have helped a non-Graduate Course captain, the officer responded: "Mostly it's just a matter of the little things of how best to run an office." *Id.*, Exhibit 36, pp. 9–11.

the job; and the OIC is not supervised within "a clear management framework." These points serve as a vehicle to discuss how the SJA might assist the improved performance of the OIC.

Defining the OIC Role and Responsibilities

The problem of OICs not thoroughly understanding their jobs was illustrated in the statement from one experienced OIC when he told Colonel Noble that some of the OICs he spoke with at USAREUR conferences seemed to be "out just wandering around on their own" when it came to performing their jobs.[15] Whether the majority of OICs are confused about their roles is questionable, although Colonel Noble's suggestion for written guidance from the SJA to the OIC would be helpful. This guidance could be included in the office SOP or in a separate document that would be continually reviewed as mission needs change. One obvious purpose of written guidance is that it reduces misunderstanding between the SJA and the OIC; it serves as a readily available guide for the OIC as he or she manages the branch office. Having created a document setting forth how the SJA expects the OIC to perform his or her job, however, does not substitute for the larger SJA responsibility to ensure through routine contact that the OIC understands the guidance.

One of the most critical inhibitors in USAREUR to this important communication is the distance between the offices of the various SJAs and their branch offices. Many offices are one hour driving time apart, and in some jurisdictions the distance is much greater. All OICs interviewed by Colonel Noble felt it was very helpful to have the SJA visit their branch office on a routine basis and many expressed the view that the visits were not frequent enough. An SJA visit is an obvious opportunity to discuss the daily problems and broader responsibilities the OIC faces.

Colonel Noble's investigation indicates that in most jurisdictions there are frequent telephone conversations between the OIC and the DSJA or SJA. This means of communication is extremely important to ensure that the SJA is apprised quickly of developing problems and the OIC receives guidance that might affect the branch office. Routine telephone conversations also develop relationships between the OIC and his or her superiors that should result in a more comfortable and open attitude when faced with solving crises. Telephone communications, however, do not have the same value as face-to-face conversations that by their nature allow for a more thorough, relaxed, and satisfying discussion. It is through these personal meetings that the SJA and the OIC can best define the role and responsibilities of the OIC.

I was an SJA in USAREUR responsible for branch offices and I had previously served as an OIC of a branch office in the same division. Based on these experiences, I think the time and effort the SJA spends visiting the branch offices is worthwhile. I would recommend that a monthly visit is appropriate. If the time between visits is much shorter the OIC may receive more supervision than is necessary, and if the visits are less frequent they become too big an event in the daily operation of the office. Several of the OICs saw the greatest importance of the visit as an opportunity to show the enlisted soldiers that the SJA was interested in the work of the branch office and appreciated the work being performed there.[16] During these visits, time should be taken to speak with enlisted soldiers, civilians, and junior captains to show that the SJA is interested in all legal services being provided by the office. I found it helpful early in my assignment to schedule a luncheon with the enlisted soldiers in each branch to become better acquainted with them and to gain an appreciation of the problems they faced in their work. I understand that there are some jurisdictions in USAREUR where the number and distances of branch offices make monthly visits difficult. After the experience of two tours in USAREUR, however, I am absolutely convinced that these visits are important and I am concerned that SJAs too often find excuses to avoid this critical responsibility.

In summary, these routine visits help to develop the communication between the SJA and the OIC that is so important to the OIC understanding his or her job. One brigade level commander responded to Colonel Noble's questions concerning the relationship between the branch office lawyers and the SJA with the following statement: "he [the SJA] seems to know what the hell these guys are doing all the time. . . . They seem to have a good network where they are tuned into each other and communicate very well."[17] With such a level of communication, the OIC will understand his or her role and responsibilities.

Preparing the OIC for the Job

Colonel Noble's finding that OICs do not receive adequate preparation for the job has been discussed above by my comments concerning the policy of assigning more experienced officers as OICs. The SJA can provide part of this experience by ensuring that young officers assigned to the office receive the widest and best possible job training in the positions that are available. This means that every effort should be made to provide job rotation on about a yearly schedule for the first or second term JAs. The SJA may not be developing a middle manager for his or her own office, but the officer who is provided this broad experience will later be available to serve as OIC of an SJA branch office in USAREUR or a similar position in another part of the world.

The SJA also has a responsibility in preparing officers for OIC positions that goes beyond providing them broad work experience and defining their roles and responsibilities. In his or her role as a trainer or mentor, the SJA must spend time with younger officers, passing on to them the lessons and values he or she has learned through his or her experiences as a military officer and as a lawyer. This includes not only how to resolve legal conflicts but also how to understand and serve commanders and staffs, how to deal with superiors within The Judge Advocate General's Corps, how to maintain proper professional relations with members of the Trial Defense Service and the Trial Judiciary, how to maintain high personal and professional ethics, and other wisdom too extensive to list. Receiving the benefit of the SJA's experience is particularly important for the officer

[15] *Id.* Exhibit 174, p. 13.

[16] *Id.*, Exhibit 36, p. 14.

[17] *Id.*, Exhibit 168, p. 6.

serving as an OIC as he or she directly supervises young officers who must be taught the special demands of serving as a professional lawyer and soldier.

There is no one best way for the SJA to assist his or her subordinates in developing the skills necessary for successful management, but the SJA can use frequent social and professional contacts to share the lessons from his or her own experiences. To be successful in most fields, one must be more than technically proficient. This is true in the law and is certainly true for military lawyers. Understanding the nuances of the military practice of law is important and should be a subject within the teaching responsibility of more senior military lawyers.

The SJA as a Manager

Colonel Noble's finding that OICs should be supervised within a "clear management framework" deserves specific comment and analysis.[18] There is clearly no "one way" to successfully manage a military legal office, although there are some fundamental principles of good management and organization that have proven effective over the years in USAREUR and elsewhere. Management has historically received only limited attention in the formal education of Army JAs. The Graduate Course student at TJAGSA has been receiving classes in the subject only since the early 1970s, the Law Office Management Course was started at about the same time, and the SJA Course provides only a few hours of instruction. There seems to be a growing awareness of and interest in the management responsibilities of the SJA, however. One indication of this is the great popularity of a seminar conducted the last several years at The Judge Advocate General's World Wide Conference in Charlottesville, Virginia. This seminar focuses on the management problems of the SJA and provides an opportunity for SJAs to exchange ideas on these problems.[19] Similar seminars are conducted at USAREUR SJA conferences to the benefit of all participants. Based on my participation in these seminars, my reading of Colonel Noble's report of investigation, and my previous experience of teaching management at TJAGSA, it is my opinion that most SJAs are eager to improve their management skills and to learn from the experiences of their peers. The difficulty is that there are too few opportunities for the exchange of ideas on management and there has been little written on the management of a legal office in *The Army Lawyer*, the most appropriate forum.[20] The many statements from JAs and commanders concerning the delivery of legal services contained in Colonel Noble's report provide a framework for discussing some principles of good office management that may assist the JA interested in improving his or her own skills.

Develop Written Policies, Procedures, and Standards

Organization is a trait of most good managers. In the context of managing a legal office, this means that policies, procedures, and standards are set forth clearly in writing. An office SOP is often used, but too often the SOP is an outdated general statement of the office mission that can be found on the top row of the oldest bookcase in the library. The SOP should be a living document that not only sets forth current policies, procedures, and standards, but also provides a compilation of detailed steps or checklists on how various office functions are performed and by whom. These checklists may deal with processing a general court-martial referral, a report of survey, or a household goods claim, but the checklists should be so clear and complete that a legal specialist with little training or experience can successfully complete his or her assigned task.

Desk books for trial counsel and administrative law officers should also be compiled to supplement SOPs and provide specific guidance to officers working in these special areas of the law. Through the use of these desk books, the SJA is able to provide written guidance on how to respond to questions that reoccur in a busy office. The desk books should also contain forms, formats, and standard letters that are used on a routine basis. The purpose of these desk books is to ensure high quality professional products by suggesting proper legal and evidentiary analysis, streamlining research efforts, and developing consistency. Particularly for the officer new to the office or the Army, it is extremely helpful to know exactly how the SJA wants a particular task completed and to be able to review as often as necessary the policies and procedures that are to be followed. For examples, the trial counsel desk book should have a detailed discussion of how to develop a good working relationship with brigade level and below commanders, and the administrative law desk book should explain how to review a report of survey for legal sufficiency and then provide the exact format that should be used in sending this advice to the appointing authority. Other desk books should be developed in those areas of the law where advice is routinely given and standardization would assist in the delivery of the service or advice.

Establish Routine

The experienced SJA will develop as much routine in his or her work habits as possible without eliminating the flexibility that is always necessary if he or she is to respond properly to the crises that arise. Routine is important to subordinates who are responsible for moving legal actions to the SJA for guidance, decision, or signature, and who need some assurance in planning their own work that the SJA will be available when needed. It is a common failure of many managers to allow actions that need attention to remain in an "in-box" much longer than is necessary for proper consideration. This trait is often detrimental to the organization and is hard on the morale of subordinates. Part of the routine of each SJA should be to spend time every day making those decisions and "moving" that paperwork that needs to flow through the office in support

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[18] *Id.*, Paragraph 4, FINDINGS, Section III.

[19] These seminars have focused on various law office management topics. At the 1985 Conference, the topic was "SJA Office Management: What Are the Trade Secrets?". The seminar purpose was "to provide a forum for exchange of management experience and ideas among SJAs." Administrative Handbook, 1985 JAG Conference. A similar seminar was held at the 1986 Conference.

[20] In addition to the articles cited previously, the following articles concerning management topics have appeared in *The Army Lawyer:* Pardue, *Ten Steps to a More Successful Legal Assistance Practice,* The Army Lawyer, Oct. 1985, at 3; Stevens, *Law Office Automation and the Judge Advocate General's Corps,* The Army Lawyer, Dec. 1983, at 10; Gaydos, *The SJA as the Commander's Lawyer: A Realistic Proposal,* The Army Lawyer, Aug. 1983, at 14; McColl, *The Small OSJA,* The Army Lawyer, Feb. 1980, at 38.

of commanders and their staffs. Establishing routine is a time-management skill. Time-management is important to the successful manager in any field. How to apply time-management techniques to a military legal office deserves special consideration in a future article.[21]

Delegate

The ability to properly delegate to subordinates is one of the toughest and most important management skills to be learned by the SJA. This issue was often raised by the SJAs and junior JAs who provided statements to Colonel Noble's investigation. Even when an SJA is dealing with an experienced OIC or trial counsel, there is a tendency for the SJA to overmanage the officer and become involved in even the smallest detail.

The point can best be illustrated by considering again the mission of an OIC in a typical SJA branch office in USAREUR. Assuming the OIC has the necessary experience and ability to perform the job, the SJA should have delegated to the OIC orally and in writing the responsibility for ensuring the delivery of high quality legal services in his or her community. In my opinion, this degree of delegation is important in all areas of the law and includes giving OIC supervisory responsibility over trial counsel who are providing advice to commanders within the branch office community. This means that a trial counsel should first seek routine guidance or assistance from the OIC. The chief of military justice, DSJA, or SJA serving in a distant location should only be contacted if the OIC is not able to provide the necessary assistance. This level of delegation enhances the position of the OIC, serves to provide him or her with the broad supervisory experience that he or she will need at a later stage of his or her career, and frees the chief of justice, DSJA, and SJA to concentrate on more critical aspects of their jobs. This type of broad delegation assumes the OIC will keep the SJA or DSJA informed of any significant problem or issue that might arise in his or her community.

In its simplest terms, proper delegating means not performing a job that a subordinate is getting paid to perform. Thus, the SJA should not be his or her own action officer except in special "close-hold" tasks for the chief of staff or the commanding general too sensitive for involvement by others. This is a hard lesson for managers to learn because they reached their level of responsibility performing as successful action officers and they may still believe they can outperform their subordinates in any given task. An SJA's ability to quickly and accurately provide legal memoranda on a wide variety of subjects may well exceed his or her subordinates. There are two very good reasons, however, why SJAs should resist the temptation to become just another action officer: part of the SJA's training responsibility is to assist the development of his or her subordinate's ability to analyze, research, write, and brief legal opinions; and the SJA who is busily performing the role of an action officer is likely neglecting those management functions required to ensure quality legal services are being provided throughout his or her area of responsibility. Delegation is certainly easier in a larger office than in a smaller one, but most successful managers have learned its importance.

Meetings—Are They Worthwhile?

I have discussed the need for written direction and guidance for subordinates, the need for routine phone conversations with OICs, and the importance in USAREUR for the SJA to visit branch offices. Another means of communication is through meetings. In several jurisdictions in USAREUR, SJAs utilize OIC meetings at central locations to have personal contact with the OICs. In my opinion, these meetings should not substitute for the previously discussed SJA visits to branch offices, but they are a beneficial part of a successful SJA's management program.

Nearly all JAs who provided statements to Colonel Noble found meetings with their peers and supervisors extremely valuable and expressed the desire to increase the frequency of professional meetings. It was my experience that routine meetings for legal assistance officers, trial counsel, and administrative law attorneys were as useful as those for my OICs. The purpose of the meetings is to give guidance, learn of problems, exchange ideas, and develop working relationships that are important to the esprit de corps of the office. The meetings should be held every four to six weeks and should be conducted from an agenda to assist in providing direction. For SJA offices in the United States where JAs performing similar work are located on the same installation, meetings will serve the same purposes.

Follow-Up on Guidance Provided

The importance of written and oral guidance to ensure subordinates understand what is expected of them as they perform their duties has been explained, but the experienced manager knows that without checking to see if the guidance is being followed, the purpose of the guidance may never be realized. The SJA, like any other manager, must devise ways to "follow-up" to see if his or her guidance is being ignored. Weekly reports are helpful to ascertain whether courts-martial are being processed as expeditiously as directed or claims are being paid in a timely manner. Legal assistance letters and administrative law reading files can be skimmed to ensure formats and quality standards are being met. Notes questioning the progress of significant actions can also serve to remind subordinates of the SJA's interest in their work. Whatever method the SJA might use, it is important for subordinates to understand that although they will be delegated responsibility commensurate with their experience and ability, the SJA will fulfill his or her responsibility to periodically check and evaluate their work. In summary, the SJA or the DSJA must routinely check to ensure that guidance is being followed throughout the office.

Work Performance Standards

No discussion of management would be complete without comment on the importance of setting high professional standards for the work that is being done by the organization. The SJA who clearly communicates the policies and procedures that should be followed by his or her subordinates, who checks to ensure compliance, and who has

[21] An excellent introduction to time-management principles is found in the Time-Life Video course series, *Time Management for Managers* (Videorecording, Los Angeles: Time Life Films, 1980) (Video Cassette HD38 T55). The course contains six videocassettes, a workbook, and a trainer's manual. The subjects included are principles of management, decision-making, delegating, scheduling, managing interruptions, and personal and professional time-management.

established high standards for work accomplishment, will find the office developing a reputation for outstanding delivery of legal services. There must never be any compromise on quality as sound legal advice is vital to the client's interest. Colonel Noble expressed concern about this issue when he stated: "The thought persisted throughout the investigation that OIC and legal advisors are not critically aware of how detrimental their advice could be to soldiers of a brigade or to the brigade commander's career, if that advice was wrong."[22] The problem of ensuring high quality legal work is exasperated in the SJA office because of the need to continually train new lawyers and provide opportunity for more experienced JAs to work in different areas of the law. This issue is interrelated with the SJA training responsibilities and need to check subordinates' work which have previously been discussed. All personnel in the office must understand the need for high standards and must recognize that after review by a superior, legal opinions may have to be revised prior to dispatch. The reviewer should not change "happy to glad," but all legal writing must be clear, concise, well researched, and correctly analyzed. The junior JA who is not held to high standards of performance will not experience the professional development that he or she needs for a successful career and future positions of responsibility.

Conclusions and Recommendations

An assignment as an SJA is a rewarding experience that requires not only a lawyer knowledgeable in a wide spectrum of military law, but also an individual who understands and is willing to apply sound management principles to the organization and administration of his or her office. Colonel Noble's investigation in the delivery of legal services in USAREUR provided insights into how SJAs can better manage their offices and thus better serve their commands. Although SJAs receive considerable legal training through military and civilian schools prior to being placed in this critical position, their management training and education is often inadequate. Fortunately, the Judge Advocate General's Corps has the opportunity to correct this deficiency by increasing the amount of management instruction provided at courses at TJAGSA. In particular, I recommend that instruction during the Graduate Course increase the emphasis on management issues in each subject area. It is not enough to know substantive law—the successful JA must understand the administrative, procedural, and practical problems he or she will encounter in providing legal services. I also recommend that additional time be added to the SJA Course during which the students would concentrate on the many management problems that will take so much of their time and effort when they become SJAs. It is a well-known fact among SJAs that their most difficult problems do not concern complex legal issues, but involve crises of personnel and administration that can have a disastrous effect on office mission if not properly resolved.

The list of management-related subjects that could be discussed at both the Graduate Course and the SJA Course is almost endless, but could include rating subordinates, husband-wife lawyer teams, office social programs, using the JACC technical channels, time-management techniques, military justice case processing, decision-making, interpersonal sensitivity, stress management, and ethical issues involved in assignment policy. The importance of technical proficiency in the law should not be underestimated, but the military lawyer in a management position has the added responsibility to ensure that the numerous clients seeking counsel in a variety of legal subjects all receive advice that is both timely and professional. Successfully meeting this responsibility requires a manager who knows how to motivate, supervise, teach, communicate, and set standards. These are all skills that can be learned and are worth additional teaching time at the courses intended to assist the military lawyer in management positions.

Although an increase in the management subjects taught at TJAGSA would be a positive development, I also suggest that military lawyers increase their writing for publication on management topics. Many of the subjects listed above as topics for discussion in management courses at TJAGSA could also be subjects for articles written for publication. Many innovative ideas are being developed in military legal offices around the world concerning better ways to deliver legal services. The analysis and discussion of these ideas and other management issues in *The Army Lawyer* would benefit the large number of JAs who want to develop and improve their management skills.

[22] Noble Investigation, *supra* note 2, paragraph 1.c, FACTS, Section V.

What Commanders Need To Know About Unlawful Command Control

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Introduction

Anyone who has read an Army Times or skimmed the advance sheets from the courts of military review during the last year is aware of the tremendous impact that one mistake in the area of command control can have on military justice and the military justice system. The purpose of

*This article was written while Major Gaydos was an Instructor in the Criminal Law Division at TJAGSA.

this article is to present a methodology judge advocates can use to "teach" commanders about lawful and unlawful command control. Teaching command control, like teaching any subject, involves a degree of salesmanship. First, the judge advocate must convince the commander of the importance of the subject matter. Next, the material must be packaged properly. The judge advocate should set out the themes and follow them with an organized presentation of the law in the area. Finally, the law must be applied to some practical situations that commanders can relate to their own experiences.

What makes command control a particularly challenging subject are the many difficult, sometimes confrontational, questions that inevitably surface. This article represents *one way* to approach the subject and suggests *some answers* to the questions commanders frequently ask—it is by no means intended to be an approved solution! Ultimately, each judge advocate must handle the task in a manner compatible with his or her own personality and the personality of the commanders. This article gives the judge advocate a place to begin.

Stressing the Importance of the Subject

It is difficult to overemphasize the importance of having commanders abide by the rules applicable to the military justice system. All commanders should be able to appreciate the fact that intentional interference with court members or prospective witnesses can adversely affect their career. Although there are no reported prosecutions for violation of Article 98,[1] non-punitive sanctions such as letters of reprimand and forced resignations have been applied in the past. The vast majority of commanders would never intentionally subvert the system, so this message is easy to sell. It is more difficult to convince commanders to take the steps necessary to avoid even the appearance or perception of unlawful command influence.

The appearance or perception that an accused is not receiving a fair trial can have an adverse effect on the morale and discipline of the command. "A military trial . . . should be an instrument of justice and in fulfilling this function it will promote discipline."[2] If the soldiers in the command feel that disciplinary action is administered fairly, they are more likely to be a well-motivated and highly disciplined unit. If the disciplinary system is perceived to be unfair, it is likely that the soldiers will not identify with the unit and will not be disciplined.

Perhaps the most important reason why military justice must be untainted by even the spectre of unlawful command influence is the need for public confidence in our system of military discipline. Historically, civilian impressions about the fairness, or lack of fairness, of the military justice system have had significant impact on legislation and court decisions directly affecting command authority. Negative impressions about military justice that civilians obtained during service in World War I and World War II led to legislation in 1920 and 1950 which "civilianized" military justice and increased the role judge advocates play in the administration of the system. Similarly, civilian impressions about the quality of military justice led to decisions like *O'Callahan v. Parker*,[3] *United States v. Roberts*,[4] and *United States v. Thomas*,[5] which circumscribed court-martial jurisdiction over off-post offenses and limited commanders' authority to search or inspect their unit.

On the other hand, recent public confidence in the military justice system has caused the pendulum to swing back, placing more authority in the hands of the commander. The 1980 Military Rules of Evidence, the Military Justice Act of 1983, the 1984 Manual for Courts-Martial, and numerous Court of Military Appeals decisions reflect increased confidence in the fairness of the military justice system by expanding court-martial jurisdiction over off-post offenses,[6] enhancing commanders' power to place an accused in pretrial confinement,[7] and increasing commanders' authority to inspect their unit.[8]

It is axiomatic that "bad facts make bad law." Even a few isolated instances of unlawful command influence, *or* perceived instances of unlawful command influence, have the potential to taint public perceptions and eventually undercut the authority of commanders to control discipline within their commands. This potential has never been greater now that military cases can be directly reviewed by the United States Supreme Court.[9]

Setting Out the Themes

The key to gaining a commander's acceptance of the limitations that the law places on otherwise unfettered command authority is to overcome the "abominable no-man" image which seems to be ascribed to some judge advocates. The orientation of the briefing or class must be positive with as much (or more) time spent emphasizing what the commander *can* do to control discipline as is spent telling the commander what he or she *cannot* do.

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[1] Uniform Code of Military Justice art. 98, 10 U.S.C. § 898 (1982) [hereinafter UCMJ]. Article 98 makes it an offense to knowingly and intentionally fail to comply with the procedural rules of a courts-martial.

[2] Westmoreland, *Military Justice—A Commander's View*, 10 Am. Crim. L. Rev. 5,8 (1971).

[3] 395 U.S. 258 (1969). Justice Douglas noted in *O'Callahan* that command influence was "pervasive" and that "courts-martial, as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 264–65.

[4] 2 M.J. 31 (C.M.A. 1976).

[5] 1 M.J. 397 (C.M.A. 1976).

[6] *See, e.g.*, United States v. Scott, 21 M.J. 345 (C.M.A. 1986) (officer offenses); United States v. Solorio, 21 M.J. 251 (C.M.A. 1986), *cert. granted*, 54 U.S.L.W. 3819 (U.S. June 16, 1986) (the Court of Military Appeals continued to expand the service connection doctrine, holding off-base sex offenses with dependent children of other Coast Guard personnel was service connected); United States v. Trottier, 9 M.J. 337 (C.M.A. 1980) (almost every involvement of a soldier with the commerce of drugs is service connected).

[7] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(h)(2)(B) [hereinafter MCM, 1984, and R.C.M., respectively]. R.C.M. 305(h)(2)(B) sets forth a more expansive definition of serious criminal misconduct to include a serious threat to the effectiveness, morale, discipline, readiness, or safety of the command.

[8] Mil. R. Evid. 313.

[9] UCMJ art. 67(h).

The first theme should be that unlawful command influence is unnecessary. It is unnecessary because the system already provides the commander with all the tools necessary to accomplish any *legitimate* disciplinary objective. The proper functioning of the military justice system depends simply on a commander using the available, lawful command control devices rather than resorting to impermissible attempts to subvert the system.

The second theme should be that unlawful command influence is easily avoided. Like almost every other aspect of military life, there are some rules that must be followed. In the command control area there are only about nine "rules" which are covered below and in Appendix A. They are easy to understand and easy to follow.

The last theme should be that unlawful command influence problems are usually *problems in leadership and communications.* The good intentions of a commander can nevertheless result in command influence problems if subordinates misinterpret or misunderstand the commander's message. The higher ranking the commander, the greater the risk that subordinates will misconstrue communications. An off-hand comment at a unit social function can end up being "policy" without the commander's knowledge or approval. This last theme is what makes command control a difficult area in practice, and it is this aspect of command control that calls for a general safe-side approach by commanders and their legal advisors.

Lawful Versus Unlawful Command Control

Commanders get involved with the criminal justice system during three different stages of a case—pretrial, trial, and post-trial. It is useful to address the commander's role during each stage separately to emphasize the role timing plays in properly affecting the ultimate disposition of a case. During the pretrial state, the commander has broad power to influence the outcome of a case, but once the trial begins commanders must generally sit back and let justice take its course. After trial, the commander has clemency powers, but the court's verdict serves as a cap on the commander's power to modify the results.

Pretrial stage

Most good trial lawyers will admit that when both sides of a case are represented by competent counsel, the facts usually determine the outcome of the case. One of the commander's most important powers in the military justice system is the power to gather the facts. In addition to the power to personally gather facts during the commander's preliminary inquiry by interviewing witnesses, authorizing the search and seizure of evidence, and accumulating documentary evidence, the commander can obtain additional investigative assistance from law enforcement agencies or by appointing an investigating officer.[10] Cases recommended for general court-martial must be investigated at an Article 32 pretrial investigation before the charges are actually referred to general court-martial. Any convening authority can appoint an investigating officer and direct an investigation. Choosing a well-qualified investigating officer who musters all the available evidence, identifies witnesses who may not be available to testify at trial, ensures that the charges are in proper form, and makes a sound recommendation as to disposition can go a long way toward ensuring ultimate success at trial.

Commanders also have the power to affect the disposition of cases involving one of their subordinates. This includes the power to take any nonpunitive or punitive action authorized at their level of command *or authorized at any inferior level of command.* A field grade commander, for example, has the authority to administer a field grade Article 15 but only give a company grade level of punishment. Similarly, a general court-martial convening authority has the power to refer a case to a summary or special court-martial. When taking a punitive action, the commander acts in a judicial capacity and must make an independent determination that punishment is appropriate. If a field grade commander feels that a case deserves company grade Article 15 punishment, that commander can either impose the appropriate punishment personally or send the case down to the company level commander for "appropriate disposition at that level." The field grade commander cannot send the case to the company level commander with instructions that "a company grade Article 15 should be administered" or "a specific type of punishment should be imposed."

Any person subject to the Code can prefer court-martial charges against any member of the armed forces.[11] If a convening authority believes that one of his or her subordinates has committed a serious offense, the convening authority can personally prefer court-martial charges. Personally preferring charges or directing someone else to prefer charges would make the convening authority an "accuser" and would thus disqualify that convening authority from referring the case to a special or general court-martial and from taking further action in the case. The solution, however, entails only the forwarding of the case to the next higher convening authority for referral and post-trial action.[12]

Finally, a commander who feels that a case demands a more serious disposition than can be administered at his or her level can forward the case to a higher authority with a recommendation as to disposition. An accused is entitled to have each level of command make an independent recommendation. A commander cannot have a fixed, inflexible policy regarding level of disposition and cannot establish guidelines "suggesting" an appropriate punishment for any category of cases. Although policy letters are not absolutely prohibited, appellate courts have strongly discouraged their use.[13] Subordinate commanders must be free to make an honest, independent assessment of how each case should be handled. This assessment necessarily requires individualized treatment of each soldier's case. Commanders should be reminded that allowing subordinates to make honest

[10] Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977).

[11] R.C.M. 307.

[12] R.C.M. 403, 404, 407, 601. *See* United States v. Ridley, 22 M.J. 43 (C.M.A. 1986) (error for convening authority to refer special court-martial when accuser was superior in rank to convening authority). The convening authority can also be an accuser by virtue of a personal interest in the case. UCMJ art. 1(9).

[13] United States v. Hawthorne, 7 C.M.A. 293, 22 C.M.R. 83 (1956); United States v. Sims, 22 C.M.R. 591 (A.B.R. 1956).

recommendations in no way jeopardizes the system, because superior commanders are not bound by their subordinate's recommended disposition. As long as a superior commander acts before jeopardy attaches, a case can be escalated from a subordinate disposition level to a higher level court-martial.[14] If a subordinate administers nonjudicial punishment for a serious criminal offense, the Article 15 does not bar subsequent trial by court-martial.[15]

Trial stage

Once the trial begins, commanders usually are not actively involved beyond providing administrative support. If the convening authority has fulfilled the statutory responsibility to pick the best qualified personnel to sit as court members, there should be no reason why the convening authority cannot just sit back and let justice take its course.[16] If the convening authority selects a panel full of "expendable" officers or enlisted soldiers, more likely than not the personal qualities which made them expendable to their military organization will carry over into their military justice duties and the court-martial results will be disappointing.

The only "contact" with witnesses that a commander normally should have is arranging for their presence at court. General court-martial convening authorities can grant immunity to witnesses so long as they are careful not to usurp the interests of the Department of Justice.[17] Subordinate commanders should scrupulously avoid negotiating "deals" with witnesses under circumstances that could be construed as involving a promise, express or implied, of immunity.[18]

The most egregious incidents of unlawful command influence are those that impact directly on the trial process by pressuring court members to convict (or punish) contrary to their actual conscience. Direct, overt attempts to subvert justice by putting command pressure on court members are illegal and can be charged as criminal offenses.[19] These incidents, however, are extremely rare.

The more common problem is perceived criticism of soldiers who participate as witnesses at a court-martial. Fortunately, these incidents are not too numerous and almost never involve any intent to subvert justice.[20] The few incidents where allegations of this type have been made recently, however, have involved large numbers of court-martial cases and as a result, there has been a great deal of unfavorable publicity.

The recent allegations of unlawful command influence in the 3d Armored Division illustrates how potential problems can arise in this area.[21] The commander of the 3d Armored Division made several speeches to groups of officers and non-commissioned officers in his command. One of the themes of his lecture was consistency in military justice actions. The division commander was concerned about subordinate commanders who recommended a case be referred to a special court-martial empowered to adjudge a bad-conduct discharge (BCD) and then testified at trial that the accused should be retained. The division commander believed that this was inconsistent behavior. He stated that commanders should not recommend a soldier for a BCD special court-martial if they believed he should be retained, and they should not testify that a soldier should be retained if they did not truly believe so.

Many of those who heard the commander understood the message to be "do not testify for an accused at a court-martial sentencing proceeding." After hearing his commander's speech, the division command sergeant major published a newsletter for non-commissioned officers that stated that "Good NCO's don't . . . stand before a court-martial or an administrative board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty."[22]

The 2d Brigade command sergeant major put out the following guidance:

> Once a soldier has been "convicted," he then is a convicted criminal. There is no way he can be called "a

[14] R.C.M. 601(f) states that "a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." United States v. Blaylock, 15 MJ. 190 (C.M.A. 1983). R.C.M. 604(b) also states that charges may not be referred to another court-martial if they were withdrawn for an improper reason. Improper reasons for withdrawal include an intent to interfere with the exercise of an accused's constitutional or codal rights or an attempt to affect the impartiality of a court-martial. *See also* United States v. Brown, 22 M.J. 597 (A.C.M.R. 1986) (no requirement for general court-martial convening authority who had accused in his command to have previous special court-martial charges withdrawn before referral to general court-martial).

[15] MCM, 1984, Part V, para. 1e. A serious offense is defined as an offense for which the maximum punishment would include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

[16] UCMJ art. 25(d)(2) provides that the commander shall pick court members who is his opinion are *best qualified* for that duty "by reason of age, education, training experience, length of service, and judicial temperament." Despite the broad discretion given to commanders in selecting members, the legal advisor must remind the convening authority that he or she: cannot improperly exclude categories of personnel from consideration (United States v. Daigle, 1 M.J. 139 (C.M.A. 1975)); cannot pack the court (United States v. Hedges, 11 C.M.A. 642, 29 C.M.R. 458 (1960); United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1985)); and cannot use improper selection criteria (United States v. McClain, 22 M.J. 124 (C.M.A. 1986)). In *McClain*, the court found an improper selection of senior personnel to avoid "light" sentences. Judge Cox, in a concurring opinion, noted his displeasure with such overreaching in stating: "If staff judge advocates and convening authorities would carry out their pretrial and post-trial duties in accordance with the law and entrust what happens during the trial to the military judge and court-martial members, we would not have to resolve allegations of tampering with the outcome of a trial." *Id.* at 133.

[17] R.C.M. 704; Dep't of Army, Reg No. 27-10, Legal Services—Military Justice, chap. 2 (1 July 1984) (C2, 10 Dec. 1985) [hereinafter AR 27-10].

[18] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982) (promises of immunity by persons with apparent authority may either bar trial or make statements inadmissible).

[19] UCMJ art. 98 (noncompliance with procedural rules).

[20] A commander cannot intimidate or discourage witnesses from testifying. United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984) (A battery commander lectured witnesses and expressed his opinion that the accused should receive the maximum punishment. The court found such conduct intolerable and inexcusable.); United States v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982) (A wing commander improperly instructed a potential witness to modify his views.).

[21] *See, e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), *petition granted*, 20 M.J. 131 (C.M.A. 1985); United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984), *petition granted*, 19 M.J. 281 (C.M.A. 1985).

[22] United States v. Treakle, 18 M.J. at 651.

good soldier" even though up until the day he's court martialed he is a super star.

The NCO Corps does not support "convicted criminals." We are ruthless and unrelenting in our pursuit of law and order and fully accept our role in upholding the moral ethics and principles upon which our nation is founded.

If you personally cannot subscribe to this philosophy my friend, you need to leave the Army and find another occupation in life.[23]

Many others perceived the commander's remarks to say they should not provide favorable character testimony. The appellate court's holding that unlawful command influence had been exerted in the 3d Armored Division affected hundreds of cases.[24] This incident highlights the need for commanders to realize that in many ways they are like E. F. Hutton commercials: "when they talk, people listen." Many subordinates, naturally eager to please their superior commanders, will read more into their superior's remarks than the superior ever intended. When they do so in the area of military justice, there is often prejudicial impact. The appellate courts do not focus solely on the intentions of the commander. Unlawful command influence can result from the misperceptions of the subordinate. If subordinates reasonably misunderstand or reasonably misinterpret the superior commander's intentions and as a result the accused is prejudiced at trial, unlawful command influence has taken place.[25]

Post-Trial Stage

After trial, the commander has the opportunity to review the results of the trial; can take action to approve or disapprove findings; and can approve, suspend or reduce the adjudged sentence.[26]

Convening authorities also have the power to request reconsideration of a military judge's legal ruling, other than a finding of not guilty, if he or she believes the ruling is erroneous.[27] The Military Justice Act of 1983 now gives the government the right to appeal an order or ruling of the military judge that "terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings."[28]

Finally, the convening authority may order a rehearing if there was a legal error in the trial that may substantially affect the findings or sentence.[29]

Again, in the post-trial scenario, Article 37 applies and places two restrictions on the commander's authorized activity. Article 37 prohibits censuring, reprimanding, or admonishing "the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings."[30] Commanders are also prohibited from giving unfavorable efficiency ratings for participating as a court member.[31]

Many commanders are disturbed when they review court-martial results, especially where favorable testimony has been given on behalf of a soldier. As mentioned previously, admonishing the members or witnesses is prohibited. Post-trial criticism or lecturing will become an issue in future cases if such conduct has a "chilling effect" on the independence of court members or the willingness of witnesses to testify.[32] The proper use of lawful controls can ameliorate the commander's concern. If the commander picks the best qualified court members, they will be able to properly evaluate the testimony of a witness who says that "even though the accused sells drugs or rapes children he can be rehabilitated and remain the the Army." Additionally, changes in the 1984 Manual enable the government to introduce more evidence in aggravation at sentencing. Commanders should encourage their subordinates to cooperate with trial counsel and to make themselves available to testify concerning evidence of rehabilitative potential.[33]

Because the convening authority conducts the initial review and takes action, he or she cannot have an inflexible attitude toward the exercise of clemency powers.[34] The classic case in this area arose at Fort Bragg where the convening authority published the following letter in a divisional publication:

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[23] *Id.*

[24] *See, e.g.*, the many reported cases in volumes 18–22, Military Justice Reporter. These cases illustrate how issues of unlawful command influence shift the focus of a case from the offense of the accused to the actions of the commander.

[25] *See* United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *petition granted*, 22 M.J. 100 (C.M.A. 1986), which provides a model to analyze unlawful command influence cases.

[26] R.C.M. 1107.

[27] R.C.M. 905(f).

[28] UCMJ art. 62; R.C.M. 908(a).

[29] R.C.M. 1107(e).

[30] UCMJ art. 37(a).

[31] UCMJ art. 37(b). Members take an oath not to disclose the vote or opinion of any particular member. *See* R.C.M. 807(b)(2) discussion and AR 27–10, para. 11–8c. Mil. R. Evid. 509 and 606 also provide that the deliberations of court members are privileged and the sanctity of those deliberations cannot be pierced except in limited circumstances, such as permitting testimony concerning unlawful command influence or extraneous prejudicial information. United States v. Accordino, 20 M.J. 102 (C.M.A. 1985). *See also* R.C.M. 1102 and United States v. Carr, 18 M.J. 297 (C.M.A. 1984) regarding the use of post-trial Article 39(a) sessions to inquire into allegations of undue influence inside the deliberation room.

[32] United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1985) (debriefing of defense witness after trial held to be improper even though no prejudice resulted to accused). Often, post-trial problems also involve leadership and judgment issues on the part of the commander. United States v. Gerke, 21 M.J. 300 (C.M.A. 1985) (order denying petition for review) (finding no eighth amendment or Article 55 violation; the commander's judgment was questioned in bringing the convicted soldier in front of a formation post-trial and referring to the appellant as a drug pusher). *See also* United States v. Cruz, 20 MJ. 873 (A.C.M.R. 1985), *petition granted* 22 M.J. 100 (C.M.A. 1986) (pretrial mass apprehension and actions by commander did not violate Article 55, UCMJ).

[33] R.C.M. 1001(b)(5). Note that such evidence may be presented initially by trial counsel and not just in rebuttal to matters presented by the defense.

[34] R.C.M. 1107. The accused is also entitled to proper consideration of his case post-trial.

> Because all convicted drug dealers say the same things, about not realizing the seriousness of their offenses before they are caught, and about not having time to think about it being wrong . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, "No, you are going to the Disciplinary Barracks at Fort Leavenworth for the full term of your sentence and your punitive discharge will stand." Drug peddlers, is that clear?[35]

As a result of this letter, the convening authority was disqualified from taking action in that case and future drug cases.

Finally, commanders must maintain the proper relationship with the military judge. The Army judiciary is an independent organization with trial judges attached to installations for only administrative support. Yet the military judge has an obvious impact on court-martial results. The bottom line is that the commander need not treat the military judge like a leper, although many military judges do not actively seek contact with convening authorities to avoid appearance problems. Yet the convening authority must be circumspect in discussions with the military judge. Attempts to criticize the rulings of the military judge or to influence him or her in future cases are prohibited.[36] If the military judge feels he or she has been improperly approached concerning a case, the judge's recourse is to report the conduct to the Trial Judiciary. The end result may be a Department of Army investigation. Perhaps the best advice to convening authorities is that if they are upset about a case, do not discuss it with the military judge. If convening authorities wants facts or reasons for a particular court-martial result, they can avoid any appearance of impropriety by having their legal advisor brief them.

The Questions and Comments (And Some Answers)

By emphasizing the positive controls a commander has over the system as well as covering the pitfalls, most commanders are more receptive to discussions on command control.[37]

Even when the judge advocates approaches the topic of command control "positively," he or she must anticipate and be able to respond to confrontational questions or comments. Some typical comments and questions are discussed below along with some possible responses.

"Problems in command control only arise when subordinates are not loyal to the senior commander."

The problem with this comment is twofold. First, it is not reasonable for a commander to believe that his or her improper comments are confidential just because they were made at a commander's meeting. A commander must expect that his or her policies and guidance will be disseminated. As the 3d Armored Division cases illustrate, thorough defense counsel investigation will eventually expose the facts surrounding any impropriety.

Second, once evidence of unlawful command influence is exposed, witnesses will be called to make sworn statements or testify at trial. It is unreasonable to expect subordinates to lie under oath under the rubric of "loyalty." Unless "loyalty" means "the willingness to lie under oath," problems in command control arise because of the commander's words and actions, not because of subordinates' lack of loyalty.

"Isn't unlawful command control just a shell game made up by you lawyers?"

Commanders should realize that there are rules in every area of military life that must be followed. In the area of military justice, Congress tried to balance command authority with the rights of the military accused. The result is a system in which the commander plays a key role. Yet Congress also passed Article 37 and 98 of the UCMJ which place limits on the commander's authority.

As a spin-off of this issue, commanders often are quick to point out that in many administrative areas they indeed order dispositions. For example, the issue may be framed "why can't I tell my subordinate to recommend all drug distribution cases for a general court-martial when Army regulations direct that a general officer letter of reprimand will be given for driving while intoxicated?"[38] Judge advocates must be prepared to distinguish administrative actions from military justice actions. The differences in rights deprivation warrant different due process guarantees which in turn place different limitations on the commander's authority.

"You are trying to take away my authority to train, educate and develop my subordinates."

This statement or question is often raised due to the emphasis on mentorship and the commander's responsibility to develop subordinates. Before the legal advisor attempts to answer the question, it is essential that he or she clearly define the real issue that concerns the commander. If the commander is concerned about training subordinates about the procedural aspects of the military justice system, he or she may do so. The commander, or preferably the supporting legal office, can provide a wide range of instruction on military justice. If "training subordinates" really means telling them they should not testify for "druggies" or they

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[35] United States v. Howard, 48 C.M.R. 939, 943 (C.M.A. 1974).

[36] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Official inquiries that question or seek justification for a judge's decision are prohibited (unless by an independent judicial commission).

[37] Appendix A is a summarization of the commander's lawful controls and the prohibitions. Appendix B contains some typical problems with some alternatives for commanders to consider in addressing the problem.

[38] *See, e.g.*, Dep't of Army, Reg. No. 190–5, Military Police—Motor Vehicle Traffic Supervision, para. 4–5 (1 Aug. 1973) (IO7 7 Apr. 1986)[hereinafter AR 190–5] (mandatory general officer letter of reprimand for drunk drivers). Note that Article 37 applies only to military justice actions. Congress did not place similar restrictions in the area of administrative actions.

should treat cases as the superior commander would, Congress, not the Judge Advocate General's Corps, has prohibited such conduct.[39]

The commander does have some ability to educate subordinates about his or her military justice philosophy. Commanders can withdraw military justice authority from subordinates over a category of offenses, a category of personnel, cases arising out of a specific incident, or completely. Commanders are very sensitive to the "power down" theory of leadership and correctly view such actions as measures of last resort. The power to withdraw authority from a subordinate or to overrule a subordinate's intended disposition of a case should be exercised judiciously. This type of action is appropriate, for example, when a soldier would otherwise receive an inappropriately lenient punishment or when the commander wants to ensure consistent handling of certain offenses.[40]

Perhaps the easiest and best way to educate and develop subordinate commanders is to ensure that judge advocates are fully utilized as consultants about case dispositions. Jurisdictions with efficient military justice systems invariably have a judge advocate serving as the primary legal advisor to the commanders of a brigade size unit. That judge advocate should be reviewing every court-martial packet before preferral of charges. When an inexperienced company commander has to decide an appropriate disposition for a case, the judge advocate can "talk him through" the factors that impact on the level of disposition and can provide some perspective by advising the commander how similar cases have been disposed of by other commanders. The judge advocate's advice can assist the company commander to make an independent decision about disposition and can avoid creating any misperception that the case "must" be disposed of in any particular manner.

The judge advocate must know how to respond to the commander who tells war stories about his or her past experiences involving undetected or uncorrected incidents of blatant unlawful command influence.

This is an area where the legal advisor must respond decisively, otherwise the commander or other listeners will interpret a soft pedal response to be equivalent to a message that you really are not all that serious about the issue. Counsel can emphasize that the risks in this area are great and just because they may have gotten away with it before does not mean such prohibited conduct is legitimized.

If the commander says he or she still intends to do something that is prohibited, the judge advocate has a duty to prevent unlawful command influence.[41] If the judge advocate has a good relationship with the commander, counsel could advise the commander that "if you do this, they'll fire me." If the response is "so what," then you should have less compunction in advising your technical chain of the problem. Of course this may put you in a no-win situation with your commander, whether the commander learns from you or from his or her superior that you have reported the information. An option may be to advise the commander "Sir, I think that course of action is prohibited, but let me solicit the advice of our next higher headquarters to see if there's a way to properly get the result you want." If the commander agrees, then the superior command will disapprove such conduct and hopefully avoid a problem without destroying the confidence of your commander.[42]

Finally, the commander may ask "Why can judge advocates talk with my subordinate commanders about military justice matters that I as the superior commander can't discuss?"

This question strikes at the very heart of the command control problem. Although there are some things a commander simply *cannot* and should not do, such as order a court member to vote for conviction, most of the unlawful command influence cases arise out of grey areas. The commander's actions were not illegal per se but they were susceptible to misinterpretation, they were misinterpreted by subordinates, and the accused's rights were prejudiced as a result.

Commanders are not per se prohibited from discussing military justice matters (to include punishment philosophy). If the subordinate commanders are left with the belief that they have the freedom to disagree with their superior's philosophy and they are convinced that they are expected to independently reach their own disposition conclusions on a case-by-case basis, there has been no unlawful command influence.[43] Who talks about military justice and what they say involves a risk assessment. Battalion commanders are more likely to feel that their independence is usurped when the brigade commander says "drug cases should go to general courts-martial" than if a JAGC captain says the same thing. Additionally, judge advocates are specially trained in military justice and are in a better position to know what types of comments are likely to be misinterpreted. Commanders are provided with a wide variety of technical support personnel. The commander should be no more reluctant to call upon his judge advocate support to resolve a military justice problem than he would be to call upon his finance center support to resolve military pay problems or

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[39] Except for administrative preparation of court members, detailed court members may not be oriented or instructed on their responsibilities in court-martial proceedings except by the military judge. *See* AR 27-10, para. 5-10c; United States v. Hollcraft, 17 M.J. 1111 (A.C.M.R. 1984). A handbook for court members was "an outside source of information on the law which cannot be countenanced." *Id.* at 1113.

[40] R.C.M. 306(a); AR 27-10, para. 3-7c. In doing so, the commander can also send a message to subordinates about his or her disposition philosophy.

[41] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

[42] Obviously staff advocates *must* ensure that all trial counsel report any incidents of unlawful command control to them immediately. Experience has shown that incidents are only exacerbated over time and corrective measures must be taken immediately to help limit taint. Should defense counsel inform the government of an uncovered incident and vice versa? While there may be disagreement on this issue, the best position is to get both sides involved because in the final analysis the focus should be an ensuring the military accused receives a fair trial.

[43] Commanders often ask if they can give "advice" to subordinates in handling particular cases. The bottom line is that advice is okay as long as the subordinate feels free to make an appropriate recommendation. A good summary of the law in this area is provided in United States v. Rogers, CM 442663 (A.C.M.R. 29 March 1983). "While a commander may not preclude subordinate commanders from exercising their independent judgment, he may express his opinion and provide guidance to them. The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them."

his maintenance support personnel to resolve unit maintenance problems.

Conclusion

While the focus of this article has been what superior commanders need to know about unlawful command control, the basic rules must be understood by subordinate commanders and noncommissioned officers as well.[44] The impact of unlawful command influence on the military justice system can be dramatic, so legal advisors have an obligation to exercise preventive law. Avoiding the issue may be a comfortable expedient that works nine times out of ten, but if a major command influence incident arises in only one case out of a thousand, the entire military justice system stands in jeopardy. Judge advocates must train commanders about unlawful command influence, not just to avoid the potential problem areas, but also to ensure that commanders are aware of the tools they have available to *lawfully* control military justice matters. The recent high visibility of unlawful command influence cases may cause some commanders to abdicate all military justice authority to their judge advocates. That is not how the system is supposed to operate! Commanders have sole responsibility for discipline in their units and they have the systemic tools to properly achieve that discipline. The judge advocate's mission is to help the commander exercise lawful command control.

[44] UCMJ art. 37(a) states "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial."; United States v. Carlson, 21 M.J. 847 (A.C.M.R. 1986) (the Article 37 prohibition against unlawful command influence extends to noncommissioned officers).

Appendix A

The Commander's Lawful Controls and Prohibitions

	Lawful Controls	Prohibitions
	Pretrial	
1.	Power to gather facts. Commander's preliminary inquiry. Law enforcement agencies. Article 32 pretrial investigation.	
2.	Power to affect a disposition. Non-punitive options.	• Cannot order a disposition.
	Preferral of charges.	• Accusers are disqualified from further action.
	Referral to courts-martial.	
	Forward with recommendation.	• Subordinates must exercise their own discretion.
	Overrule subordinate's disposition (subject to double jeopardy)	
3.	Power to select court members. Power to hand-pick members based on Article 25, UCMJ, criteria. Power to replace and reorganize panels as necessary.	• No improper exclusion of members.
	Trial	
4.	Provide facility/personnel support.	• Cannot attempt to influence actions of a court-martial in arriving at findings or a sentence. • Cannot intimidate or discourage witnesses from testifying.
5.	Grant immunity to witnesses.	• Do not usurp Department of Justice interests.
	Post-trial	
6.	Take action in the case.	• Cannot have an inflexible attitude regarding clemency.
7.	Seek reconsideration; appeal; rehearing.	• Cannot censure, reprimand, admonish, or give unfavavorable efficiency ratings for participation as a member, counsel, or military judge.

Appendix B

Typical Problems and Alternatives

Problem 1. Cases are being disposed of at an inappropriate level.

Do not order more serious dispositions.
Do not publish guidelines or policy letters regarding disposition levels.
Do not give speeches chastizing commanders for their dispositions.

Instead:

Require commanders to prefer charges at the legal office after consultation with the trial counsel.
Ask the SJA office to support the command by giving classes on military justice.
Clear the content of all speeches and policy letters addressing discipline or justice with the SJA.
Take action at your level when necessary to avoid inappropriate results.

Problem 2. Commanders and NCOs are testifying in courts-martial and causing convicted felons to be returned to the unit.

Do not discourage potential witnesses from testifying as to their true beliefs.
Do not rebuke a witness for testifying in any case.

Instead:

Select the best qualified personnel to sit as court members. Have trial counsel screen cases for alternate disposition. Ensure senior commanders are available to testify as rebuttal and aggravation witnesses.

Problem 3. The commander wants to emphasize the fact that crime will not be tolerated.

Do not selectively praise or improperly publicize results of cases.
Do not make mass public apprehensions.

Instead:

Publicize courts-martial results fairly.
Have members of the command attend trials (especially guilty plea cases).
Allow some convicted soldiers to demonstrate their remorse by making speeches (possibly in return for clemency action).

Attacking Fraud, Waste, and Abuse at the Installation Level: A Model

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Introduction

In the last several years, government personnel and the public have become aware of the broad scope of fraud, waste, and abuse in government procurement, through newspaper and television accounts, as well as "awareness training" within the government. Handling fraud, waste, and abuse at the installation level requires: recognizing the indicators of fraud, waste, and abuse; understanding the various criminal, contractual, administrative, and civil remedies which are available; and the ability to coordinate these varied remedies.

Commands must consider a number of issues when faced with contract fraud. First, mission requirements must be taken into account. Should the command complete a tainted contract or undertake alternative acquisition on an expedited basis? How broad an investigation should it conduct? This will depend on the remedies being considered, whether they be criminal remedies, suspension or debarment, or other administrative or contractual remedies. Also, appropriate sanctions should be considered. Another consideration is how to deal with involved military or civilian personnel. Some information must be kept confidential during an investigation. Finally, the remedies must be coordinated within the command, between the command and higher Army headquarters, and between the Army and any outside actors, such as a local United States Attorney or representative of the Department of Justice.

This article presents a systematic approach for attacking these problems. It includes the identification of the various remedies available to combat fraud, waste, and abuse and a discussion of fraud indicators, which serve as a basis to initiate investigation and remedial action. The article presents several scenarios and applies the model approach to resolve the issues presented by these scenarios.

The Model

Problems involving fraud, waste, and abuse are often very complex. To resolve these problems, a step-by-step approach is most appropriate. The following seven-step methodology presents a means to systematically sort through the problems involved in contract fraud.

Step One: Identify the Problem. The first step to solving any problem is to fully identify it as soon as possible! One aspect of this is early identification of potential problem areas.[1] Clearly define any potential problems; the scope of the solution depends on the nature of the problem. For example, is the problem an isolated incident of delivery of inferior goods or is there a pattern of poor performance associated with a particular contractor or government inspector? Is there a systemic failure implicating the entire procurement process? During this initial step, make a preliminary determination as to whether there is evidence of criminal fraud or whether the evidence indicates that the problem is one involving waste or abuse.

Step Two: Inventory. Once the problems have been identified, the second step calls for determining who is involved and what contracts are involved. Is the problem limited to one contractor or are several involved? How many contractor employees may face criminal charges? Are government personnel involved, such as personnel in the contracting office, in the requiring activity, or perhaps the finance office? The scope of potential remedies is also affected by the number or type of contracts involved. Is the fraud connected to only one contract or are several involved? Are completed contracts involved or only ongoing contracts?

Step Three: Consider Potential Remedies. The potential remedies in resolving contract fraud problems fall into four broad categories: criminal, contractual, administrative, and civil. The next step in the model is to identify which remedies are potentially available to combat the particular problem identified. This will help determine the scope of any necessary investigation and help to identify the government officials who need to be involved to pursue these remedies.

Step Four: Accomplish the Mission/Safeguard Documents. Once you determine the scope of the problem, identify those involved, and consider potential remedies, you should take action to safeguard pertinent contract documents to ensure their availability for investigators as well as for the contracting officer.

Also, before proceeding with the investigation and resolution of the identified problems, consider what steps may be necessary to ensure successful accomplishment of the mission. The urge to pursue remedies should not overcome requirements for effective mission performance.

Step Five: Investigate. An investigation must now be conducted, the scope of which depends on the potential remedies identified. Coordinated investigations may be necessary involving the U.S. Army Criminal Investigation Command (CID), the Department of Defense Investigative Service (DIS), and the Federal Bureau of Investigation (FBI). If no criminal charges are contemplated, CID may nonetheless be called upon to assist in investigating for purposes of a potential debarment action.[2] For waste and

[1] A helpful resource for use in the identification of potential problems is Dep't of Defense Miscellaneous Publication No. 20–1, Indicators of Fraud in Department of Defense Procurement (1 June 1985) [hereinafter Misc. Pub. 20–1].

[2] *See* Dep't of Defense Directive No. 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities (28 June 1985) [hereinafter DoD Dir. 7050.5]; Dep't of Army, Reg. No. 27–21, Remedies in Procurement Fraud and Corruption (15 July 1986) [hereinafter AR 27–21].

abuse problems, an informal investigation within the command may be sufficient.

Step Six: Evaluate Remedies. Once the investigation is complete, analyze potential remedies. Consider those remedies that will best ensure improved contracting in the future, keeping in mind the resources that will be needed to pursue these remedies. The strongest remedies should be given the most emphasis.

Step Seven: Coordinate Action. Pursuing remedies within each of the four categories requires proper coordinated action.[3] Those officials within the command (contracting office, legal office, civilian personnel office, etc.); within the Army or Department of Defense (DOD) (such as Contract Fraud Branch, Litigation Division, Office of The Judge Advocate General or the DOD Inspector General); or within the Department of Justice (DOJ) must be contacted and consulted.

A second consideration in coordinating action is the need to consider the timing of the various remedies that may be pursued. In certain instances remedies may be complementary but in other instances they may be contradictory.

Painting Contract Scenario

In order to show how use of the model may solve contract fraud problems, it will be applied to a series of scenarios which represent common installation fraud, waste, and abuse problems. The scenarios cover problems discovered in completed contracts, an ongoing contract, and a contract pending award.

Completed Contracts

The chief of staff has told the staff judge advocate (SJA) that a routine U.S. Army Audit Agency (AAA) audit has uncovered problems in the post's contracting activity. The AAA auditors discovered that 15 of 20 painting contracts awarded over the past five years were awarded to the All Star Painting Company. Inspection of the bid abstracts indicates that in addition to the 15 contracts on which it was the low bidder, All Star did the work on 4 other contracts as the subcontractor of the low bidder. All 19 contracts required the contractor to perform the following tasks: replace rotten wood prior to painting; prepare the surface to be painted by scraping, sanding, washing, and caulking; and apply two coats of paint.

The contracts required the exterior painting of designated buildings, many of which were constructed during World War II. The contracts estimated the amount and type of wood to be replaced. The estimated quantity was the same for all contracts and the records indicate that the contract estimates were always exceeded during the initial phases of performance, in most cases during the painting of the first ten buildings. The contracts all contained identical technical specifications.

The contracts required extensive government inspection; the government had to inspect and approve each phase of performance. The government inspector performed the following tasks pursuant to the contracts: certified that the wood marked for replacement needed replacement; certified actual proper replacement of wood with conforming wood siding; certified proper surface preparation; certified proper application of primer coat; certified proper application of second coat and completion of the building in accordance with the contract provisions; and forwarded requests for payment to the contracting officer with certification that work performed conformed to contract requirements.

Audit of the contract records revealed that on all completed contracts the government used the same inspector, who certified conforming work at every stage of performance. Subsequent recent inspections revealed substantial evidence that the contractor did not in fact perform work in conformance with the contract specifications. Buildings painted by All Star Painting are still in need of repainting. The paint has peeled, and in some places popped off, exposing bare wood and showing that old paint was not scraped or sanded. Inspectors also noted that many buildings were not painted under the eaves. Additionally, only fifty percent of the replacement wood billed for was actually installed and it is apparent that in many areas only one coat of paint was applied.

It is common knowledge in the contracting community that the initial inspector bowls on the same bowling team with the president of All Star Painting Company. Additionally, the inspections branch regularly borrows All Star Painting Company trucks to do personal errands. The Director of Engineering and Housing (DEH) has told the original inspector not to come to work until further notice.

Step One: Identify the Problem. There are several problems presented by the painting scenario. The scenario indicates a total breakdown of the contract process. The fact that one company has performed 19 of the last 20 painting contracts and the government has accepted and paid for work that did not conform to contract specifications are indicators of fraud and systemic contracting problems. The scenario indicates possible criminal misconduct by government or contractor employees and systemic deficiencies that could have caused this breakdown.

First, problems exist in the award process. There is no indication of meaningful competition in the award of the contracts. Award process problems could be due to the misconduct of government employees, *i.e.* leaking bid information; laziness by personnel not properly estimating government requirements; or other systemic problems. Second, there are problems in the inspection phase. The scenario indicates that on several occasions the government inspector inspected, certified, and accepted work that did not conform to contract specifications. These deficiencies could be the result of a criminal enterprise, an inefficient or over-worked inspector, or poor contractor quality control.

Finally, the scenario indicates a contracting system that has not been sensitive to the indicators of fraud. The auditors reported several fraud indicators that were not noticed or, if noticed, were not acted upon. Specifically, there was no competition, and the government estimates did not change from contract to contract even though the buildings to be painted were different. The government estimate of replacement lumber was understated in every contract, necessitating contract modifications, and the same inspector was used on all contracts. Even though the evidence may not support criminal sanctions, these problems must be

[3] DoD Dir. 7050.5; AR 27-21.

solved in order to eliminate waste and abuse within the system.

Step Two: Inventory. First, the AAA audit identified exterior painting contracts performed by All Star Paint as those contracts with deficiencies. Second, it appears that both government employees and contractor employees are involved. The scenario indicates that the government inspector, personnel who estimate requirements, the contracting officer, and other contract specialists who perform duties in conjunction with awarding exterior painting contracts are involved. The employees who handled exterior painting contracts for the contractor are also involved and their complicity must be investigated.

Step Three: Consider Potential Remedies. As noted above, there are four broad categories of remedies that must be considered to effectively eliminate contract fraud. These categories include criminal, contract, administrative, and civil remedies. These remedies are essential tools that the contracting officer[4] should use to handle the installation level contracting fraud, waste, and abuse problems. It is impractical to rely solely on the criminal justice system to police contract fraud. This system often is not suited because of the high burdens of proof and the reluctance of the local U.S. Attorney's office to take a case to the grand jury. It is equally impractical to rely solely on contract remedies to eliminate fraud when criminal conduct is involved. Administrative remedies are also appropriate when applicable. Finally, civil remedies may be valuable in certain cases but are often time consuming.

Criminal Remedies. Criminal remedies are limited only by statute and the elements of the criminal offenses. For military members, the Uniform Code of Military Justice[5] will be the source for most offenses, while Title 18 of the United States Code[6] will provide remedies for government civilian employees and contractor employees. In most cases where there is an intentional scheme to defraud, several statutes are likely to be violated. The prudent lawyer should consider using remedies that will not depend on a jury understanding the intricacies of the contract process.[7] In the given scenario the facts indicate a probable violation of several statutes;[8] the mail fraud, false statements, gratuities, and bribery statutes appear to be the easiest to prove. These statutes do not require a jury to completely understand the contracting process, and a conviction for these offenses can serve as a basis for other remedies as well. For example, charging the government inspector with a violation of 18 U.S.C. § 1001, which prohibits false statements, is relatively easy to prove, will not require an indepth understanding of the contract process, and will also support a removal, suspension, or other disciplinary action against the government employee.[9] The Federal Acquisition Regulation (FAR) specifically permits the debarment or suspension of a government contractor based on a criminal conviction[10] and suspension based on an indictment.[11]

It is necessary for the SJA to eliminate duplication of effort within the office. It is likely that separate attorneys handle criminal, contract, and labor law areas.[12] The U.S. Attorney will require a significant amount of support, as it is unlikely that the U.S. Attorney's Office will be staffed to handle the prosecution of small dollar contract fraud.[13] As a practical matter, the SJA can minimize office turbulence by using remedies that transcend all disciplines. For example, by using 18 U.S.C. § 1001, which prohibits false statements, even if the subsequent investigation does not support a criminal conviction, the information developed may be sufficient to support a removal or suspension action against the government inspector, and support suspension and debarment under FAR Part 9.4.

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[4] "Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting . . . and safeguarding the interests of the United States in its contractual relationships." Federal Acquisition Regulation § 1.602-2 (1 Apr. 1984) [hereinafter FAR].

[5] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ]. Possible UCMJ offenses should a soldier be involved include the following: Article 92 (Dereliction of Duty); Article 107 (False Official Statements); Article 108 (Wrongful Disposition of Government Property); Article 121 (Larceny/Wrongful Appropriation); Article 123 (Forgery); Article 132 (Fraud); Article 133 (Conduct Unbecoming An Officer and Gentleman); and Article 134 (Bribery, Graft, Solicitation of others to commit offenses, and the assimilation of non-capital federal and state offenses).

[6] *See generally* 18 U.S.C. (1982).

[7] *See generally* 18 U.S.C. § 1341 (1982), which prohibits the use of the mails to accomplish any scheme intended to deceive. Under this statute, the government must prove only that the accused devised a scheme to deceive (it need not be a criminal scheme) and that the accused used or caused to be used the mail to further that scheme. A contractor violates this statute by mailing an invoice for a payment the contractor was not entitled to, or by receiving payment from the government through the mail. The government does not have to prove the steps in the contracting process to prove this offense.

[8] Potential offenses include the following: 18 U.S.C. § 201(b), (c) (1982) (Offering, Seeking or Accepting a Bribe); 18 U.S.C. § 201 (f), (g) (1982) (Soliciting and Accepting Illegal Gratuities); 18 U.S.C. § 207 (1982) (False Claims); 18 U.S.C. § 1001 (1982) (Making or Using False Statements); 18 U.S.C. § 1341 (1982) (Mail Fraud); 18 U.S.C. § 641 (1982) (Theft, Embezzlement, or Destruction of Public Money, Property, or Records); 18 U.S.C. § 1342 (1982) (Wire Fraud); 18 U.S.C. § 1905 (1982) (Wrongful Disclosure of Official Information); 18 U.S.C. § 371 (1982) (Conspiracy to Defraud the United States); 18 U.S.C. § 1002 (1982) (Possession of False Documents); 18 U.S.C. § 494 (1982) (Transmitting a False Record to the United States); 18 U.S.C. § 495 (1982) (Using a False Writing in Connection with a Claim); 18 U.S.C. § 1018 (1982) (False Certification); 18 U.S.C. § 286, (1982) (Conspiracy to Defraud With Respect to a Claim); 15 U.S.C. § 1 (1982) (Entering Into a Contract in Restraint of Trade); and 18 U.S.C. § 1962 (1982) (Violations of the Racketeer Influenced and Corrupt Organizations Act).

[9] Dep't of Army, Reg. No. 690-700, Suspension and Removal of Civilian Employees, Chapter 751 (15 November 1981) (I05, 8 July 1985) [hereinafter AR 690-700 (I05, 1985)].

[10] FAR § 9.406-2(a).

[11] FAR § 9.407-2(b).

[12] It is critical that the SJA coordinate all efforts to deal with the issues raised in contract fraud. In most offices separate legal advisors offer advice to the contracting officer, the civilian personnel officer, and the CID. These lawyers must work closely together and completely understand the ramifications of the remedies in each of the different areas. It may be prudent to designate a lead counsel to coordinate all legal support to the various agencies.

[13] Recent experience indicates that the SJA may have to assign an attorney as a Special Assistant U.S. Attorney to develop the criminal case. Care must also be taken to ensure proper investigative support for the U.S. Attorney, and it may be necessary to detail a CID agent along with a judge advocate to support the U.S. Attorney's Office. It is unlikely that the FBI will assume this investigative mission in most cases.

Contract Remedies. The FAR permits the debarment of a contractor based on a recent history of poor performance.[14] The scenario is filled with indications of such a history in this case. This evidence is sufficient to require the contracting officer to initiate suspension and/or debarment by forwarding documentation of the recent history of poor performance to Contract Fraud Branch, Litigation Division.[15] If a criminal indictment is imminent, the contracting officer may wish to pursue suspension based on the indictment.[16] The CID can conduct investigations to support suspension and debarment.[17]

The contracting officer also may wish to revoke acceptance of All Star's performance under these past contracts. In narrowly defined circumstances, a contracting officer can take such action if there is evidence of fraud or a gross mistake amounting to fraud.[18] This remedy is troublesome because the government has accepted and paid for the work under these contracts. The scope of this remedy is limited by these facts.

Civil Remedies. Civil remedies are often overlooked because of a lack of familiarity with these remedies and how to initiate them. Two potential civil remedies should be considered here for the false claims submitted by the contractor and for the gratuities (use of contractor's truck) offered to the government inspector. The False Claims Act[19] allows the government to recoup $2,000 plus treble damages for each false claim.[20] Because false claim actions are asserted by DOJ or the local U.S. Attorney's Office, appropriate approvals must be obtained.[21] The contracting officer, however, can initiate action under 10 U.S.C. § 2207[22] to recover for gratuities paid to the contractor. The action to recover gratuities appears to be more appealing because DOJ concurrence is not required; the gratuities remedy, however, only applies to ongoing contracts.[23]

Administrative Remedies. There are many potential administrative remedies. Systemic changes in the award process or the inspection process may be ordered as a result of the deficiencies uncovered by AAA. These actions might include reassigning personnel, changing work assignments, rewriting job descriptions, requiring additional training, changing the organizational structure, or taking disciplinary action (*i.e.*, removal, suspension, or reprimand) against civilian employees. All of these actions raise many potential problems that must be coordinated between the labor counselor and the civilian personnel office (CPO). The inspector, because he is involved in a fraudulent scheme, must be considered for removal.[24] It may also be necessary to take other less drastic measures to preclude recurrence of these deficiencies.

Step Four: Accomplish the Mission/Safeguard Documents. After considering the potential remedies, it is essential to focus on the mission. Because contracts are employed to satisfy a military mission, remedies to contract fraud must be consistent with mission accomplishment. In this scenario, the potential remedies do not appear to conflict with the accomplishment of a military mission.

The SJA must also be sensitive to safeguarding contract documents. Problems arise when two investigating agencies operate independently, refuse to share information, and are not sensitive to keeping the contract file intact to permit continuing contract administration. The greatest problem arises when contract documents are submitted to a grand jury in pursuit of a criminal indictment. Rule 6(e) of The Rules of Criminal Procedure[25] could cause important contract documents to be sealed to prevent public disclosure of matters considered by the grand jury.[26] Sealing these documents not only disrupts contract administration, but could also prevent the government from acting on other remedies. The scenario necessitates that care be taken to ensure that the administrative, civil, and contract remedies are not lost because important documents were submitted to a grand jury and subsequently sealed.

Step Five: Investigate. This investigation begins with an already completed audit that identified many of the areas that may need follow-up.[27] Before actually pursuing an investigation, however, certain general issues should be considered. A balance must be struck between mission requirements and potential remedies. Investigators must receive guidance that defines an appropriate scope to their activities. While a number of criminal remedies may be pursued here, it must be emphasized that CID agents will investigate in support of criminal remedies *and* suspension and debarment.

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[14] FAR § 9.406-2(b)(1).

[15] *See* Army FAR Supplement § 9.472-3 (1 Dec. 1984) [hereinafter AFARS]. In the Army, The Assistant Judge Advocate General for Military Law [hereinafter AJAG for Military Law] is the Debarring Official. AFARS § 9.404(c)(4).

[16] FAR § 9.407-2(b).

[17] *See* AR 27-21, para 1-4*b*.

[18] *See, e.g.*, FAR § 52.246-12(i).

[19] 31 U.S.C. § 3729 (1982).

[20] 31 U.S.C. § 3729, *as amended by* Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 583.

[21] Dep't of Army, Reg. No. 27-40, Legal Services—Litigation, para. 1-4 (4 Dec. 1985).

[22] Under 10 U.S.C. § 2207 (1982), the contracting officer, after notice and a hearing, may terminate the right of a contractor to proceed under a contract if the contractor offered or gave a gift or any gratuity to an employee of the United States to obtain a contract or favorable treatment under a contract.

[23] 10 U.S.C. § 2207(1) (1982).

[24] AR 695-700 (I05, 1985).

[25] Fed. R. Crim. P. 6(e).

[26] Fed. R. Crim. Proc. 6(e)(6) provides that records relating to grand jury proceedings shall be kept secret to prevent disclosure of matters occurring before the grand jury.

[27] To avoid problems with grand jury secrecy requirements, evidence already developed should be identified as having been developed outside of any grand jury proceedings. Also, other means to obtain further evidence without reliance on the grand jury may be available. Administrative subpoenas, which can be used by criminal investigators to obtain contract documents, are available through the DOD Inspector General. 5 U.S.C. app. § 6 (1982). The Defense Contract Audit Agency also has subpoena authority. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, § 935, 99 Stat. 583, 700-701.

The investigation into potential criminal remedies should focus on those that have been identified above. In false statements or false claims actions, instructions should be given to the CID agents on specific documents required to support criminal charges, such as signed false certifications by the inspector and contractor invoices. To support mail fraud charges, investigators must be sensitive to the contractor's use of the mail to submit invoices.

Investigation of the award process should focus on how the government estimates for needed replacement of wood were determined and on whether the estimated cost of the jobs were leaked. Also, why was All Star the successful bidder on so many contracts? Is there evidence that the contracting officer or someone working in the contracting office is involved? If no one is criminally involved, what is the nature of the systemic problem that allowed such abuse of the award process by this contractor? Second, is the lack of competition due to collusive bidding (is there market division, where contractors split the market; is there bid suppression, causing other contractors not to bid; is there complimentary bidding, where other contractors are bidding intentionally high with no chance of receiving award)?

Investigation into inspection practices should focus on why the same inspector was used on all these contracts and why such shoddy work was accepted. Was it collusion by the inspector or was the inspector overworked or incompetent? Review the inspector's job description. Will it support removal action in this case?

Step Six: Evaluate Remedies. The contract remedies appear strongest in this scenario. Initiation of suspension or debarment action is indicated. Revoking acceptance should be considered but is more problematic because of the inspector's repeated acceptance of the defective work.

Administrative remedies are also strong here. Removal action against the government inspector is definitely indicated. Do not overlook the role of supervisors. Can an inspector be so consistently poor without a competent and honest supervisor knowing? Criminal remedies should be pursued, with DOJ concurrence. Subjects potentially include the contractor, the government inspector, and possibly someone within the contracting office. Offenses including gratuities, false claims, false statements, and mail fraud are indicated under the facts.

While civil remedies are available, these are perhaps weakest because they depend on DOJ assistance and take considerable time to complete. In any event, the civil false claims remedy is indicated by the facts.

Step Seven: Coordinate Action. Coordination must be effected with Contract Fraud Branch, Litigation Division, for suspension or debarment; with DOJ or the local U.S. Attorney for criminal and civil remedies; and with the CPO for removal action against the inspector and other disciplinary action against contracting office personnel.

Timing remedies is, of course, also a consideration. Typically, pursuit of contract and administrative remedies is most effective in order to avoid the problems with Fed. R. Crim. P. 6(e) if evidence were presented to a grand jury. It may be beneficial to first pursue indictment, however, if the case is straight forward and a quick indictment is possible. The indictment could then be used to suspend the contractor and the inspector. The key at this point is to develop a plan that will allow effective use of the remedies available and then coordinate and time these remedies for effective execution of the plan.

Contract in Progress

All Star Painting Company currently has one painting contract in progress. The Company has painted 20 buildings and is required to complete work on an additional 30 buildings under the terms of the contract. All Star has been paid $10,000 for completing work on five buildings and has requested further payment of $30,000 for work completed thus far. The contract price for painting the remaining 30 buildings is $60,000. The contractor is bonded. Based on the past performance record, a new inspector was assigned last week and is convinced that no surface preparation was done on any of the completed buildings before the primer coat was applied. The paint is already peeling off in some locations and there are several buildings where no paint was applied in the "hard to see" or "hard to reach" areas. The buildings also appear to be very dull, not at all like freshly painted buildings. In fact, the DEH advises that on the buildings completed thus far, two coats were not applied, a substandard paint was used, or the paint was thinned. The initial measurements indicate that while only $4,000 worth of replacement lumber was installed, the contractor has billed the government for $8,000 as part of the requested $30,000. The original inspector approved and certified all work done as conforming with contract requirements and had recommended payment of the $30,000.

The new inspector has also questioned some of the employees who work in the building about the contractor's performance. They indicated that, before painting, the contract employees always mixed the paint with water. They had questioned the painters and the original inspector about it and were told that the paint went on easier when it was watered down. The new inspector also learned that the first time it rained the paint washed off the building.

Step One: Identify The Problem. The problems that existed with the past contracts are still present. The government inspector has certified nonconforming work under the contract. Additionally, the evidence of paint thinning indicates a current fraudulent scheme.

Step Two: Inventory. The only change in the inventory of who is involved is that there are potentially more contractor employees involved in the fraudulent scheme. The employees who actually thinned the paint must be investigated for their complicity. Also, the specifications of the current exterior painting contract are now relevant in considering remedies available to the contracting officer.

Step Three: Consider Potential Remedies. Because final payment has not been made, additional contract and civil remedies are available. The recent evidence of nonconforming work is important because it bolsters the case against the contractor for poor performance under the completed contracts. The remedies previously discussed are also indicated by the scenario for the on-going contract.

Contract Remedies. Because final payment has not been made, the contracting officer has additional remedies under the contract. First of all, under the acceptance clause the contracting officer can either require reperformance or

accept the nonconforming work at a reduced price.[28] The contract can also be terminated for default.[29] The evidence of paint thinning would also help support any action to suspend and debar the contractor.

Civil Remedies. In addition to the remedy for false claims as discussed previously, the gratuities remedy must be considered. If the contractor gave any gratuity to a government employee to obtain favorable treatment, the contracting officer can treat the contract as terminated and can seek damages.[30] The contracting officer must first give notice of the government's intention to terminate the right of the contractor to proceed under the contract, and provide the contractor a hearing.

Step Four: Accomplish the Mission/Safeguard Documents. In addition to the considerations discussed for handling past contracts, the SJA must consider the implications of terminating the contract for default. It may be impracticable to terminate the contract for default if the mission requires that the buildings be painted immediately and reprocurement of the contract would be overly time consuming. There is an even greater need to preserve the integrity of the contract file for the ongoing to allow for effective contract administration.

Step Five: Investigate. Based on the investigation already conducted, little more is required except to follow up on the new inspector's allegations and to question the involved contractor employees.

Step Six: Evaluate Remedies. With a pending contract, the contractual remedies are even stronger because final payment has not yet been made. Hence, the contracting officer may demand reperformance of defective work. If reperformance is not satisfactory, he or she can then terminate the contract for default. In addition, the contracting officer should withhold payment, at least until the value of conforming work can be ascertained and a determination as to offsets can be made.[31] The other remedies discussed above may also be considered.

Step Seven: Coordinate Action. Time is of the essence when dealing with an ongoing contract. Immediate action by the contracting officer is essential in order to fully protect the government's interests. Close coordination between the legal office and the contracting officer is the key to successful pursuit of the identified contractual remedies.

Pending Contract

The contracting officer has advised the chief of staff that sealed bids for another painting contract have just been opened. This contract is for painting the post headquarters building and the commanding general would like performance as soon as possible. All Star Painting Company is the low bidder. The government estimate is $47,000 and All Star's bid is $44,000. The next lowest bid is $58,000. The contracting officer is anxious to award the contract.

Step One: Identify the Problem. The problem that faces the contracting officer in this scenario is that All Star Paint Company is the apparent low bidder on the pending contract. The issue is whether award should be made to All Star Paint in light of recent developments.

Step Two: Inventory. In this scenario the contracting officer and the contractor are the major participants. The contracting officer must decide if All Star Paint Company is a responsible contractor before awarding the contract.

Step Three: Consider Potential Remedies. For a pending contract, a specific contract remedy is indicated. The contracting officer must determine if All Star Paint is a responsible contractor under FAR Part 9.1. If a finding of nonresponsibility is made, the contracting officer may not award the contract to All Star Paint. Nonresponsibility can be based on a recent history of poor and nonconforming contract work,[32] evidence of which is rampant here.

Step Four: Accomplish the Mission/Safeguard Documents. The only additional consideration posed by the problem with the pending contract is acting so that the work can be accomplished in a timely fashion. Immediate support must be provided to the contracting officer to facilitate a timely decision on responsibility in order to get the contract awarded.

Step Five: Investigate. The only further investigation necessary is to review the pending award file and consider All Star's past performance.

Step Six: Evaluate Remedies. The contracting officer must consider contractor responsibility if no suspension or debarment has been initiated. At this point, there is ample evidence to support finding All Star nonresponsible. Minimal due process must be provided before making the nonresponsibility determination.[33] If All Star is found to be nonresponsible, award could be made to next lowest responsible bidder.

Step Seven: Coordinate Action. The key requirement here is to ensure that adequate due process is provided, hence coordination between the legal advisor and the contracting officer is of paramount importance. Also, because of the potential for a suspension action, coordination should be made with Contract Fraud Branch before making the responsibility determination.

Conclusion

Complex problems involving fraud, waste, and abuse in the contracting process can be resolved if a systematic approach is followed. The methodology presented in this article is a model approach for use at the installation level. This model allows for identification of fraud, waste, and abuse and pursuit of criminal, civil, administrative, and contractual remedies in a coordinated fashion. Use of this model will allow local SJAs to resolve these complex problems in an orderly manner.

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[28] *See, e.g.*, FAR § 52.246.12, Inspection of Construction.

[29] *See, e.g.*, FAR § 52.249-10, Default (Fixed-Price Construction).

[30] 10 U.S.C. § 2207 (1982).

[31] AFARS § 9.490(e) mandates withholding payments due when suspension or debarment is recommended unless otherwise directed by the Head of Contracting Activity or the AJAG for Military Law.

[32] FAR § 9.104-3(c).

[33] *See* Old Dominion Dairy Products, Inc v. Secretary of Defense, 631 F.2d 453 (D.C. Cir. 1980).

Novel Scientific Evidence's Admissibility at Courts-Martial

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Introduction

The Military Rules of Evidence Drafters' Analysis includes what one commentator has called "a rather tantalizing remark":[1] the drafters noted that the Military Rules "may be broader and *may* supersede" the standard that previously governed novel scientific evidence's admissibility at courts-martial.[2] In 1981, one text predicted that "it will take some time in the military courts for a workable standard to be developed."[3] Their prediction has proven accurate. Since the Military Rules went into effect in 1980, the Court of Military Appeals has failed to rule on whether the Military Rules supersede the former standard.[4] Nor have the Courts of Military Review been able to settle the issue.[5]

Although the military courts have not established clear rules governing novel scientific evidence's admissibility, opportunities to use such evidence have been continually increasing. Recent developments in the social and physical sciences have produced a "relentless expansion" of scientific findings with potential forensic uses.[6] The 1984 Manual for Courts-Martial's rules governing the production of military experts[7] and Defense Department civilian experts,[8] as well as the Manual's provisions concerning the employment of civilian experts[9] and the subpoena power,[10] provide military lawyers with the means to convert many of these scientific findings into evidence.

As Professor Giannelli has observed, however, "For evidence to contribute to the truth-determining function of a trial, it must be credible."[11] The rapid proliferation of fields in which military lawyers have sought to qualify expert witnesses[12] heightens the importance of determining scientific evidence's reliability. This article will examine the competing standards governing novel scientific evidence's admissibility at courts-martial.

The Competing Standards of Admissibility

It is unclear precisely what rules currently govern novel scientific evidence's admissibility at courts-martial. The confusion over this issue arises from the apparent incompatibility between the Military Rules of Evidence and the *Frye*[13] test, which had previously determined novel scientific evidence's admissibility within the military justice system.

The Frye *Test*

The holding in *Frye v. United States,* which governs the admissibility of novel scientific evidence in a majority of both federal and state jurisdictions,[14] was adopted by the Court of Military Appeals in *United States v. Ford.*[15] The *Frye* opinion rejected a defendant's claim that the trial judge had erred when he refused to allow an expert to testify about the defendant's lie detector test results.[16] In holding the evidence inadmissible, the court explained:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.[17]

The *Frye* test thus "imposes a specific burden—the technique must be *generally accepted by the relevant scientific community.*"[18]

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[1] Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology,* 100 Mil. L. Rev. 99, 101 (1983).

[2] Mil. R. Evid. 702 analysis. *See infra* notes 60–89 and accompanying text.

[3] S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 325 (1981) [hereinafter Saltzburg, Schinasi & Schlueter].

[4] *See infra* notes 61–72 and accompanying text.

[5] *See infra* notes 94–108 and accompanying text.

[6] Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial,* 106 Mil. L. Rev. 77, 77 (1984). *See also* McCormick, *Scientific Evidence: Defining a New Approach to Admissibility,* 67 Iowa L. Rev. 879, 879 (1982).

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

[8] R.C.M. 703(e)(2)(A) discussion.

[9] R.C.M. 703(d). *See generally* Hahn, *supra* note 6, at 81–98.

[10] R.C.M. 703(e)(2). *See generally* Hahn, *supra* note 6, at 98–106.

[11] Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half Century Later,* 80 Colum. L. Rev. 1197, 1200 (1980).

[12] *See generally* Hahn, *supra* note 6, at 77–78.

[13] 293 F. 1013 (D.C. Cir. 1923).

[14] For a discussion of the jurisdictions that follow the *Frye* test, see J. Weinstein & M. Berger, Weinstein's Evidence § 702[3] n.8 (1985) [hereinafter Weinstein].

[15] United States v. Ford, 4 C.M.A. 611, 613, 16 C.M.R. 185, 187 (1954).

[16] The machine at issue in *Frye* administered a "systolic blood pressure deception test." *Frye,* 293 F. at 1013. This machine, which measured only one physiological response, was a crude predecessor of the modern polygraph.

[17] 293 F. at 1014.

[18] Giannelli, *supra* note 11, at 1205 (emphasis in the original).

While the *Frye* test has been widely followed, it was not until the 1970s that courts and commentators began to critically examine the test's effects and merits.[19] Professor Giannelli observed that the *Frye* test's principal justification was that it "establishes a *method* for ensuring the reliability of scientific evidence."[20] That method is to give experts within the field a major role in determining which scientific evidence will be admissible. As the D.C. Circuit noted in 1974, "The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice."[21] The court also noted that the *Frye* standard serves the adversary system's interests by assuring that experts will be available to assist each side.[22] The California Supreme Court has suggested three additional merits: the *Frye* test promotes uniformity by requiring judges with differing views of particular scientific developments' reliability to base their admissibility rulings on the relevant scientific community's assessment of each development; the *Frye* test's conservative nature ensures that juries will not be influenced by new and potentially erroneous scientific findings; and the *Frye* test is efficient because once an appellate decision accepts a scientific development, subsequent trials will be bound by the ruling.[23]

The Relevancy Approach

Rather than asking whether a scientific technique is generally accepted, the relevancy approach applies evidentiary rules to novel scientific evidence in the same manner that those rules are applied to other kinds of evidence. Under this approach, the central question is whether the evidence's probative value outweighs its prejudicial effects.

The principal argument in favor of the relevancy approach is that the *Frye* test's excessive conservatism deprives courts of relevant and reliable evidence.[24] Proponents argue that the relevancy approach is more flexible than the *Frye* test, and thus promotes just decisions.[25]

The relevancy approach was developed by Professor McCormick[26] and advanced by a 1968 Florida intermediate appellate decision.[27] But the Federal Rules of Evidence, which some courts have interpreted as adopting the relevancy approach, have produced a rapid expansion in the number of jurisdictions abandoning the *Frye* test.[28]

The Federal Rules and the *Frye* Test. Since 1975, the Federal Rules of Evidence have governed the admissibility of evidence in the federal court system. The Federal Rules formed the basis for the Military Rules of Evidence, as well as similar rules in twenty-nine states and Puerto Rico.[29] The Federal Rules did not explicitly reject the *Frye* test or adopt the relevancy approach. Uncertainty concerning the Federal Rules' admissibility standard for novel scientific evidence persists, largely because the Rules' Advisory Committee failed to address the issue of whether the Rules supersede the *Frye* test. Nor does the Rules' legislative history provide any indication of whether Congress intended to abandon the general acceptance test.[30] The Military Rules of Evidence drafters also declined to indicate whether the Military Rules' essentially identical admissibility sections established a relevancy approach which supersedes the *Frye* test. The drafters' analysis did, however, note that the Military Rules "may be broader and *may* supersede" the *Frye* test.[31]

The *Frye* test's supporters can establish a cogent case that the Federal Rules did not abandon the general acceptance standard. Professor Giannelli observes that the following argument can be made: "Because the Federal Rules were not intended to be a comprehensive codification of the rules of evidence, a number of evidentiary rules are not covered, and many others, though mentioned, are treated only in a general fashion." Thus, "because *Frye* was the established rule and no statement repudiating *Frye* appears in the legislative history, the general acceptance standard remains intact."[32] As Professors Saltzburg and Redden have observed, "It would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding such evidence as lie detectors without explicitly saying so."[33] Those who argue that *Frye* survived the Federal Rules are also supported by a majority of the federal circuit opinions that address the issue.[34]

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[19] *See* Giannelli, *Frye v. United States*, 99 F.R.D. 189, 191 (1983).

[20] Giannelli, *supra* note 11, at 1207 (emphasis in the original).

[21] United States v. Addison, 498 F.2d 741, 743–44 (D.C. Cir. 1974).

[22] *Id.*

[23] People v. Kelly, 17 Cal. 3d 24, 30–32, 549 P.2d 1240, 1244–45, 130 Cal. Rptr. 144, 148–49 (1976). *See also* Reed v. State, 283 Md. 374, 391 A.2d 364 (1978). *See generally* McCormick, *supra* note 6, at 883–84.

[24] C. Wright & K. Graham, Federal Practice and Procedure § 5168 (1982) [hereinafter Wright & Graham].

[25] *See id.*

[26] *See* C. McCormick, Evidence 363–64 (1954). *See generally* Giannelli, *supra* note 11, at 1232–35.

[27] Coppolino v. State, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968), *appeal dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970). *See generally* Giannelli, *supra* note 11, at 1234; C. McCormick, Evidence 491 (2d ed. 1972); McCormick, *supra* note 6, at 889–90; A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 6–7 (2d ed. 1978).

[28] *See generally* McCormick, *supra* note 6, at 886–88.

[29] Weinstein, *supra* note 14, at T–1.

[30] *See generally* Giannelli, *supra* note 11, at 1229.

[31] Mil. R. Evid. 702 analysis (emphasis in the original). The drafters noted their uncertainty over whether the Military Rules established a new standard of admissibility for scientific evidence in this analysis and in the analysis to Rule 703.

[32] Giannelli, *supra* note 11, at 1229.

[33] S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 426 (1982) [hereinafter Saltzburg & Redden]. *But see infra* note 46 and accompanying text.

[34] *See* Weinstein, *supra* note 14, at § 702[3] n.8. *See, e.g.*, United States v. Lewellyn, 723 F.2d 615 (8th Cir. 1983); United States v. Distler, 671 F.2d 954 (6th Cir. 1981); United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981); United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978); United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976).

Yet a literal reading of Federal Rule 402 provides support for those who argue that the Federal Rules abolish the *Frye* test. Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Acts of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Because the *Frye* test is a judicially created standard and Rule 402 does not state that non-constitutionally based judicial standards can render relevant evidence inadmissible, several courts and commentators[35] have concluded that the Federal Rules necessarily abandon the *Frye* test.

Federal Rule 702 also provides some support for those who argue that the Federal Rules reject the *Frye* test. Rule 702 states: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As with Rule 402, commentators argue that Rule 702's failure to mention the *Frye* test is proof of the general acceptance standard's abandonment.[36]

An argument has also been advanced that Supreme Court precedent renders the *Frye* test unconstitutional as applied to criminal defendants. In *Washington v. Texas*[37] and *Chambers v. Mississippi*,[38] the Supreme Court ruled that the sixth amendment's compulsory process clause provided criminal defendants a right to present reliable evidence that was critical to their defense. Several courts[39] and commentators[40] have relied upon these cases to support the argument that criminal defendants have a constitutional right to present reliable scientific evidence that has not gained general acceptance. The Supreme Court, however, has not clarified what the term "reliable evidence" means in this context. Absent a Supreme Court holding that "reliable evidence" includes evidence based on scientific developments that do not have general acceptance within their fields,[41] this sixth amendment right is unlikely to provide the impetus for the *Frye* test's demise.

The Relevancy Approach under the Federal Rules. Although there is thus great controversy over whether the Federal Rules actually abandoned the *Frye* test, several courts and commentators have argued that the Federal Rules adopt a relevancy approach.[42]

This relevancy approach is based partially on Federal Rule 401, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Professor Giannelli observes that scientific evidence's probative value "is connected inextricably to its reliability; if the technique is not reliable, evidence derived from the technique is not relevant."[43]

Federal Rule 403 supplements Rule 401 by providing that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The D.C. Circuit contended that scientific evidence's major danger is its potential to mislead the jury by assuming "a posture of mystic infallibility in the eyes of a jury of laymen."[44] Chief Judge Everett has similarly argued that high expectations of expert testimony's reliability may create a substantial danger of unfair prejudice.[45] The relevancy approach requires that the judge decide whether such dangers *substantially* outweigh the scientific evidence's probative value. If they do not, the evidence is admissible.

The relevancy approach that results from these rules' interplay is somewhat more lenient than the general acceptance test. Professors Saltzburg and Redden explain that under the Federal Rules, evidence other than polygraph results "may be introduced after a lesser showing of acceptance in the field of the expert. This showing might be deemed 'reasonable scientific acceptance.' "[46]

The Relevancy Approach's Application. Iowa Supreme Court Justice McCormick has conducted a thorough examination of the relevancy approach's application. He identifies eleven factors that courts should consider in applying the relevancy approach to novel scientific evidence:

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[35] *See, e.g.*, United States v. Torniero, 735 F.2d 725, 731 n.9 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 788 (1985); United States v. Gould, 741 F.2d 45, 49 n.2 (4th Cir. 1984); State v. Williams, 388 A.2d 500, 504 (Me. 1978); State v. Dorsey, 88 N.M. 184, 184–85, 539 P.2d 204, 204–05 (1975); Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 New Mex. L. Rev. 187 (1976). *See also* Imwinkelried, *supra* note 1, at 105; Imwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 Wm. & Mary L. Rev. 261, 266–67 (1981) [hereinafter *A New Era*].

[36] *See, e.g.*, Weinstein, *supra* note 14, at § 702[3].

[37] 388 U.S. 14 (1967).

[38] 410 U.S. 284 (1973).

[39] *See* State v. Sims, 52 Ohio Misc. 31, 369 N.E.2d 24 (C.P. Cuyahoga County 1977); State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (Ct. App.), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975). *See also* McMorris v. Israel, 643 F.2d 458, 462, 466 (7th Cir. 1981) (suggesting such a constitutional right, but deciding the case on narrower grounds).

[40] Imwinkelried, *supra* note 1, at 106. *See also* Giannelli, *supra* note 11, at 1230–31; Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 Mil. L. Rev. 1, 73–74 (1983); McCormick, *supra* note 6, at 902–04; *A New Era*, *supra* note 35, at 267. *See generally* Imwinkelried, Chambers v. Mississippi: *The Constitutional Right to Present Defense Evidence*. 62 Mil. L. Rev. 225 (1973).

[41] *See* Lhost v. State, 85 Wis. 2d 620, 638, 271 N.W.2d 121, 130 (1978) (indicating that *Washington* and *Chambers* "do not stand for the proposition that inherently unreliable evidence or evidence of questionable validity must be admitted into evidence as part of the defendant's right to compulsory process").

[42] *See, e.g.*, Wright & Graham, *supra* note 24, at § 5168; United States v. Dorsey, 753 F.2d 1224 (3d Cir. 1985); United States v. Luschen, 614 F.2d 1164 (8th Cir.), *cert. denied*, 446 U.S. 939 (1980); United States v. Williams, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

[43] Giannelli, *supra* note 11, at 1236.

[44] Addison, 498 F.2d at 744. *But see infra* notes 77–85 and accompanying text.

[45] United States v. August, 21 M.J. 363, 365 (1986) (Everett, C.J. concurring). United States v. Cameron, 21 M.J. 59, 65 (C.M.A. 1985) (in a concurring opinion, Judge Cox indicated that he did not join in the portion of Chief Judge's Everett's opinion that discussed the danger of unfair prejudice, *id.* at 66 (Cox, J., concurring); this section therefore represents Chief Judge Everett's opinion alone); United States v. Moore, 15 M.J. 354, 375 (C.M.A. 1983) (Everett, C.J., dissenting).

[46] Saltzburg & Redden, *supra* note 33, at 452.

(1) the potential error rate in using the technique, (2) the existence and maintenance of standards governing its use, (3) presence of safeguards in the characteristics of the technique, (4) analogy to other scientific techniques whose results are admissible, (5) the extent to which the technique has been accepted by scientists in the field involved, (6) the nature and breadth of the inference adduced, (7) the clarity and simplicity with which the technique can be described and its results explained, (8) the extent to which the basic data are verifiable by the court and jury, (9) the availability of other experts to test and evaluate the technique, (10) the probative significance of the evidence in the circumstances of the case, and (11) the care with which the technique was employed in the case.[47]

Justice McCormick contends that these factors reflect the relevancy approach's incorporation of "concepts that judges understand and routinely use."[48] Through these concepts, the relevancy approach will "assure that the admissibility decision is carefully made."[49] The relevancy approach, argued Justice McCormick, reflects "the necessity of caution in admitting scientific evidence"[50] while simultaneously promoting "necessary flexibility."[51]

In *United States v. Downing*, the United States Court of Appeals for the Third Circuit concluded that the Federal Rules established a relevance test and explained that novel scientific evidence must be assessed on the basis of "(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proferred connection between the scientific research or test result to be presented, and particular disputed factual issues in the case."[52] In explaining these factors, the Third Circuit noted that like the *Frye* test, the relevancy approach considered the scientific evidence's "degree of acceptance" within the "relevant scientific community."[53] The court also offered criteria for evaluating scientific evidence without a " 'track record' in litigation."[54] Trial courts, the court held, should consider the "likelihood that the scientific basis of the new technique has been exposed to critical scientific scrutiny."[55] Other factors that the court offered as "circumstantial evidence of the reliability of the technique" were "[t]he qualifications and professional stature of expert witnesses," "the non-judicial uses to which the scientific technique are put," "[t]he frequency with which a technique leads to erroneous results," and "the type of error generated by the technique."[56]

Downing indicates that once the trial court has assessed the evidence's reliability, it must balance this determination "against the danger that the evidence, even though reliable, might nonetheless confuse or mislead the finder of fact."[57] The opinion also promoted the adversarial process' role in exposing scientific evidence's weaknesses[58] by noting "The extent to which the adverse party has had notice of the evidence and an opportunity to conduct its own tests or produce opposing experts are also appropriate considerations for the court."[59]

The Military Rules of Evidence and The *Frye* Test

While federal courts have devoted a great deal of attention to the apparent conflict between the *Frye* test and the relevancy approach,[60] the Court of Military Appeals has largely ignored the question of whether the Military Rules supersede the *Frye* test.

Chief Judge Everett is the only Court of Military Appeals judge who has expressed a definite opinion on whether the Military Rules discarded the general acceptance standard; in a dissenting opinion, Chief Judge Everett noted in passing that "the *Frye* test still has vitality."[61] Two Court of Military Appeals majority opinions, however—one written by Judge Fletcher[62] and the other by Judge Cook[63]—have noted in passing that the Military Rules may broaden the *Frye* test's standard of admissibility. Another Court of Military Appeals' majority opinion, *United States v. Snipes*,[64] stated that Military Rules of Evidence 702–705 broadened the admissibility of expert testimony.[65] As one commentator has observed, however, it is unclear whether *Snipes* will result in the court's abandonment of the *Frye* test: "*Frye* was not an issue in *Snipes* because the defense in

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[47] McCormick, *supra* note 6, at 911–12.

[48] *Id.* at 916.

[49] *Id.* at 915.

[50] *Id.*

[51] *Id.* at 916.

[52] 753 F.2d 1224, 1237 (3d Cir. 1985).

[53] *Id.* at 1238.

[54] *Id.* at 1238.

[55] *Id.* at 1238–39.

[56] *Id.* at 1239.

[57] *Id.* at 1240.

[58] *See generally infra* notes 147–55 and accompanying text.

[59] *Downing*, 753 F.2d at 1241.

[60] *See supra* notes 34 & 35 and accompanying text.

[61] United States v. Moore, 15 M.J. 354, 372 (C.M.A. 1983) (Everett, C.J., dissenting).

[62] United States v. Martin, 13 M.J. 66, 68 n.4 (C.M.A. 1982).

[63] United States v. Hammond, 17 M.J. 218, 221 n.4 (C.M.A. 1984).

[64] 18 M.J. 172 (C.M.A. 1984).

[65] *Id.* at 178.

Snipes did not object to the testimony."[66] Even more significantly, both Judge Cook, who wrote the *Snipes* opinion, and Judge Fletcher, who joined the opinion, have since retired.[67] Chief Judge Everett, who did not join the majority opinion but merely concurred in the result,[68] had previously expressed his support for the *Frye* test.[69] Although Chief Judge Everett recently cited *Snipes* in support of the proposition that Military Rules of Evidence 702 and 704 were "intended to broaden the parameters of admissible opinion testimony," he added that this expansion "is not without limitation" and repeated his concern that some expert testimony "has substantial potential for misleading the factfinder."[70] Judge Cox, however, declined to join in this portion of Chief Judge Everett's opinion[71] and has since hinted that he may support abandoning the *Frye* test in favor of a reasonable scientific acceptance standard.[72]

Support for the Frye *Test*

In the only reported opinion to expressly decide whether the *Frye* test survived the Military Rules,[73] the Army Court of Military Review called attention to the Military Rules drafters' equivocation over whether the Rules supersede *Frye*, the Court of Military Appeals' failure to decide the issue, and the Federal Rules advisory committee's silence on the question. The Army court accordingly held, "In the absence of any definitive authority to the contrary, we are unwilling to abandon a rule that has been applied in the military for almost thirty years."[74]

In support of this holding, the court argued:

> *Frye's* general acceptance standard serves as a counterbalance against the tendency of lay members to be unduly impressed by the aura of "mystic infallibility" surrounding much scientific evidence. . . . This counterbalance is greater than that afforded by the military rules alone. Military Rule of Evidence 403 only protects against the risk of misleading the members when the risk *substantially* outweighs the probative value of the evidence.[75]

Support for the Relevancy Approach

While contending that "it would be premature to make a definitive decision to abandon *Frye*,"[76] Professor Imwinkelried took issue with *Frye* test proponents who, like the Army Court of Military Review, argue that "lay jurors often attribute a 'mystic infallibility' to scientific proof."[77] Professor Imwinkelried discussed a number of studies indicating that lay jurors were capable of evaluating scientific evidence.[78] Included among these were several studies considering juries' reactions to polygraph evidence[79] that "support the belief that juries are capable of weighing and evaluating evidence and rendering verdicts that may be inconsistent with the polygraph evidence. . . . Polygraph evidence does not assume undue influence in the evidentiary scheme."[80]

After presenting studies suggesting that state juries also competently evaluated evidence based on psychiatry,[81] sound spectrography,[82] and fingerprint analysis,[83] Professor Imwinkelried concluded that when compared with state trials, "the court-martial is more likely to have better educated, sophisticated jurors. If we can have faith in a state trial jury, as suggested by the research to date, there is all the more reason to have faith in the court-martial panels that you present scientific evidence to."[84] Professor Imwinkelried recommended that if subsequent scientific investigations confirm existing data that demonstrate lay jurors' competence, then "it will be time to jettison the *Frye* test."[85]

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[66] Hahn, *supra* note 6, at 79 n.24.

[67] *See* Ceremonies, 18 M.J. CI (1984) (retirement of Judge Cook); *Judge Fletcher Retires*, 13 Mil. L. Rptr. 1091 (1985).

[68] *Snipes*, 18 M.J. at 180 (Everett, C.J., concurring).

[69] *See supra* note 61 and accompanying text.

[70] United States v. Cameron, 21 M.J. 59, 62, 65 (C.M.A. 1985).

[71] *Id.* at 66 (Cox., J., concurring).

[72] *See* United States v. August, 21 M.J. 363, 365 (1986). *See infra* note 89 and accompanying text.

[73] United States v. Bothwell, 17 M.J. 684 (A.C.M.R. 1983).

[74] *Id.* at 687.

[75] *Id.*

[76] Imwinkelried, *supra* note 1, at 117.

[77] *Id.* at 110 (quoting *Addison*, 498 F.2d at 744). *See supra* note 44 and accompanying text.

[78] Imwinkelried, *supra* note 1, at 113–16.

[79] *Id.* at 114–15. Because a pending Court of Military Appeals case will consider polygraph evidence's admissibility, these studies are particularly relevant. In *United States v. Gipson*, the court invited briefs on the issue of "whether the military judge abused his discretion in not allowing the defense an opportunity to lay a proper foundation for the admission of the results of appellant's polygraph examination into evidence." 19 M.J. 301, 301 (C.M.A. 1985).

[80] Imwinkelried, *supra* note 1, at 114–15 (quoting Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 A.B.A.J. 162, 165 (1982)). *See also* Carlson, Pasano & Tunnuzzo, *The Effect of Lie-Detector Evidence on Jury Deliberations: An Empirical Study*, 5 J. Police Sci. & Ad. 148 (1977); Cavoukian & Heslegrave, *The Admissibility of Polygraph Evidence in Court—Some Empirical Evidence*, 4 L. & Hum. Behav. 117 (1980); Markwart & Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*, 7 J. Police Sci. & Ad. 324 (1979); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 Hastings L.J. 917 (1975). *But see* Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 144 (1984).

[81] *See* Alexander, *Meeting the Insanity Defense*, in The Prosecutor's Deskbook (1971); R. Simon, The Jury and the Defense of Insanity (1967).

[82] *See* Greene, *Voiceprint Identification: The Case in Favor of Admissibility*, 13 Am. Crim. L. Rev. 171 (1975).

[83] *See* Loftus, *Psychological Aspects of Courtroom Testimony*, 347 Annals of the N.Y. Acad. of Sci. 27, 34 (1980).

[84] Imwinkelried, *supra* note 1, at 117.

[85] *Id.* at 118.

Noting that "the adoption of the Military Rules of Evidence has cast serious doubt on *Frye*," [86] the Army Court of Military Review has similarly contended that "[t]he situation in the military justice system, where the parties have access to modern, neutral forensic services and where fact-finders are *de facto* blue-ribbon juries, is particularly well suited to dispel the principal concerns of those who prefer *Frye* on policy grounds." [87]

Other commentators have also criticized the *Frye* test. Pointing to Military Rule 703, which allows experts to base opinions upon data "reasonably relied upon by experts in the particular field" even if those data would not be admissible, they argue that a "reasonable scientific acceptance" standard may be "a workable one that will provide adequate protection against premature use of new scientific techniques, without unduly restricting courts from utilizing reliable technological advances." [88] In a recent opinion, Judge Cox cited this analysis and suggested that he favors determining scientific evidence's admissibility according to whether it is based on techniques "reasonably relied upon by" scientists within the field. [89]

The Current Rules in Each Military Jurisdiction

The Court of Military Appeals. In its 1984 *Snipes* decision, the Court of Military Appeals indicated that when Military Rules of Evidence 702–705 "are read in combination, the conclusion is inescapable that they are intended to broaden the admissibility of expert testimony, and that the essential limiting parameter is whether the testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' " [90] The court also noted that the "expanded concept of 'relevant evidence' " found in Military Rules 401 and 402 "is in keeping with the overall philosophy of the Military (and Federal) Rules of Evidence." [91] The court did not specifically indicate that it was overruling its previous adoption of the *Frye* test, nor was *Frye* actually at issue in the case. [92] Nonetheless, the decision's language indicates that the court intended to adopt the relevancy approach. It is not yet clear whether the court will continue to follow *Snipes*. [93]

The Air Force Court of Military Review. There are no reported Air Force Court of Military Review decisions specifically addressing the conflict between the *Frye* test and the relevancy approach. [94] A 1982 decision, however, casts some light on the issue. There the court observed, "Contrary to defense claims, the 'battered child syndrome' is a recognized medical diagnosis." [95] The Navy-Marine Corps Court of Military Review has cited this case as standing for the proposition that a novel theory "requires general acceptance in the scientific community before receiving judicial sanction." [96] A standard of admissibility requiring merely that a theory be "recognized" within its field, however, is also consistent with the relevancy approach. The Air Force court has thus provided no clear indication of whether it will apply the *Frye* test or a relevancy approach when ruling on novel scientific evidence's admissibility. In a recent case considering the admissibility of expert testimony on the general behavior patterns of child abuse victims, however, the court cited *Snipes* and held the testimony admissible. [97] Although the Air Force court did not specifically address the admissibility standard on which this decision was based, the *Snipes* decision suggested that the relevancy approach was the proper standard. [98]

The Army Court of Military Review. In its 1983 *Bothwell* opinion, the Army Court of Military Review adopted a specific test to determine novel scientific evidence's admissibility: testimony based upon a scientific principle or discovery is admissible if the underlying theory has attained "general acceptance in the particular field in which it belongs." [99]

The *Bothwell* case was decided before the Court of Military Appeals' *Snipes* decision. Shortly after *Snipes* was announced, however, the Army Court cited *Bothwell* and the Court of Military Appeals' *Ford* decision [100] in holding that the *Frye* test governed the admissibility of hypnotically-refreshed testimony. [101]

A different Army Court of Military Review panel subsequently cited *Snipes* and indicated that the "Military Rules of Evidence were intended to broaden the admissibility of expert testimony." [102] This case did not specifically consider

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[86] United States v. Lusk, 21 M.J. 695, 699 (A.C.M.R. 1985).

[87] *Id.* at 699 n.2.

[88] Saltzburg, Schinasi & Schlueter, *supra* note 3, at 327.

[89] *See August*, 21 M.J. at 365. Chief Judge Everett's concurring opinion suggests that he did not join in this statement. *See id.* at 365 (Everett, C.J., concurring).

[90] *Snipes*, 18 M.J. at 178, (quoting Manual for Courts-Martial, United States, 1969 (Rev. ed.), appendix 18, Rule 701 analysis).

[91] 18 M.J. at 178.

[92] *See supra* note 66 and accompanying text.

[93] *See supra* notes 66–72 and accompanying text.

[94] The Air Force Court of Military Review has followed *Snipes*, but only in the context of opinion testimony's admissibility standard. *See* United States v. Nelson, ACM 24775 (A.F.C.M.R. Dec. 3, 1985) (available on LEXIS, Miltry library, CMR file); United States v. Wagner, 20 M.J. 758 (A.F.C.M.R.), *petition denied*, 20 M.J. 425 (C.M.A. 1985).

[95] United States v. Irvin, 13 M.J. 749, 752 (A.F.C.M.R. 1982).

[96] United States v. Rojas, 15 M.J. 902, 925 (N.M.C.M.R. 1983), *summarily aff'd*, 20 M.J. 330 (C.M.A. 1985).

[97] United States v. Nelson, ACM 24775 (A.F.C.M.R. December 3, 1985) (available on LEXIS, Miltry library, CMR file).

[98] *See supra* notes 90–91 and accompanying text.

[99] *Bothwell*, 17 M.J. at 686 (quoting *Frye*, 293 F. at 1014).

[100] United States v. Ford, 4 C.M.A. 611, 613, 16 C.M.R. 185, 187 (1954). *See supra* text accompanying note 15.

[101] United States v. Harrington, 18 M.J. 797, 802 (A.C.M.R. 1984).

[102] United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985).

whether the Military Rules supersede the *Frye* test, however. More recently, yet another Army court panel noted in dictum that "we believe that the adoption of the Military Rules of Evidence has cast serious doubt on *Frye*."[103] The Army Court thus seems to be retreating from its *Bothwell* decision.

The Coast Guard Court of Military Review. There are no reported Coast Guard Court of Military Review decisions on the subject.

The Navy-Marine Corps Court of Military Review. The Navy-Marine Corps Court of Military Review referred to the controversy over novel scientific evidence's standard of admissibility in *United States v. Jefferson.*[104] Before deciding the case on other grounds, the court observed, "A prerequisite to the admission of scientific evidence is that the principles upon which it is based 'must be sufficiently established to have gained general acceptance in the particular field to which it belongs.' "[105] After this reference to the *Frye* test, however, the court added, "MIL.R.EVID. 702 may broaden this test, as the rule permits the admission of expert testimony whenever it serves to aid the trier of fact."[106]

More recently, the Navy-Marine Corps Court cited *Snipes* in holding, "The Military Rules of Evidence pertaining to expert testimony are intended to broaden the admissibility of such testimony, but the essential limiting parameter is whether the testimony will assist the trier of fact to understand the evidence or determine a fact in issue."[107] Although the case did not concern novel scientific evidence,[108] the opinion does indicate that the court's earlier equivocation over the proper admissibility standard is likely to be resolved in favor of the relevancy approach.

Comparing the Effects of the *Frye* Test and the Relevancy Approach

When the effects of the two tests are compared, the apparent differences between the relevancy approach and the *Frye* test prove to be largely illusory. Professor Saltzburg has contended that the general acceptance and relevancy standards

> are essentially the same, despite the frequency with which they are assumed to differ. The question that is more significant is how much success a scientific claim must have before courts will rely on it. The answer to this question should be the same under *Frye* or a relevance approach.[109]

Because the relevancy approach demands an inquiry into whether evidence is probative, and because only reliable evidence can be probative, the relevancy standard requires judges to examine scientific evidence's reliability. Professor Giannelli has observed, "Because the judge in most cases cannot resort to logic and experience to evaluate the probative value of a novel technique, he must turn to science."[110] Thus, under either the *Frye* test or the relevancy approach, a judge will examine whether a novel technique or theory is accepted within the scientific community. While the relevancy approach may require a somewhat "lesser showing of acceptance,"[111] the two standards are substantially similar.

Both the *Frye* test's proponents and relevancy approach advocates have acknowledged that the two standards yield similar results. The United States Court of Appeals for the Sixth Circuit, which continues to apply the *Frye* test,[112] has noted that it considers "general acceptance as being nearly synonymous with reliability. If a scientific process is reliable, or sufficiently accurate, courts may also deem it 'generally accepted.' "[113]

Relevancy approach supporters have also noted the two standards' similarity. Chief Judge Weinstein and Professor Berger, for example, contend that the Federal Rules' failure to specifically incorporate the *Frye* test "should be regarded as tantamount to an abandonment of the general acceptance standard."[114] Yet they concede that "[w]hether or not the scientific principles involved have been generally accepted by experts in the field may still have a bearing on the reliability and consequent probative value of the evidence."[115] Iowa Supreme Court Justice McCormick, another relevancy approach proponent, similarly observes that as a result of modern judicial modifications of the *Frye* test,[116] the general acceptance standard now yields results essentially similar to those of the relevancy approach.[117]

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[103] *Lusk*, 21 M.J. at 699.

[104] United States v. Jefferson, 17 M.J. 728 (N.M.C.M.R. 1983), *petition denied*, 20 M.J. 292 (C.M.A. 1985) (quoting United States v. Hulen, 3 M.J. 275, 276 (C.M.A. 1977)).

[105] 17 M.J. at 731.

[106] *Id.*

[107] United States v. Kyles, 20 M.J. 571, 575 (N.M.C.M.R.), *petition denied*, 21 M.J. 112 (C.M.A. 1985).

[108] The defense offered an expert to testify on the "generalized knowledge of persons in the military community concerning divorce and annulment procedures." *Id.* at 574–75. The court found no abuse of discretion in the trial judge's restriction of proferred testimony that fell into the category of general knowledge. *Id.* at 575.

[109] Saltzburg, *Frye and Alternatives*, 99 F.R.D. 208, 209 (1983).

[110] Giannelli, *supra* note 11, at 1235.

[111] Saltzburg & Redden, *supra* note 33, at 452.

[112] *See* United States v. Distler, 671 F.2d 954 (6th Cir. 1981).

[113] United States v. Franks, 511 F.2d 25, 33 n.12 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

[114] Weinstein, *supra* note 14, at 702[3].

[115] *Id.*

[116] *See generally* McCormick, *supra* note 6, at 890–95.

[117] *Id.* at 880.

Thus, while the Court of Military Appeals' upcoming *Gipson* opinion may decide whether the Military Rules supersede the *Frye* test,[118] this decision is unlikely to have a great impact on the manner in which military courts determine novel scientific evidence's admissibility.

The Advantages of Adopting the Relevancy Approach

Because the basic inquiry into reliability will be similar under either the general acceptance or relevancy standard, a firm adoption of the relevancy approach would not require wide-scale reversal of military precedent rejecting specific forms of scientific evidence. But by signaling a slight lowering of the degree to which a scientific development must be accepted within its field before evidence based on the development will be admissible, the relevancy approach's adoption might encourage military appellate courts to reconsider scientific evidence that they have rejected in the past.

Military appellate courts have recently endorsed such controversial areas of scientific evidence as battered child syndrome[119] and rape trauma syndrome.[120] Evidence demonstrating eyewitness testimony's unreliability,[121] however, is illustrative of scientific developments that are becoming increasingly accepted by civilian courts[122] but have been barred from courts-martial. Evidence concerning eyewitness testimony's unreliability has been specifically addressed in three reported military appellate opinions, all of which rejected challenges to military judges' refusal to allow such expert testimony.

The Court of Military Appeals first addressed such evidence's admissibility in *United States v. Hulen.*[123] Holding that the "questionable nature and scant results of the one experiment conducted by the witness" were insufficient to satisfy the *Frye* test, the court affirmed a military judge's refusal to permit expert testimony concerning witness' difficulty in making interracial identifications. Judge Perry, joined by then-Chief Judge Fletcher, however, added that if the expert had been able to establish his theory as a "scientific principle," then the evidence would have been admissible.[124]

In *United States v. Hicks,* the Army Court of Military Review chose to ignore this precedent, which it characterized as "obiter dicta attributable to two judges."[125] The court instead adopted a four-part test developed by the Ninth Circuit United States Court of Appeals in *United States v. Amaral.*[126] This test required that: the witness must be qualified as an expert; the testimony must relate to proper subject matter (in other words, it must be beyond the ken of the average juror); the testimony must conform to a generally accepted scientific theory; and the testimony's probative value must outweigh its prejudicial effect.[127] Stressing the requirement that the "probative value of the tendered expert testimony be weighed against its prejudicial effect," the Army court found no abuse of discretion in the military judge's failure to procure an eyewitness identification expert to testify about social and perceptual factors in eyewitness identification.[128]

The only other reported military case to address this issue was *United States v. Dodson.*[129] In a brief discussion affirming a military judge's refusal to allow a psychologist to testify about perception and memory, the Navy-Marine Corps court held that the field of perception and memory "is not so generally accepted within the scientific community as to meet the standards of reliability applicable to scientific evidence."[130]

There is, however, substantial scientific support for evidence demonstrating that eyewitness testimony is often unreliable.[131] The available data have led one commentator to conclude that "even though an all encompassing theoretical framework has yet to be developed, there is enough

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[118] 19 M.J. 301, 301 (C.M.A. 1985). *See supra* note 79. In order to rule on whether it was error to deny the defense an opportunity to lay a foundation for the admission of polygraph results, the court may be compelled to first decide the proper standard for scientific evidence's admissibility.

[119] *See* United States v. White, 19 M.J. 995 (A.C.M.R. 1985); United States v. Irvin, 13 M.J. 749, 752–53 (A.F.C.M.R.), *petition granted,* 14 M.J. 438 (C.M.A. 1982) (finding no error in the military judge's decision allowing a physician to give testimony that included a description of the battered child syndrome). *See also* United States v. Snipes, 18 M.J. 172 (C.M.A. 1984) (holding that no abuse of discretion occurred when the military judge, without defense objection in a bench trial, allowed expert testimony on sexually abused children's behavior patterns).

[120] *See* United States v. Eastman, 20 M.J. 948 (A.F.C.M.R. 1985) (noting that "we see no reason why the prosecution should not be permitted to present evidence of psychological injury, as manifested by apparent somatic, behavioral, or emotional symptoms, if there is some evidence that such symptoms first appeared after the rape and were, arguably, a product of forcible nonconsensual intercourse." *Id.* at 952). *See also* United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985) (holding that the unrestricted use of rape trauma syndrome evidence violated Mil. R. Evid. 403's balancing standard, *id.* at 900–01, but that the properly qualified use of such evidence is permissible, *id.* at 902); *see generally Note, Qualified Use of Rape Trauma Syndrome,* The Army Lawyer, Sept. 1985, at 31. *See also* United States v. Hammond, 17 M.J. 218 (C.M.A. 1984) (endorsing the use of rape trauma evidence in sentencing, but reserving the issue of its admissibility on the merits). *See generally* Feeney, *The Complainant's Credibility: Expert Testimony and Rape Trauma Syndrome,* The Army Lawyer, Sept. 1985, at 33; *Qualifying Expert Testimony on Rape Trauma,* 13 Mil. L. Rptr. 1088 (1985).

[121] *See generally* Gilligan & Hahn, *Eyewitness Identification in Military Law,* 110 Mil. L. Rev. 1, 46–52 (1985).

[122] *See generally* Gilligan & Hahn, *supra* note 121, at 51–52. *See infra* notes 136–146 and accompanying text.

[123] 3 M.J. 275 (C.M.A. 1977).

[124] *Id.* at 277–78 (Perry, J. concurring).

[125] 7 M.J. 561, 562 (A.C.M.R.), *petition denied,* 7 M.J. 249 (C.M.A. 1979).

[126] 488 F.2d 1148, 1152–53 (9th Cir. 1973).

[127] *Hicks,* 7 M.J. at 563.

[128] *Id.* at 566.

[129] 16 M.J. 921 (N.M.C.M.R. 1983), *aff'd in part, rev'd in part on other grounds,* 21 M.J. 237 (C.M.A. 1986).

[130] *Id.* at 930. *See generally* Gilligan & Hahn, *supra* note 121, at 47–50.

[131] For an excellent summary of psychological research findings concerning eyewitness testimony's unreliability, see Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases,* 45 La. L. Rev. 721, 723–29 (1985).

research literature to begin closely questioning the judicial system's reliance on the accuracy of eyewitnesses."[132]

Research also indicates that such information would be useful to jurors. Studies of civilian juries indicate that many "prospective jurors significantly overestimate the success rate of eyewitness identifications, and are also unaware of the sources of error in such identifications."[133]

Despite this body of research literature, a majority of civilian appellate courts which have considered the issue have refused to reverse trial courts' exclusion of evidence concerning eyewitness testimony's unreliability.[134] Since the last military appellate decision on this issue,[135] however, there has been a trend among civilian courts toward endorsing scientific evidence that demonstrates eyewitness testimony's unreliability.

The case which began this trend was the Arizona Supreme Court's decision in *State v. Chapple.*[136] In *Chapple,* the court based its ruling on the same four criteria which the Army Court of Military Review used in *Hicks.*[137] Limiting its holding to "the peculiar facts of this case,"[138] however, the court ruled that it was an abuse of discretion for the trial judge to exclude testimony concerning eyewitness identifications' unreliability where the only evidence linking the defendant to the murders were identifications made by eyewitnesses more than one year after the crime.[139]

Although *Chapple* was decided before the Navy-Marine Corps court's *Dodson* opinion,[140] several civilian appellate courts have since endorsed the admissibility of scientific evidence demonstrating eyewitness testimony's unreliability.[141] In *People v. McDonald,* the California Supreme Court held that under California Evidence Code § 351's relevancy standard, when "eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability," it "will ordinarily be error" to exclude expert testimony on "specific psychological factors" that could have affected the identification's accuracy.[142] In a more recent decision considering the issue, the Ohio Supreme Court applied the relevancy approach and held that an experimental psychologist's testimony concerning factors that may impair the accuracy of a typical eyewitness identification was admissible under Ohio Evidence Rule 702.[143]

Two federal circuits have also favorably considered such scientific evidence. In *United States v. Smith,* the United States Court of Appeals for the Sixth Circuit noted that "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research;" the court strongly suggested that evidence based on this research can therefore "be said to conform to a generally accepted explanatory theory."[144] In a 1985 opinion considering similar evidence, the Third Circuit indicated that "it would appear that the scientific basis for the expert evidence in question is sufficiently reliable to satisfy Rule 702."[145]

This trend indicates that military appellate courts should reexamine their treatment of evidence demonstrating the unreliability of eyewitness testimony. If a military appellate court were to agree with the Sixth Circuit's suggestion that research demonstrating eyewitness testimony's unreliability is "generally accepted,"[146] then evidence based on such research would be admissible under either the *Frye* test or the relevancy approach. By adopting a relevancy approach, however, the Court of Military Appeals would signal its willingness to reconsider the admissibility of various forms of scientific evidence, including evidence demonstrating eyewitness testimony's unreliability. Such a decision may also encourage the courts of military review to reconsider their earlier restrictive decisions.

Military Trial Lawyers' Handling of Scientific Evidence

The relevancy approach's primary effect on trial lawyers is that it provides the proponent of novel scientific evidence with a number of possible bases for admission. While a development's general acceptance can still establish the reliability of evidence based on the development, the relevancy approach allows other factors, including the "qualifications and professional stature of expert witnesses," to serve as a substitute for general acceptance.[147] Thus, while courts will generally reach the same conclusion

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[132] C. Bartol, Psychology and American Law 169 (1983). *See also* Clifford, *Towards a More Realistic Appraisal of the Psychology of Testimony,* in Psychology in Legal Contexts, Applications and Limitations 23 (S. Lloyd-Bostock ed. 1981).

[133] Comment, *supra* note 131, at 737. *See* Bringham & Borthwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications,* 7 Law & Hum. Behav. 19, 29 (1983). *See also* Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?,* 6 Law & Hum. Behav. 15, 24–25 (1982). *But see* McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?,* 38 Am. Psychologist 550 (1983). *See generally* Gilligan & Hahn, *supra* note 121, at 46.

[134] Comment, *supra* note 97, at 722. *See generally id.* 732–33; Gilligan & Hahn, *supra* note 121, at 50–51.

[135] *Dodson,* 16 M.J. 921.

[136] 135 Ariz. 281, 660 P.2d 1208 (1983). *See generally* Note, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?,* 26 Ariz. L. Rev. 399 (1984).

[137] *See supra* note 127 and accompanying text.

[138] *Chapple,* 135 Ariz. at 297, 660 P.2d at 1224.

[139] *Id.*

[140] *Chapple* was a 1983 opinion; *Dodson* was decided later in the same year.

[141] *See generally* People v. Brooks, 128 Misc. 2d 608, 611–13, 490 N.Y.S.2d 692, 694–97 (Co. Ct. 1985).

[142] 37 Cal. 3d 351, 377, 690 P.2d 709, 727 208 Cal. Rptr. 236, 254 (1984).

[143] State v. Buell, 22 Ohio St. 3d 124 (1986).

[144] 736 F.2d 1103, 1107 (6th Cir.) (per curiam), *cert. denied,* 105 S. Ct. 213 (1984).

[145] *Downing,* 753 F.2d at 1240. *See also* United States v. Sebetich, 776 F.2d 412, 418–19 (3d Cir. 1985).

[146] *Smith,* 736 F.2d at 1107.

[147] *Downing,* 753 F.2d at 1239. *See generally supra* note 56 and accompanying text.

under either the relevancy approach or the *Frye* test,[148] trial lawyers may be able to convince particular military judges to use their discretion to admit scientific evidence that does not meet the general acceptance test, but which is unlikely to mislead the fact-finder.

In educating the fact-finder about scientific evidence, however, the trial lawyer's task will be similar under either standard. In adopting the relevancy approach, the Fourth Circuit Court of Appeals commented that "[u]nless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation."[149] But challenging opposing counsel's experts and educating the fact-finder about opposing counsel's scientific evidence's faults is no less important under the *Frye* test than under the relevancy approach. Similarly, under either standard, the trial lawyer must be prepared to bolster the merits of his or her own scientific evidence.

The military lawyer can take advantage of the "quite liberal" military discovery practice[150] to apprise himself or herself of opposing counsel's scientific evidence.[151] Counsel must then prepare to refute it. The military trial counsel should therefore become familiar with standard threats to scientific findings' validity and be able to explain these threats in language that the fact-finder can easily understand and apply.[152]

Professor Saltzburg has pointed to several specific bases on which scientific evidence may be challenged:

> It should be apparent that even if a well accepted theory or principle or a standard test is used, experts and scientists may make mistakes. In particular cases they may have axes to grind that detract from the scientific nature of their judgments. More typically, they will be drawing inferences and offering opinions that represent leaps from basic data.[153]

He also notes that there is "sufficient evidence that crime labs are not as careful and dependable as they might be."[154]

To maximize a refutation's effectiveness, however, the military lawyer must do more than merely point out threats to evidence's validity. During a discussion of data concerning civilian jurors' responses to scientific evidence, Professor Slobogin advises, "If in addition to cross-examining the expert's opinion-formation process and presenting data suggesting the general fallibility of the scientific evidence, the defense offers other, case-specific information casting doubt on the opinion evidence, any erroneous impressions engendered by an expert's testimony can perhaps be more easily dispelled."[155] By engaging in these steps, the military lawyer will not only be a more effective advocate, but he or she will also have a positive influence on the fact-finder's decision-making process.

Conclusion

Military appellate courts have recently shown a minor trend toward considering scientific evidence's reliability through the relevancy approach. While this approach will generally yield results similar to those produced by the older general acceptance test, adoption of the relevancy approach would have the advantage of promoting reconsideration of rejected forms of scientific evidence that may be sufficiently reliable to aid courts-martial in reaching just results. Adoption of the relevancy approach would also express confidence in court members' ability to effectively consider scientific evidence. The military appellate courts' trend toward the relevancy approach is thus salutary and should be continued. An explicit adoption of the relevancy approach by the Court of Military Appeals would be particularly welcome; such a holding would standardize the admissibility test among the services while simultaneously encouraging military courts to reconsider past exclusions of scientific evidence.

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[148] *See supra* note 109–117 and accompanying text.

[149] United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

[150] Mil. R. Evid. 701 analysis.

[151] *See* R.C.M. 701(a)(2) (discovery of government counsel's documents, tangible objects, and reports); R.C.M. 701(a)(3) (discovery of government counsel's prospective witnesses); R.C.M. 701(b)(3) (discovery of defense counsel's documents and tangible objects); R.C.M. 701(b)(4) (discovery of defense counsel's reports of examinations and tests); R.C.M. 701(e) (access to witnesses and evidence).

[152] For an instructive discussion of scientific methods and threats to validity written specifically for lawyers, see J. Monahan & L. Walker, Social Science in Law: Cases and Materials ch. 2 (1985).

[153] Saltzburg, *supra* note 109, at 217.

[154] *Id.* Professor Imwinkelried similarly notes that "there is mounting evidence of a high rate of misanalysis in crime laboratories." Imwinkelried, *supra* note 1, at 107. *See generally id.* at 107–09. *See also* Dinovo & Gottschalk, *Results of a Nine-Laboratory Survey of Forensic Toxicology Proficiency*, 22 Clinical Chemistry 843 (1976); Peat, Finnigan & Finkle, *Proficiency Testing in Forensic Toxicology: A Feasibility Study*, 28 J. Forensic Sci. 139 (1983).

[155] Slobogin, *supra* note 78, at 144.

Within Scope Changes and CICA

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Introduction

Government contract attorneys are experiencing an increase in the number and complexity of questions that ask whether a proposed change is within the scope of the underlying contract. The Competition In Contracting Act of 1984 (CICA)[1] has given this old issue renewed vitality.

CICA requires that federal agencies award their contracts through full and open competition. Contracting officers may award noncompetitive contracts only with high level agency approval under seven enumerated exceptions. CICA also established a cadre of competition advocates to challenge and eliminate all barriers to competition. The law dramatically increased the amount of administrative oversight into the noncompetitive practices of the various contracting agencies.

Because out of scope changes are subject to the requirements of CICA and within scope actions are not,[2] program managers, contracting officers, and competition advocates are turning to lawyers for advice on the subject. Unfortunately, determining whether a proposed change is within scope is neither a simple nor a precise task. Each case depends largely upon its unique fact situation. This article attempts to summarize the law as it applies to the more commonly confronted questions in the field.

Within The Scope of the Contract

General Concept

A change is within the scope of the contract if it was "reasonably within the contemplation of the parties when the contract was entered into."[3] That fundamental principle has been restated in a variety of ways. The Comptroller General described within scope changes as those that the competing offerors would have "reasonably anticipated under the provisions of the contract."[4]

If a specific contract provision covers a proposed modification, then the competing offerors obviously anticipated the change, and it is therefore within scope.[5] The problem becomes more difficult when a proposed change does not fit neatly into any specific contract clause. In such cases, the standard changes clause is often cited as a catchall provision.

The Changes Clause

The changes clause permits changes to drawings, designs, and specifications. In this context, the term "specifications" has been interpreted to mean the entire written description of work to be done, *i.e.*, the present contract requirements.[6] Consequently, all contract requirements are subject to some within scope change. The problem is determining the extent of flexibility authorized by that clause.

To determine whether the changes clause authorizes a particular change, the inquiry focuses on the original purpose or nature of the contract. If the original purpose or nature of the contract remains basically the same both before and after the change, then the change is most likely within scope.[7] But each case is analyzed on its own facts. There is simply no exact formula. The totality of the situation is examined including the following key factors: the function of the procured item; the sheer dollar magnitude of the proposed change; the cumulative impact of the change on the basic contract; and the degree of contract complexity.

Function of the Procured Item. The most important of all the factors appears to be the function of the procured item. If the changed item serves the same basic function as the original item, then the purpose of the contract probably remains the same and the change is most likely within the scope of the changes clause of the contract.[8] For example, changing from electro-mechanical to solid state tuners in an electronic countermeasures system was held to be within scope because the change did not substantially alter the basic function of the jamming system being purchased.[9]

Dollar Magnitude. While the dollar value of the change is not a conclusive factor, it is often a major consideration. For example, requiring a construction contractor to perform back filling around a missile silo after pipes had been installed by others (rather than before the installation) was found to be out of scope primarily because the change immensely increased the difficulty of performance as evidenced by a 300% increase in back filling costs.[10]

It would be a mistake to think that within scope questions can be resolved by simply making an automatic mathematical comparison of the contract price with the cost of the change. The case law reveals a startling array of

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[1] 10 U.S.C. § 2304 (Supp. II 1984). For a general discussion of CICA, see Cornelius & Ackley, *The Competition in Contracting Act of 1984*, The Army Lawyer, Jan. 1985, at 31.

[2] Federal Acquisition Reg. § 6.001(c) (1 Apr. 1984) [hereinafter FAR].

[3] Freund v. United States, 260 U.S. 60, 63 (1922).

[4] American Air Filter Co., 57 Comp. Gen. 567 (1978).

[5] National Data Corp., Comp. Gen. Dec. B–207340 (Sept. 13, 1982), 82–2 CPD 222.

[6] Basys, Inc., GSBCA Nos. TD–7, TD–10, 73–1 BCA ¶ 9798, at 45,772. *See also* Compudyne Corp., ASBCA 14556, 72–1 BCA ¶ 9218, at 42,771.

[7] Air-A-Plane Corp. v. United States, 187 Ct. Cl. 269 (1969); Aragona Contr. Co. v. United States, 165 Ct. Cl. 382 (1964).

[8] Keco Industries Inc. v. United States, 176 Ct. Cl. 983 (1966).

[9] Comp. Gen. Dec. B–167003 (Sept. 17, 1973).

[10] Peter Kiewit Sons' Co. v. Summit Const. Co., 422 F.2d 242 (1969).

seemingly inconsistent results. For example, adding an additional wing to a hospital under construction at an increase in cost of about 33% was out of scope[11] while a change on a supply contract that increased the contract price by over 170% was held to be within scope.[12] These disparities demonstrate that the relative dollar magnitude of the change is simply one of several influential, but inconclusive, considerations.

Cumulative Impact. Another important factor is the cumulative impact that the proposed change will have on the basic contract. Again, it is best illustrated by actual case law. The substitution of 100 electric refrigerators for the 100 gasoline refrigerators required under the basic contract was held to be a within scope change because the two types were essentially the same except for the power units which the contractor planned to purchase fully assembled.[13] Changing from gasoline to diesel driven portable heaters was held to be out of scope, however, primarily because of the cumulative impact that the change had on the basic contract.[14] Unlike the first case, the substitution here required substantial alteration of other components of the system, a doubling of the delivery schedule, and a twenty-nine percent price increase.

Contract Complexity. The relative complexity of the item being procured is another important consideration.[15] It is reasonable to assume that competing offerors would expect complex contracts to have more changes than standard contracts. For example, it is common for development contracts with complex and indefinite statements of work to undergo frequent redirection as the results of the research unfold during contract performance. In a contract for nuclear submarines, numerous changes that increased the contract price by 165% and extended the period of performance by three years were held to be within scope primarily because of the complexities surrounding submarine development.[16]

While these four factors are usually important considerations, each question must be considered on a case-by-case basis through a careful analysis of all surrounding circumstances. Because there are often compelling arguments on each side of the question, it is important to keep an open mind during the fact-gathering process. One must determine whether the proposed contract change is of the type which would have been reasonably expected at the time of contract award. The cases outlined below cover the most commonly confronted situations and consequently provide helpful insight into the likely outcome of future controversies.

Common Problem Areas

The most common questions generally involve changes to the contract work elements, quantity, or performance period.

Changes to the Work Elements

Occasionally the government must change the contract work elements such as material, parts, components, and methods. These changes are generally within the scope of the contract if the nature of the end item remains *functionally* the same after the change. The specific facts and contract language in each case play a critical role in the decisions because again, the key question is whether the contracting parties would have reasonably anticipated the proposed change.

Examples of Within Scope Changes Relating to Work Elements. The following changes were held to be within scope: substituting component materials in the construction of a hospital because the completed project was essentially the same as the one awarded;[17] replacing one large firefighting air tanker with two small ones because the basic purpose of the contract was to deliver fire retardant and not aircraft;[18] and numerous change orders relating to defective government furnished plans involving structural matters in a hospital construction project because the project ultimately completed was essentially the same as the one contracted for originally.[19] Because the changes clause does not place a limit on the number of authorized changes, rarely will that number alone form the basis for an out of scope determination.[20]

Examples of Out of Scope Changes Relating to Work Elements. The following changes were held to be out of scope: changing from a purchase to a "lease to ownership" of disk drives because the rights of the parties were so materially altered that the basic purpose or nature of the contract was different after the change;[21] changing the points of delivery in a transportation and storage contract to places outside of the zones specified in the basic contract because delivery was not an incidental aspect of the contract but rather its very essence and purpose;[22] and changing the agencies covered by a teleprocessing services contract because the solicitation did not provide offerors with a reasonable expectation of such a change.[23]

Changes to Contract Quantity

Changes in the quantity of contract items are generally outside the scope of the contract unless a special provision

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[11] 30 Comp. Gen. 34 (1950).

[12] Axel Electronics, Inc., ASBCA 18990, 74-1 BCA ¶ 10471.

[13] *Keco Industries Inc.*

[14] *American Air Filter Co.*

[15] *Id.*

[16] General Dynamics Corp. v. United States, 585 F.2d 457 (1978).

[17] *Aragona Contr. Co.*

[18] Comp. Gen. Dec. B-176745 (May 10, 1973).

[19] Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180 (1965).

[20] James F. Seger v. United States, 14 G.C. (Fed. Pubs.) ¶ 451 (Ct. Cl. 1972).

[21] Memorex Corp., Comp. Gen. Dec. B-200722 (Oct. 23, 1981), 81-2 CPD 334.

[22] Embassy Moving & Storage Co. v. United States, 12 G.C. (Fed. Pubs.) ¶ 168 (Ct. Cl. 1970).

[23] Tymshare, Inc., Comp. Gen. Dec. B-195315 (Feb. 20, 1981), 81-1 CPD 118.

provides for the change. Minor changes to the quantity of subsidiary items such as components, spare parts, technical data, and provisioning usually are within scope, however, because it is reasonable to assume that the competing parties would have contemplated the need for such flexibility.[24]

Examples of Within Scope Changes to Contract Quantity. The following changes were held to be within scope: a twenty-five percent increase in the quantity of coal and other supplies to be shipped under a requirements contract because of the similarity of work, equipment, and delivery between the original and changed work and because the contract contained a special provision providing for a substantial change in quantity;[25] a one-third increase in the quantity of teleprocessing services because the contract had a special provision authorizing changes in quantities;[26] and adding a data requirement to an air conditioning supply contract.[27] In one interesting decision, the General Accounting Office (GAO) had no objection to a substantial quantity increase because there was no prejudice to the original competition. Without expressly addressing the within scope issue, GAO permitted a sixty-seven percent increase in the quantity of hours of instruction because the contract was essentially labor intensive to the extent that economies of scale could not be derived from increased quantities to materially affect the relative standing of the competing offerors.[28]

Examples of Out of Scope Changes to Contract Quantity. The following changes were held to be out of scope: adding community facilities to a capehardt housing project;[29] adding two buildings to a nine building contract;[30] doubling the length of an earthen embankment;[31] and deleting 258 of the 504 units of electronic equipment because the deletion should have been processed in accordance with the termination for convenience clause.[32] While it is within scope to change a contract to provide for a more advanced approach to meet the original contract obligation at no cost increase,[33] there are several cases holding that a *substantial reduction* in the contract requirements is outside the scope of the changes clause, especially if the change occurs immediately after contract award or otherwise taints the propriety of the original competition.[34]

Changes to the Performance Period

Changes to the performance period may be within scope depending upon the role that time plays under the basic contract. If time is used merely to define when the contract obligation must be performed, then changes to the performance period will usually be within scope unless the government awarded the contract with the intention to later alter the schedule to the prejudice of competing offerors[35] or the change was so substantial that it would taint the propriety of the original competition.[36] If time is used in the contract to actually define the extent of the contract obligation, such as in requirements contracts, then changes to the performance period generally will be out of scope.

Examples of Within Scope Changes to Performance Period. The following changes were held to be within scope: a lengthy time extension to permit the contractor to correct delinquencies because the first article approval clause permitted time extensions to ensure delivery of a satisfactory product;[37] and the extension of the delivery schedule for the submission of a first article because the matter was one of contract administration which was a function and responsibility of the contracting agency.[38] In one case, however, a doubling of the delivery schedule was held to be out of scope because the time extension was not used to complete the original effort but rather to perform new, albeit similar, work needed by the government *after* the original period.[39]

Examples of Out of Scope Changes to Performance Periods. The following changes were held to be out of scope: a change extending a three year requirements contract for an additional three year period because in this type of contract, time was used to define the extent of the basic obligation;[40] an extension to a level of effort *term* contract

[24] J.W. Bateson Co., Inc. v. United States, 308 F.2d 510 (1962).

[25] Mantech Field Engineering Corp., Comp. Gen. Dec. B-218542 (Aug. 8, 1985), 85-2 CPD 147; Marine Logistics Corp., Comp. Gen. Dec. B-218542 (Aug. 8, 1985), 85-2 CPD 147; Marine Logistics Corp., Comp. Gen. Dec. B-218150 (May 30, 1985), 85-1 CPD 614; W.H. Mullins, Comp. Gen. Dec. B-207200 (Feb. 16, 1983), 83-1 CPD 158; 52 Comp. Gen. 732 (1973).

[26] *National Data Corp.*

[27] Comp. Gen. Dec. B-164234 (July 8, 1968).

[28] Central Texas College System, Comp. Gen. Dec. B-215172 (Feb. 7, 1985), 85-1 CPD 153.

[29] 39 Comp. Gen. 566 (1960).

[30] 15 Comp. Gen. 573 (1935).

[31] P.L. Saddler v. United States, 152 Ct. Cl. 561, 287 F.2d 413 (1961).

[32] Doughboy Industries, Inc., FAACAP No. 67-3, 9 G.C. (Fed. Pubs) ¶ 129 (1967); Stewart Avionics, Inc. ASBCA No. 10226, 8 G.C. (Fed. Pubs) ¶ 108 (1966).

[33] Cray Research, Inc., Comp. Gen. Dec. B-207586 (Oct. 28, 1982), 82-2 CPD 376.

[34] Nucletronix, Inc., Comp Gen. Dec. B-213559 (July 23, 1984), 84-2 CPD 82; Lamson Div. of Diebold, Inc., Comp. Gen. Dec. B-196029.2 (June 30, 1980), 80-1 CPD 447; Webcraft Packaging, Div. of Beatrice Foods Co., Comp. Gen. Dec. B-194087 (Aug. 14, 1979), 79-2 CPD 120; Skidmore, Owings, & Merrill, ASBCA No. 5115, 60-1 BCA ¶ 2570.

[35] Tricentennial Energy Corp., Comp. Gen. Dec. B-197829 (Oct. 21, 1980), 80-2 CPD 303.

[36] Gull Airborne Instruments, Inc., Comp. Gen. Dec. B-197204 (Aug. 8, 1980), 80-2 CPD 316.

[37] *Tricentennial Energy Corp.*

[38] Valhalla Scientific, Inc., Comp. Gen. Dec. B-209025 (Sept. 23, 1982), 82-2 CPD 267.

[39] Kent Watkins & Associates, Inc., Comp. Gen. Dec. B-191078 (May 17, 1978), 78-1 CPD 377.

[40] CPT Corp., Comp. Gen. Dec. B-211464 (June 7, 1984), 84-1 CPD 606; Intermem Corp., Comp. Gen. Dec. B-187607 (Apr. 15, 1977), 77-1 CPD 263.

because the very essence of the contract was its term of performance;[41] and an extension of a contract that had been expired for four months.[42] It should be noted that on several occasions, GAO has acquiesced in out of scope changes for that period of time necessary to tide the government over until a competitive contract could be awarded.[43]

Conclusion

The Competition In Contracting Act does not require recompetition of within scope modifications. A change is within scope if it was reasonably anticipated by the parties under the provisions of the contract. The changes clause has been broadly interpreted to provide flexibility in this area, but determining the boundaries of the flexibility is not easy.

The courts focus their inquiry on the purpose or nature of the contract. If the original purpose or nature of the contract remains basically the same both before and after the change, then the change is most likely within scope. Numerous factors are considered, including the function of the procured item, the sheer magnitude of the change, the cumulative impact of the change on the basic contract, and the degree of contract complexity.

The cases reveal that changes to contract work elements, such as material, parts, components, and methods, are within scope if the original purpose or nature of the contract remains functionally the same both before and after the change. Changes to contract quantities are generally outside the scope of the contract unless a specific contract provision provides for the change or the change is relatively minor. Changes to performance periods may be within scope depending on the role that time plays under the basic contract. If time is used merely to define when a contract obligation must be performed, then changes to the performance period tend to be within scope. But if time is used in the contract to actually define the extent of the obligation, then changes to the performance period are usually out of scope.

In the final analysis, attorneys should maintain an open mind during the fact-gathering process because each question is ultimately decided on a case-by-case basis through a careful analysis of all of the surrounding circumstances.

[41] Comp. Gen. Dec. B-214597 (Dec. 24, 1985).

[42] Washington National Arena Limited Partnership, Comp. Gen. Dec. B-219136 (Oct. 22, 1985), 85-2 CPD 435.

[43] National Designers, Inc., Comp. Gen. Dec. B-214032 (June 18, 1984), 84-1 CPD 637; *CPT Corp.*; KET, Inc., 58 Comp. Gen. 38 (1978); *Intermem Corp.*

The Korean Military Justice System

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Introduction

Purpose

This article describes the Korean military justice system. After a brief historical overview, it introduces some of the most important substantive and procedural differences between the military justice systems of the Republic of Korea and United States of America. It then briefly describes the administration and organization of the Korean military justice system and comments on points of particular interest to American military attorneys. The article concludes by pointing out some basic differences between the two systems.

Historical Background

Korean military law has a long history. It can be traced back several thousand years. In that earlier time, military law was affected by the precepts of Confucianism and Buddhism. It was a system of military regulations established to carry out military orders under the ancient sovereign's system. This period of military regulations lasted until the establishment of the Great Korean Imperial Kingdom which adopted a westernized system in 1894.

In 1948, the armed forces of the Republic of Korea adopted a modern military justice system which was articulated in the National Constabulary Act and the Coast Guard Act[1] in order to try military personnel who failed to comply with the criminal law and the requirements of military discipline. In 1962, Korea abolished these Acts and adopted a reformed military justice system. The new system is found in the Military Penal Act[2] and the Court-Martial Act.[3] This conforms to the practice of the civil law system which prefers to codify substantive law and procedural law separately.

*Captain Lee was a member of the 34th Judge Advocate Officer Graduate Course. He wrote this article in partial fulfillment of the requirements of that course.

[1] The National Constabulatory Act and the Coast Guard Act, which originated from the Articles for the Government of the Korean Constabulatory, adopted by the Military Governor of Korea in 1946, were promulgated in July, 1948, and were in effect until the Military Penal Act and the Court-Martial Act went into effect on June 1, 1962.

[2] Republic of Korea Current Code, Volume 12, Book 15 (Military Affairs), Part 7 (Military Judicial Law) [hereinafter K.C.C. V12, B15, P7]. The Military Penal Act was promulgated on January 20, 1962, Law No. 1003 (amended 1981) [hereinafter MPA].

[3] K.C.C. V12, B15, P7. The Court-Martial Act was also promulgated on January 20, 1962, Law No. 1004 (amended 1981) [hereinafter CMA].

Fundamental Differences

Civil Law System

The administration of military justice in Korea follows Korean civilian criminal procedure to a great extent. To the American observer, Korean criminal trials lack two elements that are regarded as keystones in the common law system—trial by jury and a complete adversarial system. The basic premise of the civil law procedure is that a competent, well-trained, impartial judge should decide both law and facts.

Military Justice Belongs to the Judicial Branch

The Korean Constitution provides the basis for the courts-martial system and establishes the court-martial as a special court under the Supreme Court.[4] Therefore, a Korean court-martial is a specialized court which is part of the judicial branch of the government. Compared with the civilian courts, however, the court-martial has a different organization and a limited jurisdiction as will be discussed later. In this respect, the Korean military justice system is distinguished from the United States system, where courts-martial are creatures of legislative authority,[5] albeit, by delegation,[6] greatly controlled by the executive branch.

Jurisdiction

During peacetime, Korean courts-martial exercise jurisdiction over the following persons: members of the armed forces; civilian employees of the armed forces; and any person committing, *inter alia,* espionage related to military affairs, crimes affecting military installations or property, or crimes in regard to a sentinel or sentry posts, as such crimes are defined by the CMA.[7] During wartime or a period of national emergency, courts-martial may exercise jurisdiction over any person committing treasonable acts or crimes against the security of the state as provided by a declaration of martial law or emergency action. Martial law may be declared by the President in accordance with the Constitution,[8] and emergency action can be instituted by the decree of the President in accordance with constitutionally mandated procedure.[9] By this emergency action, the jurisdiction of courts-martial can be changed and expanded.

Procedural Aspects

Administration of Military Justice

Ultimate control of military justice in Korea is vested in the highest civilian court, the Supreme Court. But the judicial powers exercised by military authorities, such as being the convening authority, initially confirming a court-martial's adjudication, and similar ministerial functions, are vested in the Minister of Defense, and are delegated to each service Chief of Staff and then to field general commanders. The judicial power of the several convening authorities under the Court-Martial Act is promulgated in conjunction with the National Military Organization Act.[10] Each convening authority has a legal advisor, much like the General Counsel to the Minister of Defense. Thus there is a Judge Advocate General for each service Chief of Staff, and a staff judge advocate for each field general commander. The staff judge advocate has the responsibility to supervise the administrative work of courts-martial. The convening authorities and their legal advisors at all levels may not interfere in the court-martial proceedings, including the court's discretionary power in rendering judgments or orders. Military judges of all courts-martial are independent of any other institution's interference or control throughout the proceedings. This has been guaranteed by the Constitution and the Court-Martial Act.[11]

Organization of Military Justice

The Korean military justice system is divided into three levels: the Supreme Court; high courts-martial; and common courts-martial. The Supreme Court, the head of the judicial branch, decides appeals from high courts-martial.

High courts-martial are the appellate review courts, which can be convened by the Minister of Defense, the Army Chief of Staff, the Navy Chief of Staff, and the Air Force Chief of Staff. There are only the four high courts-martial.

Common courts-martial are the military courts of first instance. They can be convened by the Minister of Defense, each service Chief of Staff, and field general commanders. For example, field general commanders in the Army are limited to army commanders, corps commanders, and division commanders. Only these officers may be convening authorities.

In high courts-martial, five military judges form a quorum for trial and adjudication. The court is composed of three judge advocates who are always lawyers and two non-lawyer commissioned officers. Except for the lawyer-judges, each judge must be higher in rank than the accused. The convening authority appoints the judges who serve on the high courts-martial.

In common courts-martial, three or five military judges form a quorum. They are composed of only one judge advocate and two or four non-lawyer commissioned officers. Again, except for the lawyer-judge, all judges must be higher in rank than the accused. The members of a court-martial are collectively called "military judges," and they act in the same manner as civilian judges. A military judge who is not a judge advocate does not ordinarily have a law

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[4] Republic of Korea Current Code, Volume 1, Book 1 (Constitutional Law), Part 1 (the Constitution). The Constitution was amended in 1980 [hereinafter K. Const.] Chapter 5 (Courts), article 111, Section 1.

[5] U.S. Const. art. 1, § 8, cl. 14.

[6] Uniform Code of Military Justice, arts. 36, 56, 10 U.S.C. §§ 836, 856 (1982) [hereinafter UCMJ].

[7] K. Const. art. 26.

[8] *Id.* art. 52; K.C.C. V12, B15, P8; Martial Law Act of 1981.

[9] K. Const. art. 51.

[10] K.C.C. V12, B15, P1 (Administrative Organization and General Rules). The National Military Organization Act was promulgated on May 20, 1963, Law No. 1343 (amended 1974). CMA, art. 6.

[11] K. Const. art. 104; CMA, art. 28.

degree. Selection for appointment as a non-lawyer judge is on a rotational basis among all officers in the command. As a practical matter, the lawyer-judge conducts the case, instructs the non-lawyer judges on points of law and procedure, and writes the court's decision. Appointment and removal of the lawyer-judges at all levels is under the authority of the Minister of Defense or each service Chief of Staff, and the appointment and removal of non-lawyer judges is done by each convening authority.

Each common court-martial has jurisdiction over the personnel under the control of the convening authority, which is limited to the territory of that commander's military operations.

Pretrial Proceedings

The Military Personnel Act[12] vests the prerogative of initiating disciplinary proceedings with commanding officers who are at least company commanders. Following the rules of the Act, judicial criminal procedure must precede administrative disciplinary proceedings. Therefore, a commanding officer receiving information concerning an alleged offense by one of his soldiers may initiate disciplinary proceedings only after pursuing the appropriate judicial procedure.

Only when the military prosecutor declines to prosecute a case may a commander resort to administrative disciplinary proceedings. Pursuant to his administrative disciplinary authority, military commanders may impose one of several punishments—discharge, suspension, demotion, deductions from pay, confinement for less than fifteen days, penitence, or reprimand—following the decision of a disciplinary panel which is composed of at least three commissioned officers. The powers of these administrative disciplinary proceedings are articulated exactly in the Military Personnel Act.[13] This clear separation of authority flows from the nature of the civil law system, which strictly distinguishes administrative procedure from judicial procedure.

The judicial procedure begins with a pretrial investigation. The formal pretrial investigation is initiated by the military police or the military prosecutor. A military prosecutor has the authority to order the military police to investigate or to initiate the investigation by himself. A military prosecutor must immediately initiate an investigation when information about a crime is laid before him, a complaint is made to him, the offender voluntarily surrenders, or when he otherwise knows or has a suspicion that an offense has been committed.

This investigation consists of the following steps: interrogation of the informant, the complainant, the suspect, and other parties concerned; and the examination of the evidence. In order to investigate the evidence and the circumstances of a crime, the military prosecutor may make inspections, summon witnesses, and call experts to render impartial opinions. The military police can initiate an investigation in the same manner, and after finishing the investigation they send the suspect and the investigation dossier to the military prosecutor.

During the course of a pretrial investigation, prosecutors can arrest, search, seize, and confine a suspect by a warrant from the convening authority, who must first hear the opinion of a lawyer-judge. Even before the trial, every suspect has the constitutional right to counsel.[14]

After the pretrial investigation, the military prosecutor, as a representative of the government, will decide whether to prosecute the case under the supervision of convening authority. If a decision is made to prosecute, the prosecutor prepares an indictment.

Trial Procedure

After indictment, the accused receives a copy of the indictment and is free to communicate with his counsel. If the accused does not select a counsel, the court-martial must furnish a counsel, who is usually a judge advocate. A summons must be served on the accused at least five days before the trial.

Courts-martial are public trials. The progress of the trial is controlled under the rather broad discretionary powers of the president of the court, who is the highest in rank among the military judges. The president may, in his discretion, direct the argument of the counsels, call witnesses, request the production of documents, and take other steps necessary to discover the truth. As noted above, in practice, a lawyer-judge conducts the court through a delegation of the president's powers.

Examinations of the accused and the witnesses are conducted first by the party who has the responsibility to prove the case and then cross-examination by the other party. Finally, the judges may conduct examinations of the accused and any witnesses. Examination of the accused precedes all examination of evidence, although the accused may remain silent.

After finishing the examination of all the evidence, the military prosecutor submits an argument that summarizes the alleged crimes and the legal basis for punishment and his opinion of an appropriate punishment. Then the counsel for the accused delivers the defense argument. Finally, the accused may present his opinion. During the trial, the accused can elect to keep silent.[15]

The deliberations of courts-martial are conducted in secret. A majority of the judges must concur in findings of guilty and the punishment.

Court-martial punishments are of the same kind as civilian court penalties—death, imprisonment with or without hard labor, deprivation or suspension of qualifications, fine,

[12] K.C.C. V12, B15, P2 (Military Personnel and Civilian Employee). The Military Personnel Act was promulgated on January 20, 1962, Law No. 1006 (amended 1985).

[13] *Id.* Chapter 10 (Disciplinary Proceedings), art. 56–60.

[14] K. Const. art. 11, section 4.

[15] *Id.* section 2.

confinement less than thirty days, or confiscation of property. Punishments are specified at minimum or maximum levels in each criminal article.[16]

After the court-martial adjudges the sentence, the convening authority confirms the sentence within ten days. When confirming a sentence, the convening authority can remit, mitigate, or suspend the sentence. He cannot change the type of punishment or increase the sentence. In practice, the convening authority follows the recommendation of his staff judge advocate, although this recommendation has no statutory basis.

Appellate Procedure

An appeal from the adjudication of a common court-martial is not automatic except in cases imposing death or life imprisonment. An appeal must be filed by the accused or a military prosecutor within seven days after the convening authority confirms the sentence.

Upon an appeal a high court-martial can take the following actions: approve or affirm the common court-martial decision; reduce the sentence; increase the punishment, but only when a military prosecutor appeals the sentence; or disapprove the findings completely and dismiss the charges. A military prosecutor sometimes appeals a sentence because he believes the sentence of the common court-martial to be improperly lenient.

When extraordinary martial law has been declared, persons subject to trial by courts-martial lose their right to appeal.[17]

After the review and adjudication of the high court-martial on appeal, the convening authority confirms the sentence in the same manner as the common court-martial convening authority. After this confirmation, the accused and prosecutor can appeal to the Supreme Court only upon alleged errors of law, except in cases imposing a death penalty or imprisonment for more than ten years.

Enforcement of Sentence

The responsibility for ordering the finally approved sentence into execution is vested in the military prosecutor. Except in death penalty cases, the execution of the judgment can be carried out after the period for appeal has expired or the judgment on the appeal has been received from the Supreme Court. The military prosecutor issues a warrant ordering the authority concerned (usually the military police) to execute the sentence.

Conclusion

During the 1960's, the Republic of Korea streamlined its laws in many fields. In the military justice system, Korea distinguished administrative disciplinary punishment from judicial criminal punishment by way of separate codes. Therefore, the Korean military justice system does not include the nonjudicial punishment process. That is purely an administrative action by the commander. Still, the Korean military justice system resembles in some respects the American military justice system, which gives the commander great powers such as being the convening authority.

Comparing the Korean military justice system with the United States military justice system, several conclusions may be drawn. First, Korean courts-martial operate under the judicial branch under the control of the Supreme Court, while American courts-martial function under the legislative and executive branches. Second, Korean courts-martial have relatively broad jurisdiction, while United States courts-martial have a much more strictly limited jurisdiction. Third, Korea has a three-tiered system with common courts-martial, high courts-martial, and the Korean Supreme Court, whereas the United States uses a four-tiered system with three separate level of courts-martial, courts of military review, the Court of Military Appeals, and the U.S. Supreme Court. Fourth, Korea has only one level of common court-martial for a trial in the first instance and only the field general commander may be the convening authority. American courts-martial may be convened by officers as far down as the company level.[18] Fifth, Korean courts-martial have a mixed judge system that consists of three or five officers including one lawyer-judge in a common court-martial and three lawyer-judges in a high court-martial. The United States has a jury system and the accused may elect trial by a military judge alone.[19] Sixth, Korean military prosecutors can initiate a criminal investigation, but a United States military prosecutor cannot without an order from a convening authority or other commander. Finally, as to the basic trial procedure, Korea applies a mixed approach of both the inquisitorial system and the adversary system, while the United States uses the common law adversarial system.

By and large, it could be concluded that the Korean military justice system is more oriented toward the judicial function than the disciplinary function in comparison with the United States' military justice system. In Korea, the military disciplinary function rests in the military commander's separate administrative disciplinary powers.

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[16] *See, e.g.*, K.C.C. V5, B6, P7 (Penal Code) Penal Act, art. 250 (Murder) section 1 (A person who kills another shall be punished with death, imprisonment with hard labor for life or for not less than five years.); MPA art. 47 (Disobeying an Order) (Any person who is duty-bound to adhere to lawful orders, rules, or regulations, but who violates or disobeys the same, shall be punished by imprisonment with hard labor or without for not more than two years.).

[17] K. Const. art. 111, section 4; CMA, art. 525.

[18] UCMJ arts. 22, 23, and 24.

[19] UCMJ art. 16.

USAREUR Automation*

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Today's challenges are not new. SJA office managers and workers have always faced expanding missions, shrinking resources, and the desire to improve the delivery of legal services. Many times, the only answer was longer duty hours. The United States Army, Europe (USAREUR) judge advocate community will meet today's challenges in the spirit of cooperation and with the aid of automation.

The power and availability of the microcomputer offers new solutions to familiar challenges. Productivity is improved with fewer conversions of information from one form to another. The use of microcomputers eliminates "shadow functions"—the unpredictable, time consuming activities that do not contribute to productivity, like searching for a file. Supervisors and managers control events and time better because they track actions more efficiently. Managers make quicker and better personnel decisions and offices deliver legal services more effectively because of better and more timely information (having the "right" information at the "right" time).

In this article, I will discuss the progress of USAREUR theater-wide automation initiatives and future goals. I will also relate the experiences of HQ, USAREUR, Office of the Judge Advocate (OJA), during the initial phases of implementation of an automated office information system. I will mention some of the applications in use and describe how we are gaining and motivating user acceptance as we change the way we do business and manage the shift to the information systems age.

Project JAGNET

The goal of Project JAGNET is to acquire compatible hardware and software throughout the USAREUR judge advocate community. The purpose is to establish a communications network among the sixty USAREUR judge advocate offices. The network will be used by staff judge advocates to report command judicial and nonjudicial activities and by action attorneys to research commercial legal automated databases in the Continental United States (CONUS) and USAREUR OJA policy and precedent legal opinion files. Although communications among offices is the primary goal, it is important that users also be able to run and develop potential standard judge advocate programs within each office functional area.

Because we cannot provide a central procurement of systems within USAREUR, each major subordinate command procures separately under standard Army microcomputer contracts to ensure system compatibility. The theater-wide system of choice is based upon The Judge Advocate General's and USAREUR standard IBM compatible (MS–DOS) microcomputer. Most offices are using the ISSA Contract DAHC26–85–D–0005 (HQDA/SMS Data Group MICROS–C) to acquire the Wyse PC, an IBM compatible; and the Intel System 310, which links the PCs in a network environment. Those offices that cannot secure the funding to procure a network system are beginning to acquire the Zenith Z–248 PC, which is compatible with the IBM PC and the Wyse PC, and can later be linked to an Intel System 310 or compatible system.

Wyse PC or Zenith PC users can operate independently using software that is standard throughout the JAG Corps, such as Enable and Displaywrite 3. When connected to an Intel System 310, they can log on to the 310 to send messages or to transfer files to other PC users, or they can use the 310's powerful Xenix operating system software application programs, such as graphics and external communications. We believe that this system offers "the best of both worlds," as it offers the user a choice of applications under the MS–DOS and the Xenix operating systems. They are both standards in the business world.

We are progressing. As of July 1986, compatible systems have been implemented in five major judge advocate offices: OJA; OSJA, V Corps; OSJA, 3d Infantry Division; OSJA, 1st Armored Division; and OSJA, USA Berlin. Three other major offices are awaiting systems delivery: OSJA, 1st Infantry Division (Forward); OSJA, 2d Armored Division (Forward); and OSJA, 32d Army Air Defense Command. OSJA, 3d Armored Division, is awaiting hardware that will render their current system compatible with the others. The offices listed above have similarily equipped their subordinate branch offices. All other USAREUR judge advocate offices either have gained or are pending administrative approval of their system requirements, and are attempting to secure funding. Staff judge advocate offices in 21st Support Command, USASETAF, and 8th Infantry Division are expected to order their systems by the end of FY86 or early FY87.

This progress is largely the result of a coordinated effort among USAREUR legal administrators. They meet three times a year to discuss acquisition strategy and implementation issues like system administration, user training, and common applications. Between meetings, there are numerous phone calls among legal administrators. Those who have installed their office system advise those who have not reached that phase. Those who have been using their system awhile assist those who are just beginning. This information exchange is not limited to legal administrators. The USAREUR automation effort is a topic of high interest in all the offices and during theater-wide conferences among staff judge advocates and legal NCOs. Centralized training courses are currently being developed to include every member of the USAREUR judge advocate family, and each is becoming involved in some way with the automation effort.

We have progressed rapidly in acquiring automated systems that enable us to provide quicker and better services locally. Communication between these systems presents special problems in USAREUR, however. Anyone who has spent more than one day in Europe knows that telephone

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

communications are not ideal. Presently, we must rely on these same communication lines for data communications. HQ, USAREUR Judge Advocate's Office is linked to a local host computer that provides access to the Defense Data Network (DDN). DDN enables us to communicate with CONUS offices that are also linked to the DDN. Other USAREUR judge advocate offices do not yet have DDN hosts. Theoretically, offices throughout USAREUR could use host nation telephone lines to communicate with the HQ USAREUR host; however, the host nation has not yet approved long distance data communications over military telephone lines within Germany. We estimate that the DDN connection will be available in every USAREUR location within the next two years. When that occurs, all USAREUR staff judge advocate offices will be ready to begin data communications.

Office of the USAREUR Judge Advocate

Automation of functions in this office began approximately two years ago with the installation of three IBM PC/XT standalone microcomputers. These systems were primarily used for administrative purposes within the Executive Office. An elaborate budget management program was developed within the office using Lotus 1–2–3, a commercially available electronic spreadsheet application program. Three different database management software programs were tested for effectiveness in maintaining personnel data. We are now converting to Ashton and Tate's dBASE III for all personnel management functions. Applications using dBASE III for inventory control of office furniture, supplies, and law library materials are almost completed and ready for testing.

Two months ago, OJA accepted delivery of an Intel System 310 with seven Wyse PC microcomputers, one in each functional division. In the near future, all IBM and Wyse systems will be connected to the Intel 310 to create an office information network.

We realized that selling office automation internally overcomes user resistance. An office user's group was established several months before expected delivery. The group, J–MUG (Judge Advocate's Microcomputer User's Group), began with eight members and rapidly grew to fourteen members. Members are administrative support people from each OJA functional division and potential key users of the new systems. The initial purpose of J–MUG was to disseminate information about the new system and to get potential users involved in planning implementation strategies. Written memos covering the matters discussed during weekly J–MUG meetings were distributed to all office personnel. Recommendations were discussed at meetings of office division chiefs. When the system arrived, J–MUG members were "hungry" for training.

Training began with the word processing package and soon all systems were humming as users typed (excuse me, "input characters") as if they had been working with these systems all along. The office computer assistant, a newly established position, conducted individualized hands-on training on the basics of the MS–DOS operating system and the dBASE III program. The office contracted with a local university for a week-long course in advanced MS–DOS and dBASE III applications development. All fourteen J–MUG members attended the course, which was tailored to our specified needs and allowed us to use our own equipment. Automated database management systems are being developed in each functional area by our own people, working together as the team they have been from the start.

Among OJA's action officers, some informal leaders in automation have emerged. Mostly it is the young attorneys who have had some computer experience or those who happen to own a home computer (heretofore used only by the children, in some cases). But some of the more experienced attorneys have surprised us with immediate acceptance and eagerness to learn. We are certain that we will use our new office tools to produce results that will eventually win over even the most resistant.

As each office works to automate its own functions, the office computer assistant and I are developing a multi-user database that will reside on the Intel System 310 using the Xenix-based database management application program, Informix. The database will be accessible by all OJA action officers using their office PC for research of legal opinions, policies, and other actions that are filed in every OJA division. A new record will be created at a central point when an action arrives. It will include information about the subject, the originator, the suspense date, and the action division assigned. After the action is transferred to the assigned division, a member of that division will append the record with further information, such as the name of the action officer, completion date, a synopsis of the action taken, and filing data. Once programmed, the database will generate not only an information sheet to be filed with each action, but also several reports such as a weekly report of outstanding actions. The information that can be manipulated and retrieved from such a database is limited only by the information contained and the user's imagination.

The introduction of microcomputers has brought new challenges to office resource managers. Because of funding constraints, it will be a long time before OJA can implement the ideal system, which dedicates a PC, printer, and modem to each potential user. It is obvious that user training is a critical key to success. Office managers must also be prepared to plan carefully the use of a limited number of systems to optimize use and accessibility to all users. We realize that the information generated within the office is a resource and, like funding and personnel resources, should be managed. The microcomputer has already become an important tool in information management. If our object is to be free from mundane jobs so we can devote more of our time to creative thinking, the microcomputer is a tool that increases rather than decreases our need for talented people, our greatest resource.

Conclusion

All things considered, the much ballyhoohed computerized "office of the future," which has had an astonishingly unsavory past, is fulfilling its promise. At least we finally know what the office of the future is. The Judge Advocate General's Corps, like others before us, will make mistakes during the transition from manual to automated systems. But we are learning from the past mistakes of others and capitalizing on our strengths—forward-thinking individuals and team effort. The future of the JAGC is here!

USALSA Report

United States Army Legal Services Agency

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Trial Counsel Forum

Piercing the "Twilight Zone" Between Detention and Apprehension

Major James B. Thwing
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&
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> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our judicial establishment . . . the rights of men in the Armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. [1]

Introduction

Justice Stewart, in *United States v. Mendenball,* [2] concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [3] This standard seems to be simple and objective and appears to provide a salutary basis for prosecutors to determine the constitutionality of law enforcement conduct surrounding the seizure of a suspect. The standard, however, fails to

[1] Burns v. Wilson, 346 U.S. 137, 140 (1953).

[2] 446 U.S. 544 (1980).

[3] *Id.* at 509. In arriving at this conclusion, Justice Stewart was joined only by Justice Rehnquist.

provide much assistance to military prosecutors or law enforcement officials. This is so because the perception of restraints on a soldier's freedom of movement will nearly always be colored by the realities of military life. To a certain extent, this reality has been compounded by the notion that "seizure of the person" in military jurisprudence (*i.e.*, "apprehension")[4] is not the exact counterpart of a civilian "arrest." This distinction needs to be understood by military prosecutors and law enforcement officials.

Recent military case law focusing on "apprehension" demonstrates the complexities encountered by trying to apply civilian notions of constitutional law enforcement regarding "seizure of the person" to the military situation and questions whether such civilian notions must be modified by the practical realities of military service. It seems that these issues would have been settled long ago, but they have not. Instead they have become more complex, due principally to the manner in which law enforcement authorities have adopted a more sophisticated approach in the "competitive enterprise of ferreting out crime."[5] Consequently, military prosecutors must still litigate whether the accused had been "seized" when the authorities conducted their questioning or search. This article focuses on recent Supreme Court cases regarding "seizure of the person" and examines their impact on the most recent cases decided by the Court of Military Appeals and courts of military review. Additionally, this article seeks to determine whether there is a meaningful difference between the civilian concept of "arrest" and the military concept of "apprehension" and whether, in view of recent developments, the concept of "apprehension" in the military has been changed or simply clarified. In doing so, this article should provide prosecutors with a current understanding of the issues that have now crystallized around the concept of "apprehension" so that commanders and law enforcement agents can be more completely and accurately advised concerning this perplexing problem.

"The Arrest": The Supreme Court View

Two cases decided by the United States Supreme Court give military prosecutors an excellent vantage point from which to assess the civilian perspective of what constitutes an arrest.

In *Dunaway v. New York*,[6] the proprietor of a pizza parlor in Rochester, New York, was killed during an attempted robbery. Some months later, a detective still investigating this crime was informed by a fellow police officer that an informant had supplied him a lead as to the possible perpetrator of the murder. The informant—a jail inmate awaiting trial for burglary—was interviewed by the investigating detective. Although he provided some information pertaining to the accused, it was not sufficient for the investigating detective to obtain an arrest warrant. Even so, the investigating detective ordered three other law enforcement agents to "pick up" the accused and "bring him in." The agents located the accused at his neighbor's house one morning and, although taken into custody, he was not told that he was under arrest. According to testimony developed at trial, however, the law enforcement agents revealed that the accused would have been physically restrained if he had attempted to leave. The accused was then driven to police headquarters in a police car and placed in an interrogation room. After being properly advised of his *Miranda v. Arizona*[7] warning rights, he was questioned by the detectives. After waiving his rights, the accused eventually made several incriminating statements and drew sketches that further demonstrated his involvement in the crime.

On appeal, the accused argued that he had been unlawfully arrested. Before the United States Supreme Court, the state argued, among other things, that the accused's "detention" was a necessary and minimal intrusion upon his person. While the state conceded that the primary issue regarding the admissibility of his pretrial statements and the sketches that he had drawn was directly affected by his posture at the time he was questioned, it urged the Court to expand the doctrine of "detention" as outlined in *Terry v. Ohio*.[8] In essence, the state argued that the accused's case involved "a brief detention for interrogation based upon reasonable suspicion, where there was no formal accusation filed against defendant and where great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months."[9] The Supreme Court rejected this argument, however. In reviewing *Terry* and its progeny,[10] the Court noted that these cases established a narrowly drawn authority for a police officer to search a suspect for weapons for the protection of the officer, but only where the officer had reason to believe that he was dealing with an armed and dangerous individual. According to the Supreme Court, only in this circumstance was the requirement for probable cause to arrest vitiated. In the Court's view, *Terry* and its progeny therefore departed from the traditional probable cause analysis in that they defined a special category of fourth amendment "seizures" substantially less intrusive than arrests. Even so, the Court found that the manner in which the accused in *Dunaway* was "detained" exceeded the bounds of the special category of cases carved out by *Terry*, observing that

> Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home

[4] Uniform Code of Military Justice art. 7(a), 10 U.S.C. § 807(a)(1982) [hereinafter UCMJ], provides that "Apprehension is the taking of a person into custody." The Manual for Courts-Martial, United States, 1984, Part IV para. 19(c)(3) [hereinafter MCM, 1984], defines "custody" as "restraint of *free locomotion* imposed by lawful apprehension . . . . Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released." (emphasis added). In appendix 21, MCM, 1984, at A21-12, the analysis of "apprehension," as defined in Rule for Courts-Martial 302, provides that "[T]he peculiar military term 'apprehension' is statutory . . . and cannot be abandoned in favor of the more conventional civilian term 'arrest.' "

[5] *Johnson v. United States*, 333 U.S. 10,14 (1948).

[6] 442 U.S. 199 (1979).

[7] 384 U.S. 436 (1966).

[8] 392 U.S. 1 (1968).

[9] *Dunaway*, 442 U.S. at 211 n.14.

[10] *Id.* at 213–14. Prosecutors should particularly note the Court's analysis of Davis v. Mississippi, 394 U.S. 721 (1969) and Brown v. Illinois, 422 U.S. 590 (1975) in this regard.

to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. . . . The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, *while not insignificant for all purposes*, . . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny.[11]

Thus, the Supreme Court held that the Rochester police violated the fourth amendment when, without probable cause, they seized the accused and transported him to the police station for interrogation, stating that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."[12]

In *United States v. Mendenhall*,[13] the threshold encounter between law enforcement agents and the accused was more subtle. The accused had arrived at the Detroit Metropolitan Airport on a flight that had originated from Los Angeles. Moments after the accused entered the airport, Drug Enforcement Administration (DEA) agents observed her conduct and concluded that she met the drug courier profile. Accordingly, as the accused was walking through the concourse, the DEA agents approached her, identified themselves as federal agents, and asked for her identification and airline ticket. The DEA agents observed that the accused's driver's license and her airline ticket contained two different names. Upon being briefly questioned about this discrepancy and after being questioned about how long she had been in California, the accused was asked to accompany the DEA agents to their airport office for further questions. The accused willingly complied with this request. At the DEA office, she was asked whether she would consent to a search of her person and her handbag. She was informed that she had the right to decline such a search if she desired. The accused responded, "Go ahead." A female police officer who had joined the two DEA agents proceeded to search the accused. When the policewoman explained to the accused that she would have to remove her clothing, the accused stated that she had a plane to catch and was assured that if she was carrying no narcotics there would be no problem. As the accused began to disrobe, two packages, one of which appeared to be heroin, were removed from her undergarments. The accused was then arrested for possessing suspected heroin.

At both her trial and on appeal, the accused claimed that her consent to search was vitiated by her preceding unlawful seizure by the DEA agents. The Supreme Court disagreed. In viewing both the momentary stop of the accused in the airport concourse and her subsequent detention in the DEA office, the Court struggled with the accused's contention that she had, first, been subjected to an "investigatory stop" and, second, that this "investigatory stop" had been converted into a full-blown arrest when she was compelled to go to the DEA office.[14] As in *Dunaway*, the Court reviewed the accused's claims through the perspective of its holding in *Terry*. In facing the issue whether the accused's initial detention amounted to a "seizure," Justice Stewart, writing for himself and Justice Rehnquist, opined that

> a person has been "seized" within the meaning of the Fourth Amendment only, if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, and as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification.[15]

Accordingly, Justice Stewart determined that the accused was not seized because she had neither been subjected to physical force, a show of authority, nor other restraint by the DEA agents.[16] Justice Powell's view, with whom the Chief Justice and Justice Blackmun joined, however, was that the detention of the accused for questioning in the airport concourse "did constitute a seizure."[17] Even so, this constituency of the Court held that the "seizure" of the accused, at that point, was reasonable because the DEA agents had a "reasonable and articulable suspicion of criminal activity when they stopped the [accused] in a public place and asked her for identification."[18] Such an intrusion, according to these members of the Court, had to be assessed "in light of all the exigencies of the case,"[19] which included the facts that "the [accused] was not physically restrained[, t]he agents did not display weapons[, and t]he questioning was brief."[20]

Escorting the accused to the DEA office was similar to the facts in *Sibron v. New York*,[21] a case decided the same day at *Terry*. In *Sibron*, a police officer, before conducting

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[11] 442 U.S. at 212 (emphasis added).

[12] *Id.* at 216.

[13] 446 U.S. 544 (1980).

[14] *Id.* at 551–67. Justice Powell observed that: "I do not necessarily disagree with the views expressed in Part II–A [of Justice Stewart's opinion in which he determined that the accused's initial stop by DEA agents was not a seizure]. For me, the question whether the respondent in this case reasonably could have thought she was free to "walk away" when asked by two Government agents for her driver's license *is extremely close*." *Id.* at 560 n.1 (Powell, J., concurring in part and concurring in the judgment) (emphasis added).

[15] *Id.* at 554.

[16] *Id.* at 555.

[17] *Id.* at 560 (footnote omitted).

[18] *Id.* at 565.

[19] *Id.* at 562 (citing *Terry*, 392 U.S. at 18 n.15).

[20] *Id.* at 563.

[21] 392 U.S. 40 (1968).

what was later found to have been an unlawful search, approached Sibron in a restaurant and told him to come outside, which Sibron did. Although the Supreme Court did not decide whether there was a "seizure" of Sibron at that point, it did determine that up to the point that the police officer physically grabbed Sibron outside the restaurant, there was no showing that Sibron was compelled by either force or show of authority to join the police officer on the outside of the restaurant. Justice Stewart's view of this circumstance in his opinion in *Mendenhall* was that "there was no seizure until the police in some way demonstrably curtailed Sibron's liberty."[22] Accordingly, in applying this analysis of *Sibron* to the facts in *Mendenhall*, Justice Stewart observed that "the totality of the evidence . . . was plainly adequate to support the finding . . . that the [accused] voluntarily consented to accompany the officers to the DEA office."[23] A majority of the Court held that the accused voluntarily consented to the search. The majority noted that she had an eleventh grade education, that she was twenty-two years of age, that she was twice expressly told that she was free to decline to consent to the search, and that there were no threats nor any show of force by the DEA agents.[24]

Several other observations made by Justice Stewart help bring the seeming divergency of the Court's opinion of "seizure" into closer harmony. For example, Justice Stewart observed that the *subjective intention* of the DEA agents in the case to detain the accused, had she attempted to leave, was irrelevant except insofar as that may have been conveyed to the accused.[25] Additionally, he observed that the agents wore no uniforms and displayed no weapons. They did not summon the accused to their presence and requested, not demanded, to see her identification and airline ticket.[26] Justice Powell, and the remainder of the majority concurring in the judgment, found that these facts demonstrated the "reasonableness" of the accused's detention.[27] Ultimately, in balancing the interests of the accused with "the public interest in preventing drug traffic."[28] these members of the Court determined that the intrusion upon the accused's privacy was "minimal."[29]

The "Apprehension": A Court of Military Appeals View

One of the first cases where the Court of Military Appeals applied the Supreme Court's holding in *Dunaway* was *United States v. Schneider.*[30] During a two month period, four fires occurred in the bachelor enlisted quarters at the Naval Education and Training Center, Newport, Rhode Island. Following the last two fires, the Naval Investigative Service (NIS) began an investigation. Preliminary information disclosed that the accused had been the fire guard on all four nights and had made "all secure" entries in the fire watch log for the approximate times at which the fires started. Additionally, NIS agents discovered that the accused had been the first person at the scene of the fires, that there were no witnesses to the starting of the fires, and the accused was one of two individuals who had received medical treatment for smoke inhalation after both of the last two fires. One of the NIS agents became suspicious of the accused after the last fire. He had learned in training that the first person who arrived at the scene of a fire was often the person who set the fire, acting out a "hero syndrome." He also knew that the accused had been charged with a violation of an enlisted quarter's regulation and might have been motivated either by revenge or by a desire to enhance his standing with the command. Also, the doctor who treated the accused for smoke inhalation told NIS agents that the accused might have faked the symptoms. Based upon these pieces of evidence, the NIS agents had the accused brought from the hospital to the NIS office for interrogation. Although the accused initially denied starting the fires, he subsequently admitted that he had done so. Following his conviction, the accused appealed to the Court of Military Appeals and argued that his incriminating statements were the result of an apprehension not based upon sufficient probable cause, citing *Dunaway.*

The Court of Military Appeals agreed that the situation was similar to that in *Dunaway* and determined that if the accused had been "apprehended," then probable cause was required. The court also determined, however, that a literal application of *Dunaway* in a military context afforded no clear solution to this determination and that even the Codal definition of "apprehension" could not provide a clear solution to a determination of whether the accused had been "seized" by the NIS agents. In so concluding, the Court of Military Appeals observed:

> There are numerous situations in the military context where a military person is required to provide information to military authorities without consideration of the existence of probable cause. . . . This may occur on the street, in offices, and in hearing rooms, as well as in places specifically provided for interrogation. And the obligation to report to such places for the purpose of giving such information, *if properly related to the military mission,* is a valid military duty.[31]

Accordingly, the court found that the proper perspective from which to apply the *Dunaway* doctrine was not whether there had been an infringement on the accused's privacy interests in terms of the fourth amendment; but rather the court looked in terms of the accused's freedom of movement more commonly focused on in analysing whether the accused was a suspect for purposes of assessing whether he

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[22] 446 U.S. at 553.

[23] *Id.* at 555.

[24] *Id.* at 558.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 562–63.

[28] *Id.* at 565 & n.1 Justice Powell noted the amount of heroin that had been seized at the Detroit Airport from 1975 through 1978.

[29] *Id.*

[30] 14 M.J. 189 (C.M.A. 1982).

[31] *Id.* at 192 (emphasis added).

had been accorded his right against self-incrimination pursuant to Article 31.[32] Regarding this approach, the court drew upon *United States v. Tempia:*[33]

> The test to be applied is not whether the accused, technically, has been taken into custody, but, absent that, whether he has been "otherwise deprived of his freedom of action in any significant way.". . . In the military, unlike civilian life, a suspect may be required to report and submit to questioning without regard to warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action.[34]

In applying these concerns to the facts in *Schneider,* taking into consideration that the NIS agents denied that the accused was apprehended but agreed that he was in their "custody" during the interrogation, the court determined that as the accused was brought to the NIS office under guard, and in circumstances clearly indicating that he was a suspect, he was apprehended. In viewing this setting and, especially in terms of its impact upon police questioning, however, the court also observed that "not every interrogation at the 'police station' amounts to *custodial* interrogation"[35] The court then provided several factors to determine whether a "custodial" setting existed: "[1] Did he report voluntarily? [2] Was he ordered to report? [3] Was he brought in under guard? [4] Was he a suspect? [5] Further, what relation do these conditions have to the interrogation? [6] Was the accused free to leave at any time? [6] May he depart by himself? [7] Must he remain under guard?"[36]

In *United States v. Sanford,*[37] the Court of Military Appeals chose to rely upon the Supreme Court's rationale in *Mendenhall* rather than *Dunaway.* Sergeant First Class (SFC) Lander was standing at a window on the third floor of his unit's barracks and observed two soldiers standing outside the barracks in close proximity exchanging what appeared to be money and a silver package. Although SFC Lander could not identify either of the soldiers by name, he suspected that a drug transaction had occurred. He immediately reported his observation and suspicions to his commander, Lieutenant Young. At this time, both were standing at a window overlooking a parade field and SFC Lander again saw the accused and identified him to Lieutenant Young. Lieutenant Young instructed SFC Lander to bring the accused to his office, adding, "Just tell him I would like to see him. . . . Don't tell him why." Subsequently, SFC Lander located the accused and told him that Lieutenant Young wanted to see him. The accused responded, "Okay," and began to follow SFC Lander to Lieutenant Young's office. As the two entered the barracks and began walking up the stairs to the office, SFC Lander observed the accused hand a leather pouch to another soldier. SFC Lander approached the other soldier and demanded that he hand over the leather pouch. Although at trial the accused contested the admissibility of the leather pouch and its contents, (which ultimately revealed the presence of marihuana), on the basis that it was the product of an unlawful search, his focus on appeal was whether at the time he was confronted by SFC Lander he was placed under apprehension and whether that apprehension was lawful.

The Court of Military Appeals agreed, consistent with *Dunaway,* that if SFC Lander's conduct could be characterized as an arrest or detention for custodial interrogation, his actions must have been based on probable cause in order to be lawful. In reviewing all the facts, however and especially in applying the Supreme Court's rationale in *Mendenhall,* the Court of Military Appeals concluded that SFC Lander's actions neither subjectively nor objectively provided a basis for a determination that the accused had been apprehended. In arriving at this conclusion, the court again found it necessary to place the underpinnings of a Supreme Court decision within the context of military life, observing that "[i]n untempered light, Sergeant Lander's initial communication of Lieutenant Young's order to [the accused] and his subsequent following of [the accused] to the battery commander's office might readily be construed as seizure. However, this show of authority occurred within the context of the military and its daily operations."[38] In placing the holding of the *Mendenhall* case in this context, the court found that because a service member was not free to ignore the lawful orders of his superiors, then the service member "could not reasonably conclude that such action alone constituted seizure for law enforcement purposes."[39] The court also set forth the other circumstances that objectively indicated that the accused was not being restrained for law enforcement purposes:

> Sergeant Lander did not announce to [the accused] that he was being apprehended and the record does not evidence any of the other formalities normally accompanying arrest. . . . Moreover, there was no notice or indication given to [the accused] that he was being detained for purposes of investigation. . . . The record also does not indicate in any way that Sergeant Lander was a military policeman or held himself out as such when he communicated the order of Lieutenant Young to [the accused].[40]

The Court of Military Appeals, also in parallel with the *Mendenhall* rationale, viewed as irrelevant to the consideration of the accused's contact with Sergeant Lander the latter's intent in executing Lieutenant Young's order to bring the accused to his office. The court found that if Sergeant Lander had told the accused that he was in custody, his or Lieutenant Young's intent would have been relevant.

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[32] UCMJ art. 31.

[33] 16 C.M.A. 629, 37 C.M.R. 249 (1967).

[34] *Schneider,* 14 M.J. at 193 (citing *Tempia,* 16 C.M.A. at 636, 37 C.M.R. at 256.

[35] *Id.* at 195 (emphasis added).

[36] *Id.*

[37] 12 M.J. 170 (C.M.A. 1981).

[38] *Id.* at 173.

[39] *Id.*

[40] *Id.* at 174 (citations omitted).

United States v. Thomas: A "Pure" Military Test?

In its most recent encounter with the sole issue of apprehension, the Army Court of Military Review, in *United States v. Thomas,*[41] was confronted with an interesting factual setting that presented a blending of the facts outlined in *Schneider* and *Sanford*. In *Thomas,* a barracks larceny was reported to agents of the Criminal Investigation Division (CID). A preliminary investigation revealed no signs of forced entry into the victim's room. The investigation also revealed that the accused, along with three other soldiers, was in the area at the time of the theft and that he had access to the key to the victim's room. The accused's first sergeant suspected the accused of theft of the master key to the unit and this information was conveyed by an officer in the unit to the CID. A few days after the larceny, the accused was scheduled along with three other members of unit for interviews at the CID office. The first sergeant directed another senior noncommissioned officer to ensure that the accused "arrived at the CID office on time." Subsequently, the accused was escorted to the CID office by another noncommissioned officer because the accused's on-post driving privileges had been suspended. The accused was not told that he was under apprehension and he was not placed in handirons. The accused believed that he had to report to the CID office because he had been ordered to do so by his platoon sergeant.

At the CID office, the accused was advised that he was a "suspect" and advised of his *Article 31/Tempia* rights, which he waived. At no time was the accused informed by anyone from his unit or by CID that he was free to leave the CID office. The accused remained at the CID office for nearly five hours. During that time, the accused initially made an oral statement denying his criminality. When he was asked to sign a written version of the oral statement, however, he declined to do so, informing the CID agent conducting the interrogation (Special Agent (SA) Jarman) that the statement was not true and that he "had taken the property." Subsequently, the accused changed his mind and indicated to SA Jarman that he was willing to sign a statement. The accused also indicated that he had a previous appointment and asked SA Jarman if he could leave and "return later to complete the statement." In response, SA Jarman stated, "You've already here, you might as well stay to complete the statement."

At trial, the accused testified that he asked to leave the office as soon as SA Jarman "started asking questions about the theft," or about five or ten minutes after the accused had waived his *Article 31/Tempia* rights. The accused testified that SA Jarman told him he "couldn't go that [he] had to stay and answer some questions then he'd let [him] go." The accused did not believe he was free to leave the CID office.

In assessing whether the Supreme Court's holding in *Dunaway* compelled the conclusion that the accused had been apprehended at the moment he was instructed to report to the CID office, the Army court observed that if the accused's case had occurred in a civilian law enforcement environment, "it would have been considered as an instance of Fourth Amendment 'seizure' requiring probable cause."[42] The Army court departed from *Dunaway,* however, observing that

> It is readily apparent that members of the armed forces cannot and do not enjoy the same rights of privacy as do civilian elements of our society. In fact, even in a volunteer Army environment, the rights to privacy of members of the armed forces are substantially diminished when compared to the right to privacy enjoyed by civilians, and this is one major consideration which compels certain soldiers to return ultimately to civilian life.[43]

And, in justifying this departure from the view held by the Court of Military Appeals in *Schneider* that application of the *Dunaway* rationale could not be ignored,[44] the Army court stated that

> [D]ue to the vital role which a thoroughly-trained, properly-equipped, and well-disciplined military force has to preserve national security, and thereby to secure for our citizens the rights and values flowing from our Constitution, *military necessity* requires that the constitutional rights of members of our armed forces, in certain compelling circumstances, be given a "different application" than those of the civilian members of our society.[45]

Under "different application" of the constitutional underpinnings of the procedure used to obtain the accused's presence at the CID office, the Army court determined that "[m]erely being ordered to the CID office does not equate to a 'seizure' under the Fourth Amendment."[46] Instead, the court determined that whether such a "seizure" has occurred within the context of military environment "is best determined by applying the test established by the Supreme Court in *United States v. Mendenhall* . . . and impliedly modified . . . by the Court of Military Appeals in *United States v. Sanford.*"[47] According to the Army court, this test, dubbed the "*Mendenhall/Sanford*" test,

> [P]rovides that a person is seized only when, by means of physical force or a show of authority, as viewed in the context of the military and its daily operations, his freedom of movement is restrained significantly beyond that point where other service members' freedom of movement can be circumscribed without constitutional infringement. It is only when this degree of restraint is imposed that there is any foundation whatsoever for invoking constitutional safeguards.[48]

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[41] 21 M.J. 928 (A.C.M.R. 1986).

[42] *Id.* at 932.

[43] *Id.*

[44] *Schneider,* 14 M.J. at 193.

[45] *Thomas,* 21 M.J. 932–33 (emphasis added).

[46] *Id.*

[47] *Id.*

[48] *Id.*

Accordingly, the Army court, in applying this test to the facts in *Thomas*, determined that two distinct time periods that required separate examination in assessing whether the accused had been "seized." The first began when the accused was ordered to report to CID and culminated in his oral admission to the agent. Among several relevant factors the Army court found instructive in this analysis were:

> [1] The [accused] was given a lawful order to report to the CID office; [2] The [accused] was transported to the CID office by an NCO escort, but he was not placed under apprehension; [3] The [accused] did not protest the order, but this omission constituted only a showing of acquiescence to military authority; [4] No probable cause existed to apprehend [the accused] or to place him in an investigative detention (custodial seizure) status when he initially reported to the CID office; [5] The [accused] was interviewed as a "suspect"; [6] The [accused] was properly advised of his *Article 31/Tempia* rights . . .; [7] The [accused] was not expressly told that he could leave the CID office at anytime; and [8] At no time during this period did [the accused] seek clarification of his status, request an attorney, decline to make a statement, or attempt to obtain permission to leave.[49]

Based on the totality of the circumstances, and especially these factors, the Army court held that the accused had not been under apprehension during this first time period.[50]

The court's review of the second time period of the accused's detention brings the foregoing application of the Army court's *Mendenhall/Stanford* test into sharper focus. The Army court concluded that the second time period was that which followed the accused's oral admission and concluded when he was released from the CID office.[51] With the exception of factors [4] and [8], the court adopted the same factors it had made in evaluating the first time period of the accused's detention.[52] The court also identified five additional relevant factors:

> [1] [The accused] sought clarification of his interrogation status by asking SA if he could temporarily depart the CID office and return later to complete his statement; [2] Special Agent Jarman did not understand the nature of [the accused's] request because it was ambiguously worded; [3] Special Agent Jarman did not attempt to resolve this ambiguity by asking any meaningful follow-up questions; [4] Special Agent Jarman gave appellant an ambiguous reply to his request for status clarification; [and] [5] After receiving SA Jarman's reply, [the accused] erroneously believed he was not free to leave the CID office.[53]

The Army court found, after considering all these factors, that at the moment SA Jarman gave the accused an ambiguous reply to the accused's request for clarification of his status, the accused "was unwittingly subject to a show of authority which restrained his freedom of movement."[54] The court found, at that point, that the accused reasonably believed that he was not free to leave the CID office and was therefore "seized" within the meaning of the *Mendenhall/Sanford* test. Interestingly, the Army court determined there was, also at that precise moment, sufficient probable cause to apprehend the accused because the CID agent had already received the accused's oral confession.[55]

United States v. Scott: "The Right Stuff?"

As if it was designed to answer the critical question whether the Army Court of Military Review was correct in rejecting the application of the *Dunaway* rationale in *Thomas*, the Court of Military Appeals was confronted with a similar factual setting in *United States v. Scott*.[56] In *Scott*, the accused was charged with the premeditated murder of a fellow sailor. The victim's body was found by a gate guard at 5:20 A.M. on the compound of a Navy Ship Repair Facility (SRF) in Guam. The victim had been stabbed several times in the chest, neck, and back. The gate guard reported to Naval Investigative Service (NIS) agents that he had seen the victim earlier in the morning (2:26 A.M.) as the victim was entering the compound in order to take his passengers to their ship, the USS *Kinkaid* (the only ship berthed at the SRF). The witness noticed that there were two or three other men in the victim's car, some of whom were black. Subsequently, NIS agents found the victim's car not far from his body and also found evidence of drug use in the interior of the car. Also found near the victim's body was a pair of sunglasses that were later identified as similar to those habitually worn by Gregory Price, a crewman of the *Kinkaid*. It was discovered that Price had boarded the *Kinkaid* with the accused at 3:00 A.M. The NIS investigation was able to account for and corroborate the activities during the relevant time period of every black sailor on board the *Kinkaid* except for Price and the accused.

The NIS first interviewed Price, who stated that he and the accused had been together the entire evening previous to the murder of the victim. Price admitted that both he and the accused had smoked marijuana before boarding the *Kinkaid*, but maintained that they had not entered the SRF with the victim. Instead, according to Price, both had taken a taxi to the ship. The NIS agents were able to identify several falsehoods in Price's story and the investigation quickly focused on Price and the accused.

In coordinating its investigation with the commander of the *Kinkaid*, the NIS arranged for the witnesses to be transported to the on-site investigation. This procedure, which included having a shorepatrolman escort the witnesses, was followed when the NIS eventually asked to see the accused. When the shorepatrolman went to locate the accused in order to transport him from the *Kinkaid* to the NIS office, however, he discovered that the accused was at the beach

[49] *Id.* at 934.

[50] *Id.*

[51] *Id.* at 934–35.

[52] *Id.* at 935.

[53] *Id.* at 934–35 (footnote omitted).

[54] *Id.* at 936.

[55] *Id.*

[56] 22 M.J. 297 (C.M.A. 1986)

on liberty. The Duty-Master-at-Arms then accompanied the shorepatrolman in a conspicuously marked shore patrol vehicle and located the accused. After checking the accused's identification card, the Duty-Master-at-Arms informed the accused that he had to accompany them to the NIS office. The accused entered the shore patrol vehicle without resistance. Once at the NIS office, the accused was told to have a seat in the waiting room where Price and other witnesses were seated. The Duty-Master-at-Arms stood by the door of the waiting room.

The accused was called to the investigating agent's office after about ten minutes, properly advised of his *Article 31/ Tempia* rights, and was told that he could terminate the interview at any time. At trial, the investigating agent testified that he would have terminated the interview of the accused had the accused requested to do so, but in that event the accused would have been escorted back to the ship and would have been restrained if he had attempted to leave on his own. During the interview, the accused consented to the search of his wall locker, which provided more incriminating evidence. Later, during a subsequent interview, the accused admitted his involvement in the murder.

Both at trial and on appeal the accused urged that the evidence of his confession and of the search of his wall locker had been obtained as a result of his initial unlawful apprehension, specifically arguing that this view was supported by the Supreme Court's holding in *Dunaway*. The Navy-Marine Court of Military rejected this argument, holding that "*Dunaway v. New York* . . . is not applicable to the military setting."[57] In underscoring this determination, the Navy court observed that

> The detention of appellant was one of those situations where the specialized needs of the military should permit a seizure on less than probable cause. A brutal murder was committed on base and it was imperative that the investigation and solution of the offense be accomplished as soon as possible in order to maintain order, effectiveness, and discipline at the command.[58]

Unlike the Army court in *Thomas*, however, the Navy court offered no other analysis of the accused's detention or other application of law regarding how such a detention could satisfy constitutional muster. Subsequent to this decision, the Court of Military Appeals reversed the Navy court and remanded the case for reconsideration "in light of *United States v. Schneider*."[59] Again, the Navy court determined that the accused had not been apprehended but also found, in the alternative, that there was sufficient probable cause to justify the accused's apprehension.[60]

The issue of the accused's detention by Naval authorities thus properly framed brought about its full review by the Court of Military Appeals.

The court focused on four factors surrounding the transporting of the accused to and subsequent placement in the NIS office which it believed relevant to the issue of whether the accused had been apprehended. First, the court found the facts that the accused was ordered to accompany the Duty-Master-at-Arms and the shore patrolman, in a marked shore patrol vehicle, to law enforcement offices for interrogation, were factors that independently established that the accused was in custody.[61] Even so, a second factor, determined by the court to be as significant, were the suspicions of the NIS agents. The court found that the primary investigating agent suspected the accused of criminal conduct at the time he directed that the accused be brought in for questioning. The court found that this circumstance compelled the conclusion that the Duty-Master-at-Arms and the shorepatrolman assigned to escort the accused were carrying out the interests of law enforcement authority.[62] Third, the court determined that presence of the Duty-Master-at-Arms presence at the waiting room door after he had escorted the accused to the NIS office, although not compelling by itself, was another factor indicating that the accused's freedom of movement had been restricted to the limits determined by law enforcement authorities.[63] Finally, the court noted that, although the accused was told that he could terminate the interview at any time, he was never advised that he then would be free to leave. The court observed that if the accused had been so advised, then the presence of the Duty-Master-at-Arms as a factor leading to the conclusion that the accused was in custody would have been vitiated.[64] Because there was an absence of such advice, however, the implication of each of the other factors was heightened.

In completing this assessment of the facts, the court concluded that the accused's eventual detention in the NIS office was neither the end-product of a circumstance compelled by military operations nor motivated by superior military interests in accomplishing a mission.[65] Instead, the court found that "Scott was a suspect whose freedom of locomotion had been restricted more than momentarily for a law-enforcement purpose."[66] Additionally, the court, as it had done in *Schneider*, emphasized that *Dunaway* was applicable to the military. Although recognizing that the privacy interests between civilians and soldiers may be different within the context of their respective "societies," the court reiterated that "[w]e are not free to ignore the decisions of the Supreme Court, but must, instead, attempt to fit them into the context of military society."[67]

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[57] United States v. Scott, 13 M.J. 874, 876 (N.M.C.M.R. 1982). It is interesting to note that this holding by the Navy court nearly mirrors the argument raised by the State of New York and rejected by the Supreme Court in *Dunaway*. 442 U.S. at 212.

[58] 13 M.J. at 876.

[59] United States v. Scott, 16 M.J. 449, 450 (C.M.R. 1983).

[60] United States v. Scott, 17 M.J. 724 (N.M.C.M.R. 1983).

[61] *Scott*, 22 M.J. at 302.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 303.

[65] *Id.* at 302.

[66] *Id.* at 303.

[67] *Id.*

Conclusions

In order to resolve the issues arising out of the actions of law enforcement or command authority in the "twilight zone" between detention and arrest, as illustrated by the cases discussed above, the courts have attempted to construct guidelines that provide dimension to the public interest in effective law enforcement while also preserving the greatest possible protection of the constitutional rights of the individual. The Supreme Court decisions in *Dunaway* and *Mendenhall* are instructive in this regard, but they present an analytical dichotomy. Moreover, the constitutional right upon which the Supreme Court has focused its attention is the individual's right to privacy.[68] In an attempt to conform these opinions to military reality, the Court of Military Appeals has developed a similar bifurcated view of the issues surrounding seizure of the person as illustrated by *Schneider* and *Sanford.* Recognizing that the matter of individual privacy in the military is not the functional equivalent of privacy in civilian life, however, the Court of Military Appeals has focused its attention on the soldier's vested interests in "freedom of movement." Even though each of these decisions is clearly justified within the context of their factual settings, they leave a military prosecutor with the seemingly single conclusion that each case must receive an *ad hoc* analysis—*after it develops*—a problem of critical dimension for both prosecutors and those that would be called upon to advise either commanders or law enforcement authorities during crucial stages of a criminal investigation.[69] While the *Mendenhall/Sanford* test enunciated by the Army Court of Military Review in *Thomas* holds out some promise of uniting the views outlined in the *Dunaway/Schneider* and *Mendenhall/Sanford* lines of cases, the recent Court of Military Appeals decision in *Scott* has overshadowed this promise with its debatable observation that it must conform military law to the *Dunaway* rationale. Even so, there are several observations from these cases that do provide prosecutors with vantage points for accurate advice.

First, the technical characterization of the seizure of a person by command or law enforcement authorities as either an "arrest" or "apprehension" contributes very little, if anything, to an understanding whether a person has been lawfully detained or seized. Indeed, as noted above, the Unites States Supreme Court expressly iterated in *Dunaway* that, "whether or not it is technically characterized as an arrest," detention of a person beyond the brief stop-and-frisk situations approved in *Terry,* or beyond the brief investigative stops approved in *United States v. Brignoni-Ponce,*[70] "must be supported by probable cause," whether at the "investigative" or at the "accusatory" stage.[71] Similarly, the Court of Military Appeals has reiterated this view in both the *Schneider* and the *Scott* cases.

Second, law enforcement personnel, for reasons that may include a reliance on the technical definition of apprehension, a failure to understand the circumstances or the consequences of their actions, or for tactics, frequently avoid making clear their intent in either detaining or seizing an individual. Moreover, the problems encountered by prosecutors in this regard are exacerbated in the military when commanders detain or seize soldiers and fail to manifest whether their intent is to accomplish either a law enforcement or military purpose.

Third, the admissibility of crucial evidence in extremely serious cases is imperiled when commanders or law enforcement personnel bring the issue of the seizure of a suspect into question by their ambiguous conduct. This ambiguous conduct is most likely to occur in settings where the soldier is questioned regarding some suspected misconduct or when, as the result of an act of misconduct, consent to search is requested.

Fourth, the *methodology* used by the courts in analyzing law enforcement or command conduct provides a model for prosecutors to emulate both in giving advice during a criminal investigation and assessing the actions of law enforcement or command authority at trial.

Finally, and probably most importantly, prosecutors have a key role in advising commanders and law enforcement officials. When an individual is suspected of an offense and the commander or CID would like to talk to the suspect, they should seek consensual appearance. The CID should request the consent of the individual to come to either office. Most individuals are not hesitant about consenting to these inquiries. It is the failure to get consent that raised the issues present in *Scott, Schneider,* and *Sanford.*

Prosecutors should note that where either law enforcement authorities or commanders have developed a strong suspicion that the accused has committed some act of misconduct and that other possibilities have been excluded, any purpose in detaining the accused will be viewed by the courts as a *law enforcement purpose.* The factual setting of the case will then most likely be exposed to the analytical framework outlined in *Dunaway* and *Schneider.* Where the misconduct being investigated is also intertwined in the practical exigencies of military life, however, and where the accused is among others who are equally capable of being suspected, his detention, even if it includes being ordered to report to a law enforcement office, should be viewed within the analytical framework outlined in *Mendenhall* and *Sanford.* In either case, it is clear that the *Dunaway* rationale will be applied by the Court of Military Appeals as that fact was made conclusively evident in *Scott.* Even so, the *Thomas* rationale is appealing. As to the individual set of facts embraced in that case, there is considerable jurisprudential, if not philosophical, support for the Army court's

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[68] For example, in *Dunaway,* after the State of New York had urged the Supreme Court to extend the boundaries of investigative detention outlined in *Terry,* the Supreme Court observed that: "The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment cannot be compromised in this fashion." 442 U.S. at 214.

[69] Consider, for example, the case of United States v. Avala, 22 M.J. 777 (A.C.M.R. 1986), where, after the discovery of an unidentified female body, a series of events caused the Criminal Investigation Division of Fort Carson, Colorado, to extensively rely on the advice of the Fort Carson on-call judge advocate for critical advice regarding the search of the accused's "cleared" on-post quarters and his eventual apprehension in an off-post motel during a July weekend in 1984.

[70] 422 U.S. 873 (1975)

[71] *Dunaway,* 442 U.S. at 214.

opinion and therefore it should not be discounted as an anomaly.[72] Indeed, if this case is eventually reviewed by the Court of Military Appeals, it should present the court with an opportunity to find a meeting ground between the *Schneider* and *Sanford* decisions, further clarifying the dimensions of detention and seizure.

[72] Even so, *Thomas* is marred to a certain extent by the differences in the majority opinion in *Mendenhall* over whether the accused was seized at the moment she was momentarily stopped by the DEA agents and asked to produce both her airline ticket and other identification. Furthermore, prosecutors in advising command or law enforcement authority with regard to the *Thomas* holding *must avoid* any possibility that they would construe or use the advice as a basis for enticing the accused into a custodial setting for purpose of extracting either an admission, confession, or other investigative advantage where probable cause to apprehend the accused is entirely lacking. Under these circumstances, the law enforcement motive underlying this objective would be patently obvious as well as compromising at trial.

The Advocate for Military Defense Counsel

Effective Assistance of Counsel During Sentencing

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Introduction

The sentencing proceeding is frequently as important a phase of trial for an accused as the trial on the merits. In many other jurisdictions, as in the military, where the guilt and sentencing phases are bifurcated, and where the sentencing proceeding is adversarial, the sentencing proceeding in effect almost becomes a new trial.[1] Those defendants who have pleaded guilty,[2] or for whom a reversal of conviction on appeal is not probable, will find the sentencing stage of trial to be especially important. In the case of a capital offender, what goes on at the sentencing hearing may well make the difference between life and death.

Because of the importance of the sentencing stage of trial, an accused is entitled to effective assistance of counsel at sentencing. Protection and assertion of rights belonging to the accused can only be properly accomplished in an adversarial setting if the accused has the benefit of effective assistance of counsel.[3] The accused at capital sentencing proceedings, which consist mainly of a balancing of aggravating and mitigating factors,[4] will have to rely on counsel's ability to marshall sufficient factors in his or her favor to prevent imposition of the death penalty.[5] To protect these interests of the accused, the courts have ruled that counsel's performance during sentencing proceedings must meet the same standard of reasonable effectiveness that counsel must observe in all other phases of trial.[6]

This article, the fourth in a series on ineffective assistance of counsel,[7] examines the issue of ineffectiveness of counsel at the sentencing stage. Because understanding the policies behind the doctrine may better enable counsel to predict whether the rule will expand or contract as applied to the particular facts, this article will begin by examining the constitutional and practical interests underlying judicial opinions on this subject. Special emphasis will be placed on the issue of mitigation of sentence, the most common basis of ineffectiveness claims in the sentencing stage. The article concludes with the case law in this area and some observations of what courts have or have not found to be ineffective assistance of counsel at sentencing.

[1] Strickland v. Washington, 466 U.S. 668, 686–87 (1984).

[2] Current caseload statistics at the Defense Appellate Division indicate that 64% of the cases waiting to be briefed are guilty pleas; therefore, defense counsel's main function in a current majority of cases, other than perhaps negotiating a favorable pre-trial agreement, is the presentation of matters affecting sentence.

[3] Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956) ("Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."), *cited with approval in* United States v. DeCoster 487 F.2d 1197 (1973).

[4] Vela v. Estelle, 708 F.2d 954, 966 (5th Cir. 1983), *cert. denied sub nom.* McKaskle v. Vela, 464 U.S. 1053 (1984).

[5] Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir.), *cert. denied sub nom.* James v. Tyler, 106 S. Ct. 582 (1985).

[6] Strickland v. Washington, 466 U.S. at 686–87. *See also* United States v. Schreck, 10 M.J. 226, 228 (C.M.A. 1981) ("The loyalty of defense counsel to his client—before, during, and after trial—is a cornerstone of military justice."); United States v. Davis, 20 M.J. 1015, 1017–18 (A.C.M.R. 1985). Furthermore, the same standard applies whether or not the sentencing involves the death penalty, although the seriousness of the charges against the defendant is one of the factors to be considered when assessing ineffectiveness claims. Stanley v. Zant, 697 F.2d 955, 962–63 (11th Cir. 1983), *cert. denied sub nom.* Stanley v. Kemp, 467 U.S. 1219 (1984).

[7] The previous articles are Hancock, *Ineffective Assistance of Counsel: An Overview*, The Army Lawyer, Apr. 1986, at 41; Burrell, *Effective Assistance of Counsel: Conflicts of Interests and Pretrial Duty to Investigate*, The Army Lawyer, June 1986, at 39; and Curry, *Ineffective Assistance of Counsel During Trial*, The Army Lawyer, August 1986, at 52.

The Standard

The controlling rule that governs defense counsel's performance is the same rule that applies to all stages of trial. This rule was expressed by the Supreme Court in *Strickland v. Washington,*[8] which held that a defendant who made an ineffectiveness of counsel claim must first overcome a presumption of competence by proving counsel's performance was below a standard of reasonableness as established by an objective standard of professional competence and as evidenced by all the circumstances of the case.[9] Even should the defendant carry this heavy burden of proof, he or she must further prove that counsel's particular acts or omissions may have been outcome-determinative, *i.e.,* were prejudicial to the defendant.[10] This two-prong test is obviously a difficult one to meet. It is not surprising, therefore, that few ineffective assistance of counsel claims succeed.

Although the applicable rule is not difficult to state, the policies underlying it are not as easy to understand. The courts have offered a number of rationales for imposing such a heavy burden on the claimant.[11] The right to effective counsel, it has been argued, is derived from the sixth amendment right to counsel; but the purpose of the sixth amendment right is to guarantee that the adversarial system will produce just and reliable results.[12] Thus, it is deemed appropriate to impose on the party claiming a violation of that right the burden of proving that the results of the system cannot be relied upon,[13] were prejudicial, and thereby also a denial of the accused's due process right to a fair trial.[14] One court has justified imposing the burden of proof on the defendant by citing the common law rule that the burden should be imposed on the party with exclusive control of the evidence.[15]

A slightly more practical policy reason for the rule was expressed by a commentator who suggested that what really powers the courts is the institutional need of an "overburdened judiciary, saddled with the responsibility to achieve finality and conserve judicial resources [to] strive for speedy and effective adjudication of guilt to achieve society's criminal justice interests."[16] In certain circumstances, such as where a conflict of interest is demonstrated or where the court or prosecution is responsible for depriving the accused of effective counsel, the court will presume prejudice.[17] The Supreme Court's explanation for these exceptions perhaps betrays judicial concerns that are institutional in nature:

> Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. . . . Moreover, such circumstances involve impairments of the sixth amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.[18]

A tension between constitutional interest that is specific to ineffectiveness of counsel claims at sentencing, in particular to capital sentencing, centers around the issue of mitigation. In *Lockett v. Ohio,*[19] the Supreme Court struck down a state court procedural rule that limited what aspects of a defendant's character and record could be introduced as factors in mitigation of sentence.[20] The Court ruled that the eighth and fourteenth amendments require that defendants be allowed to present any relevant evidence in mitigation.[21] In the context of ineffective counsel claims, however, the courts have held essentially that this right is one that is more appropriately asserted against the state than against counsel.[22] The fact that the state cannot limit the right to present mitigating evidence at sentencing proceedings does not create a corresponding duty on defense to

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[8] 466 U.S. 668 (1984). The *Strickland* standard is followed by the military courts. United States v. Davis, 20 M.J. at 1017. For an extensive discussion of *Strickland* and its progeny, see Schaefer, *Current Ineffective Assistance of Counsel Standards,* The Army Lawyer, June 1986, at 7. *See also* United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986).

[9] 466 U.S. at 690.

[10] *Id.* at 687.

[11] In a lengthy dissent to a case formulating what would eventually be adopted as the two-pronged test in *Strickland,* Judge Bazelon argued that placing the burden on the defendant to prove prejudice unconstitutionally shifts the government's burden of proving guilt to the defendant and makes the defendant establish the likelihood of his innocence. United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (Bazelon, J., dissenting) [hereinafter DeCoster III]. Bazelon proposed that the better view is to impose on the government the burden of proving an absence of prejudice after the defendant makes an initial showing of incompetence by counsel. *Id.* at 294.

[12] Strickland v. Washington, 466 U.S. at 686.

[13] *Id.* at 691–92.

[14] *DeCoster III,* 624 F.2d at 222.

[15] *Id.* at 228. Another element of this rationale is the absence of prosecutorial involvement. *Id.* at 229.

[16] Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel,* 93 Harv. L. Rev. 752, 752 (1980) (citing *DeCoster III,* 624 F.2d at 207–08).

[17] Strickland v. Washington, 466 U.S. at 692. In Dillon v. Duckworth, 751 F.2d 895 (7th Cir.), *cert. denied,* 105 S. Ct. 2344 (1985), the court held that the defendant was denied effective assistance of counsel by the trial court, which refused to grant motions for continuance and venue change where defense counsel believed himself incompetent to try the case, where counsel's father passed away during the course of trial, and where, at the death penalty hearing, counsel failed to provide character witnesses or make any other effort to prevent the imposition of death. *See also* United States v. Devitt, 20 M.J. 240, 244 n.3:

> When an actual conflict [of interest] develops at any stage of a trial, prejudice will be conclusively presumed as to all further proceedings. . . . It is conceivable [, however,] that no conflict might exist with respect to findings but may exist as to sentence. In that event, the findings would not be tainted.

[18] Strickland v. Washington, 466 U.S. at 692.

[19] 438 U.S. 586 (1978). *See generally* Hertz and Weisberg, *In Mitigation of the Penalty of Death,* 69 Calif. L. Rev. 317 (1981).

[20] *Lockett,* 438 U.S. at 608.

[21] *Id.* at 604. *Accord* Skipper v. South Carolina, 106 S. Ct. 1669, 1670–71 (1986).

[22] Stanley v. Zant, 697 F.2d at 961.

present such evidence.[23] And because counsel has no absolute duty to present mitigating evidence, his or her failure to do so is not per se ineffective assistance.[24] The teaching of *Lockett* is that the state at sentencing must treat each defendant individually, and must independently consider the defendant's character and circumstances.[25] Deciding whether it is ineffective assistance for counsel not to present mitigating factors likewise must include an evaluation of the defendant's particular circumstances.

Applying The Standard

Aside from establishing the two-pronged rule for ineffectiveness of counsel, the Supreme Court has eschewed creating specific guidelines for counsel to follow beyond a requirement of objective reasonableness.[26] In *Strickland v. Washington,* Justice O'Connor not only declined to list specific duties, but she also wrote that beyond the general reasonableness standard "[m]ore specific guidelines are not appropriate."[27] This view reflects a reluctance on the part of the courts to second guess trial defense counsel's strategy.[28] Implicit in this approach is perhaps the judicial belief that the right to effective counsel is best served when counsel is not hampered with strict guidelines that might restrict counsel's initiative.[29]

Despite the absence of judicial guidelines and despite judicial admonitions against attempts to delineate basic duties, several observations can be made as to what the courts have required at sentencing. First, defense counsel should consult available non-judicial guidelines.[30] These guidelines emphasize the need for counsel to prepare for the sentencing proceedings by reading and verifying when possible all potential aggravation evidence and to keep the client informed of developments. Great care should be taken to avoid allowing inadmissible evidence to be introduced without a proper objection.[31] In particular, counsel should be aware of admissible information such as a bar to reenlistment that shows prior nonjudicial punishment without evincing *Booker*[32] requirements.[33] In a recent case before the Army court, a counsel was found to have been ineffective for failing to object to the introduction of confidential information concerning the accused's enrollment in the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP).[34] In the same context, counsel should be constantly on guard to object to the introduction of inadmissible uncharged misconduct.

In what may be the only specific guidelines on effective assistance of counsel at sentencing set down by a court, Chief Judge Bazelon in *United States v. Pinkney*[35] offered the following recommendations:

> [Counsel should] [f]amiliarize himself with all reports serving as a foundation for sentence sufficiently in advance of the sentencing hearing. . . . An attempt to verify the information contained therein would then enable counsel to supplement the reports when incomplete, and challenge them when inaccurate. . . .
>
> . . . .
>
> Counsel should confer with his client during the presentence period, keeping him fully informed of the dispositional alternatives, and their implications, and ascertaining the client's views.[36]

These guidelines were based loosely on the American Bar Association (ABA) standards.[37]

One duty not assimilated by Chief Judge Bazelon into the *Pinkney* guidelines concerns the right of allocution: "Counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a judicial confession in the courts of allocution which might tend to prejudice an appeal."[38] This approach diverges somewhat

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[23] *Id. See also* Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985) ("Counsel has no absolute duty to present mitigating character evidence.")

[24] Stanley v. Zant, 697 F.2d at 962; *see also id.* at 959 n.2.

[25] Tyler v. Kemp, 755 F.2d at 745.

[26] Strickland v. Washington, 466 U.S. at 688.

[27] *Id. See also DeCoster III,* 624 F.2d at 203 & 223. In United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976), Bazelon C.J., wrote that it was appropriate for the circuit court, because of its supervisory role over the administration of criminal justice in the circuit, to set down guidelines in order to "implant the specificity necessary to give content to the standards" for effective assistance of counsel that it established. *Id.* at 1248–49. One commentator who shares Judge Bazelon's view that guidelines are needed argues that a standard without guidelines amounts to no standards at all: "Like the recipe without measurements, a standard with no ultimate point of reference is likely to produce different results with each application and with each judge. Such a nonprescriptive standard does not provide trial judges with clear precepts according to which they can police defense counsel performance." Note, *supra* note 16, at 765.

[28] *See, e.g.,* Washington v. Watkins, 655 F.2d 1346, 1356 (1981) *cert. denied* 456 U.S. 949 (1982); Mitchell v. Hopper, 564 F. Supp. 780, 782 (S.D. Ga. 1983), *aff'd sub nom.* Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); United States v. Davis, 20 M.J. 1015, 1018 (A.C.M.R. 1985).

[29] "[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Strickland v. Washington, 466 U.S. at 689.

[30] *See, e.g.,* ABA Standards For Criminal Justice § 4–8.1. (1986); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L. Rev. 299, 362 (1983).

[31] Absent a proper objection, most presentencing errors regarding evidence are waived. Mil. R. Evid. 103.

[32] United States v. Booker, 5 M.J. 246 (C.M.A. 1978).

[33] United States v. Brown, 11 M.J. 263 (C.M.A. 1981) (in trial before members, a bar to reenlistment cannot contain evidence of punishment that was independently inadmissible). *But see* United States v. Dalton, 19 M.J. 718 (A.C.M.R. 1984) (in trial before military judge alone, a military judge is presumed to consider only evidence that is properly before him). *See also* United States v. Warren, 15 M.J. 776 (A.C.M.R. 1983) (evidence of a summary court-martial conviction contained in the appellant's Personal Qualification Record Part II (DA Form 2–1) was inadmissible because it did not reflect that the due process requirements of *Booker* had been complied with).

[34] United States v. Howes, 22 M.J. 704 (A.C.M.R. 1986) (trial counsel attempted to rebut appellant's claim that he had never been in trouble before with testimony showing that he had been involved in ADAPCP).

[35] 551 F.2d 1241 (D.C. Cir. 1976).

[36] *Id.* at 1249–50.

[37] ABA Standards, *supra* note 30.

[38] *Id.* at 4–8.1(c).

from the usual trial defense strategy of urging the client to admit his or her wrongs and verbally demonstrate the client's decision to rehabilitate himself or herself. Counsel should carefully balance the benefits of the defendant's admissions versus any perceptible binding effects that could be created by such admissions on appeal or in a rehearing. This problem can be avoided, at least to a degree, by allowing the client to make a carefully tailored unsworn statement clearly expressing remorse and a desire for rehabilitation but avoiding particular admissions of fact and concomitantly avoiding cross examination. Although the *Pinkney* and ABA guidelines have no binding effect,[39] the duties they impose are obvious ones that military counsel should perform out of professional instinct.[40]

Second, counsel should investigate the client's background for evidence of extenuating and mitigating factors. It is where counsel fails to do this that the courts have most often found ineffective assistance of counsel at the sentencing stage of trial.[41] In *United States v. Sadler*, the Army Court of Military Review held that defense counsel's failure to interview potential witnesses, a list of which was provided to him by the defendant, was ineffective assistance of counsel.[42] The court ruled that defense counsel had an "affirmative duty" to present matters in extenuation and mitigation.[43] As a balancing of mitigating and aggravating factors is central to sentencing hearings, the courts have found that counsel's failure to investigate can amount to the accused receiving no representation at all.[44] The duty to investigate is discharged when counsel makes a reasonable inquiry into the defendant's background. Counsel must make an independent search for witnesses and records rather than merely relying on what the defendant tells counsel.[45] This entails, in the military context, interviewing potential witnesses, such as members of defendant's chain of command, defendant's family, and gathering documentary evidence such as Good Conduct Medals and letters of commendation.[46]

After counsel has accumulated this evidence, the courts will not inquire extensively into whether counsel was ineffective in not using any of it, provided that counsel can articulate a reason which evinces that counsel "made an informed choice between reasonable alternatives."[47] Among the reasons the courts have found valid for not presenting mitigating evidence in court are counsel's judgment that the witnesses would prove harmful to the defendant upon cross-examination,[48] that the witnesses seemed reluctant to testify,[49] and that such evidence had been presented at the guilt phase of trial without success.[50] In each of these examples, mitigation proved ineffective or was likely to prove ineffective; because the likelihood of prejudice to the defendant was therefore low, the courts dismissed the claims.[51] The courts have made it clear that counsel has no absolute duty to present mitigating evidence.[52] As long as counsel investigated the possibility of using such evidence, his or her decision to not present the evidence in court, if based on articulated tactical considerations, will not be found to be ineffective assistance.[53]

In addition to investigating and presenting evidence in mitigation, defense counsel at the sentencing proceeding should be prepared to object to improper remarks made by the prosecution in argument. Although the judge has a duty to intervene *sua sponte* where failure to stop an improper argument would be plain error, the general rule is that counsel's failure to object constitutes waiver of the issue on

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[39] In addition to the fact that *United States v. DeCoster* and *Strickland v. Washington* decided against the use of guidelines, the *Pinkney* guidelines lack binding effect because the case itself was decided on grounds other than ineffective assistance of counsel.

[40] In United States v. Sadler, 16 M.J. 982 (A.C.M.R. 1983), the court did rule that defense counsel has an "affirmative duty" to "thoroughly advise the accused as to his allocution rights." *Id.* at 983.

[41] Blake v. Kemp, 758 F.2d 523 (11th Cir.), *cert. denied*, 106 S. Ct. 374 (1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir.), *cert. denied sub nom.* James v. Tyler 106 S. Ct. 582 (1985); King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2020 (1985); Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983).

[42] 16 M.J. at 983.

[43] *Id.*

[44] In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), the court held that defendant received ineffective assistance of counsel where counsel made no preparations whatsoever for the sentencing hearing because he believed the defendant would, by reason of insanity, not be sentenced to death; counsel therefore went into the sentencing phase with nothing other than a psychiatric report. *Id.* at 533. This would indicate that, although a rational tactical reason may serve as a valid justification for not presenting mitigating evidence (*see infra* text accompanying notes 47–53), it is insufficient to excuse counsel from the duty to investigate.

Because the right to effective counsel derives from the right to counsel itself, the courts are most likely to find ineffective assistance in cases like *Blake v. Kemp*, where counsel constructively provided no representation at all. Of course, where the defendant in fact had no representation at all rather than merely constructively being deprived of effective assistance, the court will grant a rehearing on the sentence. Hollywood v. Yost, 20 M.J. 785 (C.G.C.M.R. 1985).

[45] Baldwin v. Maggio, 704 F.2d 1325, 1332–33 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984).

[46] For an example of a military case where counsel's investigation and presentation of extenuating and mitigating evidence was found to be sufficient, see United States v. Richardson, CM 444294 (A.C.M.R. 19 Oct. 1984).

[47] Griffin v. Wainright, 760 F.2d 1505, 1514 (11th Cir. 1985).

[48] *See, e.g.*, Moore v. Maggio, 740 F.2d 308 (5th Cir.), *cert. denied*, 105 S. Ct. 3514 (1985); Burger v. Kemp, 753 F.2d 930 (11th Cir. 1985).

[49] Messer v. Kemp, 760 F.2d 1080 (11th Cir.), *cert. denied*, 106 S. Ct. 864 (1985).

[50] *See, e.g.*, Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3490 (1985).

[51] Other cases where defendant failed to satisfy either the incompetence or prejudice prong include Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2050 (1985); Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984), *cert. denied sub nom* Knighton v. Louisiana, 105 S. Ct. 306 (1984); Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984); Stanley v. Zant, 697 F.2d 955 (11th Cir.), *cert. denied*, 467 U.S. 1219 (1983).

[52] Mitchell v. Kemp, 762 F.2d at 889.

[53] The courts will also find ineffective assistance where, after investigation, the evidence presented in mitigation was unjustifiably insufficient. In Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), the court found that although counsel "did not present a strong case in mitigation . . . [t]he fault lies with the intrinsic lack of suitable mitigating evidence rather than the neglect of counsel in finding it." *Id.* at 1248.

appeal.[54] The test for whether counsel's failure to object also constitutes ineffective assistance is based on the prejudice prong of the *Strickland v. Washington* standard, whether the challenged statement by prosecution would have been admissible anyway. In *United States v. Garcia,*[55] the Air Force Court of Military Review held that, as the prosecution's introduction of deterrence evidence was generally permissible at sentencing proceedings, defense counsel's failure to object to trial counsel's argument seeking a sentence that would act as a deterrent to the accused as to future similar misconduct was not defective performance.[56] In *United States v. Collins,*[57] the Air Force court held that counsel's failure to object to inflammatory remarks made by prosecution was waived and did not mandate a rehearing on the sentence.[58] The court indicated that the basis of the holding was its belief that the remarks were not sufficiently inflammatory to affect the outcome of the sentencing: "Such defense passivity, incidentally, has also been used as a somewhat reliable indicator of the minimal impact the prosecutor's remarks made on the court."[59]

Finally, counsel seeking to avoid an ineffective assistance claim should take care not to make an unwarranted concession of sentence appropriateness. The test for ineffectiveness of a concession is whether "under all the circumstances, the concession constituted a sensible 'trade-off,' taking into account the risks and the benefits reasonably to be expected."[60] In the military context, this means that defense counsel, before requesting or conceding the appropriateness of a sentence, should consider these factors: "[w]hether the maximum punishment included a dishonorable discharge, providing appellant with the motive of avoiding this more onerous punishment by conceding a bad-conduct discharge . . . [; and] [w]hether the objective of the argument (usually reduced confinement) justified the concession."[61]

In addition to these considerations, counsel *must* obtain the defendant's approval before making a concession.[62]

In their treatment of ineffectiveness claims based on concession of sentence, the courts have largely relied on the prejudice prong of the *Strickland v. Washington* rule. In *United States v. Volmar,*[63] the Court of Military Appeals held that it was not ineffective assistance for counsel to concede the appropriateness of a bad-conduct discharge. The court found that the defendant, tried and found guilty by a general court martial of wrongfully using marijuana, transferring cocaine, and obstructing justice, was unlikely to receive a sentence without a punitive discharge.[64] Where, as in *Volmar,* the defendant did not disapprove of the concession at the time if was proffered,[65] and where the defendant did not receive a greater sentence than what he or she would have received anyway, the concession will not be found to be ineffective assistance because it did not prejudice the outcome of the sentencing to the defendant's detriment.[66]

Conclusion

The sentencing stage is an important phase of an accused's defense. Because of this, the courts have ruled that the accused has a right to effective assistance of counsel at sentencing. The standard for assessing the effectiveness of counsel's assistance is the two-pronged test set down in *Strickland v. Washington.* Under this standard, all circumstances will be examined. Although no single act or omission has been identified by the courts as being per se ineffectiveness, one duty that counsel should always perform at sentencing is to investigate evidence of extenuating and mitigating factors. Counsel should document that investigation.

In addition to investigating and presenting extenuating and mitigating evidence, defense counsel should read all available reports and keep the defendant informed of developments, especially when counsel decides, after weighing all the risks and benefits, to request or concede the appropriateness of a sentence. The appellate courts' main concern is that the accused not be deprived of representation by counsel, whether constructively or in fact. Therefore, defense counsel at sentencing should always be prepared to act, *e.g.,* objecting to improper argument by the prosecution. As long as counsel takes action where action is required by the circumstances, the courts will not second-guess why counsel chose one action over another and will be satisfied that the defendant has not been deprived of effective assistance of counsel at sentencing.

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[54] United States v. Williams, CM 446852 (A.C.M.R. 7 August 1986).

[55] 18 M.J. 716 (A.F.C.M.R. 1984).

[56] *Id.* at 720.

[57] 3 M.J. 518 (A.F.C.M.R. 1977) (prosecutor commented that the accused, a security officer, betrayed the trust his country placed in him by selling LSD).

[58] *Id.* at 521.

[59] *Id.* at 521 (citations omitted).

[60] United States v. Kadlec, 22 M.J. 571, 573 (A.C.M.R. 1986).

[61] *Id.* at 572–73 (citations omitted).

[62] *Id.* at 573 ("The desires of the accused regarding a punitive discharge compel an argument which is consistent with those desires. Thus there is no opportunity for deference to counsel's tactical or strategic choices in this area when they run counter to appellant's desires.").

[63] 15 M.J. 339 (C.M.A. 1983).

[64] *Id.* at 343. The same result was reached in United States v. Robertson, 17 M.J. 846 (N.M.C.M.R. 1984), where the accused did not object to counsel's conceding a bad conduct discharge and where the defendant, a six-time drug offender, was unlikely to be retained in the military.

[65] *Id.* at 343.

[66] The test is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694. In United States v. Davis, 20 M.J. 1015 (A.C.M.R. 1985), the court held that counsel's failure to notify the convening authority of the trial judge's recommendation that the bad-conduct discharge be suspended deprived the accused of effective counsel because there was a "reasonable probability" that the convening authority would be persuaded by the recommendation.

Is the Military Nonunanimous Finding of Guilty Still An Issue?

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Introduction

In light of the new direct appeal right of military accused to the United States Supreme Court,[1] many observers of military law and the Supreme Court have opined that the military nonunanimous finding of guilty is uniquely presentable for Supreme Court review.[2] Although the Supreme Court has denied petitions for certiorari in two military cases raising this issue,[3] no case has recently been presented to the appellate courts in a sufficient posture for consideration. This article will discuss the precedent pertinent to the issue, describe the requisite elements of an adequate record for appeal, and suggest how trial defense counsel may lay the foundation for appellate review of this issue.

The Issue

No Guarantee of Trial by Jury

The Supreme Court focused on the sixth amendment requisites of a civilian jury in a series of cases arising out of attempts by Louisiana and other states to limit the right to jury trial. In *Duncan v. Louisiana,*[4] the Court held that states must provide jury trial for non-petty crimes carrying possible penalties of more than six months. In *Williams v. Florida,*[5] the Court established that six jurors may decide a non-petty case. In 1972, the Court indicated that twelve jurors need not be unanimous. In *Apodoca v. Oregon,*[6] a concurrence of ten jurors was sufficient, and in *Johnson v. Louisiana,*[7] a vote of nine out of twelve jurors produced a constitutional conviction. The Court subsequently struck down Georgia's attempt to limit juries to five members.[8] Finally, in *Burch v. Louisiana,*[9] the Court held that a nonunanimous six-person jury may not convict for a non-petty offense.

All of these sixth amendment holdings are made applicable to the states by way of the fourteenth amendment's due process clause because "trial by jury in criminal cases is fundamental to the American scheme of justice."[10] These holdings have no direct application to military accused, however. The sixth amendment does not extend the right of trial by jury to courts-martial accused.[11]

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[1] Uniform Code of Military Justice art. 67(h), 10 U.S.C. § 867(h) (1982 and Supp. II 1984) [hereinafter UCMJ].

[2] *See, e.g.,* Remarks of Andrew Frey, Deputy Solicitor General of the United States, 11th Annual Homer Ferguson Conference sponsored by the United States Court of Military Appeals and the Military Law Institute, 28 May 1986. *See* Mendrano v. Smith, No. 84–1735 (10th Cir. July 31, 1986) for the most recent judicial discussion of the issue.

[3] United States v. Garwood, 20 M.J. 148 (C.M.A. 1985), *cert. denied,* 106 S. Ct. 524 (1985); United States v. Hutchinson, 18 M.J. 281 (C.M.A. 1984), *cert. denied,* 105 S. Ct. 384 (1984).

[4] 391 U.S. 145 (1968).

[5] 399 U.S. 78 (1970).

[6] 406 U.S. 404 (1972).

[7] 406 U.S. 356 (1972).

[8] Ballew v. Georgia, 435 U.S. 223 (1978). Military courts have not followed this precedent. *E.g.,* United States v. Montgomery, 5 M.J. 832 (A.C.M.R.), *petition denied,* 6 M.J. 89 (C.M.A. 1978).

[9] 441 U.S. 130 (1979).

[10] 391 U.S. at 149.

[11] Courts-martial have never been considered subject to the jury trial demands of the Constitution. Instead, the qualifications for service on courts-martial have been prescribed by Congress in the exercise of its power under Art. I, § 8, cl. 14 of the Constitution. United States v. McClain, 22 M.J. 124 (C.M.A. 1986). *See also* O'Callahan v. Parker, 395 U.S. 258 (1969); Reid v. Covert, 354 U.S. 1 (1957); Whelchel v. McDonald, 340 U.S. 122 (1950); *Ex parte* Quirin, 317 U.S. 1 (1942); Kahn v. Anderson, 255 U.S. 1 (1921); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). The rule is premised on the historical fact that military accused were not entitled to trial by jury at the time of the Constitution's ratification. *Ex parte* Quirin, 317 U.S. at 40. *See also* Larkin, *Should The Military Less-Than-Unanimous Verdict of Guilty Be Retained?* 22 Hastings L.J. 237, 240–41 (1971). Every other clause of the sixth amendment, however, is now applicable to courts-martial. United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985), *cert. denied,* 54 U.S.L.W. 3840 (U.S. Jun. 23, 1986) (assistance of counsel). United States v. Johnson, 17 M.J. 255 (C.M.A. 1984) (speedy trial); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977) (public trial); United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975) (compulsory process); United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960) (confrontation). None of these sixth amendment guarantees were specifically applicable to courts-martial accused at the time the Constitution was ratified. *See, e.g.,* United

The Military Nonunanimous Finding of Guilty

A unanimous court-martial finding of guilty is necessary only when the death penalty is mandatory.[12] Otherwise, a two-thirds concurrence of the members may convict.[13] Acquittal results if fewer than two-thirds of the members vote for a finding of guilty.[14]

This voting procedure differs significantly from that of federal district courts, where verdicts must be unanimous.[15] Juries consist of twelve members unless reduced in size with the defendant's consent.[16] If all jurors do not agree in a finding of guilty, no finding results and the jury is "hung." Likewise, there is no acquittal unless all jurors agree to a finding of not guilty.

This procedure produces two alternative results, neither of which occurs in courts-martial practice. First, there is frequent need for retrials when jury verdicts are not unanimous. Second, results are more reliable due to extended deliberation, especially in difficult cases.

> [E]xcept in those cases where the evidence clearly indicates either guilt or innocence, the jurors must often exhaustively disclose their preliminary views; compare their inferences, evaluations and subordinate judgements; discuss the relative import of specific items of evidence; and argue the application of the total factual picture to the carefully identified legal questions. All of this must be done with the joint deliberations necessary to secure unanimity.[17]

Due Process Concerns

Court-martial voting rules apply regardless of the number of members voting on findings, whether the statutory minimum of five,[18] or some larger number. Because Supreme Court precedent upholds convictions based on the vote of nine out of twelve jurors, it is unlikely that a vote, for example, of eight of twelve court-martial members is unconstitutional.[19] The holdings of *Ballew v. Georgia* and *Burch v. Louisiana* further demonstrate that cases of five

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States v. Jacoby, 11 C.M.A. at 437, 29 C.M.R. at 253 (Latimer, J., dissenting). That historical fact has not prevented the extending of constitutional protections to service members. *See, e.g.*, United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411 (1963), wherein Judge Kilday opines that the sixth amendment right to counsel is not applicable to courts-martial, while Chief Judge Quinn and Judge Ferguson express the contrary view.

It is significant that Congress has chosen to extend most of these rights, while it has chosen not to extend the right to trial by jury. UCMJ art. 10 (speedy trial, notice of charges); UCMJ art. 46 (compulsory process); UCMJ art. 27 (assistance of counsel). Although the Court of Military Appeals has guaranteed the right to public trial, United States v. Grunden, 2 M.J. at 120, and the right of confrontation, United States v. Jacoby, 11 C.M.A. at 431, 29 C.M.R. at 247, even though Congress has not spoken on those issues, it has not guaranteed the right to trial by jury in light of the congressional mandate that courts-martial members be detailed instead. UCMJ arts. 16 and 25. *See* United States v. Kemp, 46 C.M.R. 152 (C.M.A. 1973).

This article assumes, in light of precedent and history, that Congress' decision not to guarantee a sixth amendment trial by jury is justifiable, although appellants continue to assail that judgment. *E.g.*, United States v. Delacruz, CM 447095 (A.C.M.R. 30 Apr. 1986), *petition filed*, Dkt. No. 55,198(18 Jul. 1986). *See also* Schafer, *The Military and the Six Member Court—An Initial Look at Ballew*, 10 The Advocate 67, 69–73 (1978). That judgment may become suspect, however, if the Supreme Court takes a new expansive view of court-martial jurisdiction, United States v. Solorio, 21 M.J. 251 (C.M.A. 1986), *cert. granted*, 54 U.S.L.W. 3823 (U.S. 16 Jun. 1986), because court-martial jurisdiction has traditionally been limited due to service members' lack of entitlement to trial by jury. O'Callahan v. Parker, 395 U.S. 258.

[12] UCMJ art. 52(a)(1). Only the offense of spying in wartime now mandates the death penalty. UCMJ art. 106.

[13] UCMJ art. 52(a)(2). Except when the death penalty is imposed, sentences of courts-martial are also the result of nonunanimous voting. UCMJ art. 52(b). In order for the death penalty to be imposed, the findings must be unanimous. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004(a)(2) [hereinafter MCM, 1984, and R.C.M., respectively].

Because the military sentencing procedure with voting by members is unique, there is no applicable decisional law. Arguably, concerns about the unreliable results of small deliberative bodies applies to sentencing bodies as well. Except in a capital case, the military accused who desires to avoid such unreliable results on sentencing need only request trial by military judge alone. R.C.M. 903(a)(2). The accused thereby also forfeits his or her entitlement to trial by members on the merits. Yet sentencing by a military judge provides the accused with substantially the same sentencing procedure as that accorded a civilian counterpart. There is therefore little efficacy in an argument that Congress was not justified in providing for nonunanimous member voting on sentencing.

[14] R.C.M. 921(c)(3).

[15] Fed. R. Crim. P. 31(a).

[16] Fed. R. Crim. P. 23(b).

[17] Larkin, *supra* note 11, at 245.

[18] Only cases involving non-petty offenses invoke lack of unanimity concerns. Because offenses authorizing more than six months of criminal penalty are non-petty, all offenses tried by general court-martial qualify. UCMJ arts. 18 and 19. General courts-martial must have at least five members. UCMJ art. 16(1)(A).

[19] Justice Blackmun holds the view that a 7–5 verdict may not be constitutionally permissible. Johnson v. Louisiana, 406 U.S. at 366 (Blackmun, J., concurring).

and six member courts-martial best present the lack of unanimity issue.[20]

Small Juries Require Unanimity to Produce Reliable Results. The military accused who is convicted by a nonunanimous five or six member general court-martial must rely on the Due Process Clause of the fifth amendment to present the issue.[21] He or she must invoke the conclusions of empirical studies concerning small juries that were relied on in *Ballew* and *Burch* demonstrating that smaller deliberative bodies produce results that are less well-considered and less accurate. The Supreme Court reached the following conclusions en route to its holdings that five-member and nonunanimous six-member juries are unconstitutional: "progressively smaller juries are less likely to foster effective group deliberation;"[22] "the risk of convicting an innocent person . . . rises as the size of the jury diminishes;"[23] "the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and . . . the variance amounts to an imbalance to the detriment of one side, the defense;"[24] "the presence of minority viewpoints [diminishes] as juries decrease in size . . .;"[25] and "[w]hen the case is close, and the guilt or innocence of the defendant is not readily apparent [larger juries] will insure evaluation by the sense of the community and will also tend to insure accurate factfinding."[26]

The Court emphasized that the empirical findings that it relied on were not available when it decided in 1970 that a six-member jury was constitutionally permissible.[27] In fact, the empirical studies were a direct response to the Court's holdings in the early 1970s concerning jury requisites.[28]

Use of these empirical studies has been urged on military counsel[29] and appellate courts. The Navy[30] and Army[31] Courts of Military Review, however, have rejected them as inapposite in light of the differences between court-martial members and civilian juries. Petitioners in *United States v. Garwood* and *United States v. Hutchinson* offered to the Supreme Court the opinion of the same expert the Court heavily relied on in *Ballew* and *Burch*.[32] Professor Saks opined that "the same principles [of group decisionmaking] would apply to the military as to civilian decision makers," and "[i]n other areas of research, only negligible or no differences have been found between civilian and military populations."[33] The Solicitor General responded that Congress was a more appropriate forum for the consideration of empirical studies.[34] He further argued that Congress rejected a unanimous finding requirement both before[35] and after[36] the enactment of the UCMJ. This argument ignored the point, emphasized by the Supreme Court in *Ballew*, that empirical studies of deliberative bodies were not available until the mid-1970s. Hence, Congress could not have considered such studies when it enacted the UCMJ nor when it considered unanimous findings for courts-martial in 1971.

The Source of Due Process for Courts-Martial Accused: The Code or the Due Process Clause? The Solicitor General argued that the courts should pay special deference to the judgments of Congress when enacting legislation to "make Rules for the Government and Regulation of the

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[20] The Court has reserved its views regarding nonunanimous verdicts of more than six but less than 12 members. Burch v. Louisiana, 441 U.S. at 138 n.11. When the number of court-martial members is seven, the issue is not squarely presented. United States v. Guilford, 8 M.J. 598, 601 (A.C.M.R. 1979), *petition denied*, 8 M.J. 242 (C.M.A. 1980).

[21] Some appellants have attempted to invoke the equal protection component of the clause. *See* United States v. Wolff, 5 M.J. 923, 925 (N.C.M.R. 1978), *petition denied*, 6 M.J. 305 (C.M.A. 1979).

[22] *Ballew*, 435 U.S. at 232. The Court relied heavily upon the research of Professor Saks summarized in M. Saks, Jury Verdicts (1977) to reach this and other conclusions.

[23] *Ballew*, 435 U.S. at 234.

[24] *Id.* at 236.

[25] *Id.*

[26] *Id.* at 238. Unanimity is required in six-member juries to ensure that this sense of the community stands between the zealous prosecutor or biased judge, a prime function of the jury. *See* Burch v. Louisiana, 441 U.S. at 135–37. The Court has determined that 10–2, 9–3 and 6–0 jury verdicts serve this insulation function, but 4–1 and 4–2 verdicts do not. Courts-martial accused need not only the same insulation, but also need additional insulation from the effects of unlawful command influence on courts-martial members. *Cf.* United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (convening authority systematically excluded enlisted soldiers and officers of less rank to obtain courts-martial less disposed to adjudge lenient sentences).

[27] *Ballew*, 435 U.S. at 230.

[28] *Id.*

[29] Schafer, *supra* note 11; Nolan, *Ballew and Burch—Round Two*, 11 The Advocate 117 (1979).

[30] United States v. Wolff, 5 M.J. at 925.

[31] United States v. Guilford, 8 M.J. at 601–02. These differences include the composition and function. Members of a courts-martial are drawn exclusively from the accused's profession, based on specialized knowledge of the profession and specified qualifications, including judicial temperment. Their function includes questioning witnesses and determining sentences. *Id.* at 598, 602. *See also* Mendrano v. Smith, No. 84–1735 (10th Cir. July 31, 1986).

[32] Letter from Michael J. Saks, Department of Psychology, Boston College to Appellate Defense Division, Navy-Marine Appellate Review Activity. A copy of the letter is on file at Defense Appellate Division.

[33] *Id.* There is some reason to think that court-martial members may produce less reliable findings of guilty when the observation of then-Representative Gerald Ford is considered that courts-martial too often seek not to determine guilt or innocence but only to award punishment. Index and Legislative History, Uniform Code of Military Justice, *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services, House of Representatives*, 81st. Cong., 1st Sess. 825 (1949) [hereinafter Hearings].

[34] Brief for The United States In Opposition to Petition for A Writ of Certiorari to the United States Court of Military Appeals, United States v. Hutchinson, No. 84–254, at 12–13 [hereinafter Brief in Opposition].

[35] Hearings, *supra* note 33, at 757 (testimony of Colonel Oliver).

[36] H.R. 7263, 7292, 7467, 92d Cong., 1st Sess. (1971).

land and naval forces."[37] Such deference is certainly evident in Supreme Court precedent.[38] The United States Court of Military Appeals has also indicated that it looks first to congressional mandates within the UCMJ to determine the requirements of due process for military accused.[39] Consequently, Article 25, and not the sixth amendment, controls the selection of court-martial members.[40] Likewise, Article 52 now controls the voting procedures of courts-martial. Therefore, military accused must urge courts to decide whether the provisions of Article 52, providing for less than unanimous findings, are in conflict with the requirements of the Due Process Clause.[41]

The Solicitor General maintained that "Congress had a rational basis, rooted in two centuries of precedent and experience for rejecting a unanimous verdict requirement."[42] Such an argument presumes that the application of a rational basis analysis is appropriate. If a rational basis test is applicable, military accused will have difficulty attacking Article 52. That Congress irrationally enacted the provisions of Article 52 is a difficult position to maintain.[43]

Military accuseds should avoid a rational basis analysis. They should instead presume that the Due Process Clause applies to them[44] and that "the burden that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."[45] Presuming the United States has the burden to justify the less-than-unanimous finding of guilty in five and six member courts-martial, accuseds should urge the balancing of due process interests.

The Supreme Court has adopted, in *Ake v. Oklahoma*,[46] the due process balancing test of *Mathews v. Eldridge*[47] to resolve criminal due process concerns. Three factors are balanced.

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.[48]

The first factor, the military accused's interest in preserving his or her life or liberty, is a constant. The Court has said that "[t]he interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis."[49]

The second factor, the affected governmental interest, invites litigation. The Solicitor General takes the position that "Congress could rationally conclude that diversion of the additional resources necessary to conduct any retrials that might be occasioned by a unanimous verdict is too high a price to pay in terms of lost military preparedness."[50] This argument presumes that retrials will result from a unanimity requirement in five and six member courts-martial. Such a presumption is erroneous. Congress has several options other than requiring retrial. In light of the empirical conclusions of *Ballew* and *Burch*, Congress could eliminate five and six member courts-martial, and hence the due process infirmities they engender. All it need do is require a minimum of seven members for general courts-martial. Alternatively, Congress could provide for acquittal upon a failure to obtain a unanimous vote of five and six members, as it now does for offenses carrying a mandatory death penalty.[51]

Congress could adopt a rule, similar to the one in effect for federal district courts, requiring unanimous votes for conviction or acquittal.[52] Congress' adoption of the complete rule would produce "hung" courts-martial, with attendant retrials. One commentator has concluded that the effect of "hung" courts-martial and the resultant retrials would be *de minimus*. Empirical studies of civilian "hung" juries suggest there would be retrials in 10 or 15 general courts-martial out of the approximately 3,000 tried each year in the military.[53]

Furthermore, the swift maintenance of military discipline at a reduced burden on resources is not the only governmental interest affected by nonunanimous courts-martial

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[37] Brief in Opposition, *supra* note 34, at 8–11 (*quoting* U.S. Const. Art. I, § 8, Cl. 14).

[38] *E.g.*, Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986) (judicial deference to Air Force judgment that regulation prohibiting wear of yarmulke necessary to ensure uniformity).

[39] United States v. Clay, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

[40] United States v. Kemp, 46 C.M.R. at 154.

[41] Military courts are reluctant to consider the constitutionality of Articles of the UCMJ. *See* United States v. Culp, 14 C.M.A. at 219, 33 C.M.R. at 431 (Ferguson, J., concurring).

[42] Brief in Opposition, *supra* note 34, at 9.

[43] It is also difficult to maintain that courts should strictly scrutinize the issue on the basis that lack of unanimity impacts the fundamental right to conviction beyond a reasonable doubt because the Supreme Court has rejected the notion that lack of unanimity establishes reasonable doubt. Johnson v. Louisiana, 406 U.S. at 362–63. *But see* Larkin, *supra* note 11, at 249–50.

[44] Burns v. Wilson, 346 U.S. 137, 142 (1953).

[45] Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) (citing Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969)).

[46] 105 S. Ct. 1087 (1985).

[47] 424 U.S. 319, 335 (1976).

[48] 105 S. Ct. at 1094.

[49] *Id.*

[50] Brief in Opposition, *supra* note 34, at 10–11. Congress has to date demonstrated no aversion to retrial of courts-martial. In fact, it has liberally provided for them at every stage of the post-trial process. UCMJ arts. 60(e), 63, 66(d), 67(e), 69(c), and 73.

[51] UCMJ art. 52(a)(1); R.C.M. 921(c)(3).

[52] The President could not adopt such a rule for courts-martial because it would be contrary to the provisions of Article 52, UCMJ. *See* UCMJ art. 36 (The President may prescribe rules which are not "contrary to or inconsistent with [the UCMJ]").

[53] Larkin, *supra* note 11, at 256–57.

findings. The government shares the compelling interest of the accused in producing accurate trial results.[54] Therefore, the United States' interest in reducing the time and expense of administering criminal justice must yield.[55]

The third due process factor is demonstrated by the empirical evidence relied on in *Ballew* and *Burch*. There is a substantial risk of five and six member deliberative bodies reaching erroneous findings. Military accused must demonstrate the applicability of the empirical evidence to courts-martial.

The Adequate Record For Appeal

Appellate courts, particularly the Supreme Court, are interested in the review of issues that have been fully litigated in trial and inferior appellate courts.[56] Because certworthy issues usually are presented more than once, the Supreme Court can pick the best case for review from among those presented.[57] Accordingly, the recent denial of petitions for certiorari in *Garwood* and *Hutchinson* does not mean the issue is decided. It may mean that the Supreme Court is waiting to grant a petition in a more suitable case.

The Supreme Court did not indicate why it denied the petitions for certiorari in *Garwood* and *Hutchinson*. The denial could have been premised on the legal bases that courts-martial accused enjoy no sixth amendment right to trial by jury; that deference is due Congress' judgment expressed in Article 52, UCMJ; or that the balancing of due process factors sustains the current voting rules on findings. The Justices may have concluded that the issue was not well presented as it was not seriously addressed in the inferior appellate courts.[58] Most likely, the petitions were denied because the petitioners lacked standing.

Standing

Burch involved two petitioners to the Supreme Court, Burch and a Louisiana corporation. Polling of the jury after it rendered its verdict revealed that Burch had been convicted by a 5–1 vote and the corporate defendant by a unanimous vote of the six member jury. The Court indicated that the corporate defendant lacked standing to constitutionally attack the statute which allowed conviction by a nonunanimous six-member jury.[59]

Private First Class Garwood was convicted by a five-member court-martial,[60] Corporal Hutchinson by six members.[61] Neither petitioner was able to represent that he had been convicted by a nonunanimous vote.[62] Therefore, both petitioners lacked standing to constitutionally attack the provisions of Article 52, UCMJ.[63]

The Trial Foundation For Appeal

Military accused must present a record that invites Supreme Court review. The record must include a showing that the accused was convicted by a nonunanimous vote of a five or six member court-martial for a non-petty offense. The record should include evidence probative of the two due process factors which are subject to dispute, *viz.*, the affected governmental interest and the risk of unreliable results if unanimity is not required. Citation to *Ballew*, *Burch*, and *Ake* will provide the legal basis for argument in both the trial court and the appellate courts.[64] Counsel should present any evidence that demonstrates that courts-martial members in groups of five or six produce results as unreliable as those of civilian jurors.

A record with these elements could prompt the military appellate courts to again discuss the issue, even though the courts may again find no merit in the issue.[65] Such discussion, based upon an adequate record, might prompt Supreme Court review.

Suggested Approach

Timing and Presentation of Motions. Some counsel have attempted to raise issues of right to jury trial and due process prior to pleas. Such attempts are ineffective as they are predicated on a sixth amendment right to trial by jury. Moreover, the issue, *i.e.*, whether due process prevents conviction by nonunanimous vote of a five or six member court-martial for a non-petty offense, is not ripe prior to

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[54] Ake v. Oklahoma, 105 S. Ct. at 1095.

[55] *Id.* at 1097; Burch v. Louisiana, 441 U.S. at 139.

[56] *See* Illinois v. Gates, 462 U.S. 213, 217–18 (1983). *See also* Ott, *Military Supreme Court Practice*, The Army Lawyer, Jan. 1985, at 63 (early identification of issues to be presented to Supreme Court critical).

[57] Ripple, *The Supreme Court's Workload: Some Thoughts for the Practitioner*, 66 A.B.A. J. 174, 176 (1980).

[58] Neither the Navy-Marine Corps Court of Military Review, 16 M.J. 863, nor the Court of Military Appeals, 20 M.J. 148, addressed the issue in Garwood's case. Both the Navy-Marine Court, 15 M.J. at 1063–64, and the Court of Military Appeals, 17 M.J. 156, summarily discussed it in Hutchinson's case.

[59] 441 U.S. at 132 n.4.

[60] Petition for a Writ of Certiorari to the United States Court of Military Appeals, United States v. Garwood, No. 85–175, at 5 [hereinafter Petition].

[61] Petition, United States v. Hutchinson, No. 84–254, at 8.

[62] The Supreme Court expects petitioners to address preliminary questions such as standing so that the Court will not grant a petition for certiorari only to later vacate it on procedural grounds. Ripple, *supra* note 57, at 175.

[63] Apparently no other military case has included as a fact of record that the vote of the members on findings was not unanimous. *E.g.*, United States v. Guilford, 8 M.J. at 601.

[64] Appellate courts often decide issues on the basis of legal theories the parties advanced at trial. Argument at trial tailored to the due process factors of *Ake* will establish the environment for appellate resolution of the issue on the same legal basis. In fact, failure to present a legal theory at trial may waive use of that theory on appeal. Mil. R. Evid. 103. *See* United States v. Groves, 19 M.J. 804, 806 n.1 (A.C.M.R. 1985).

[65] The Army Court of Military Review's most serious consideration of the issue came in a case where: the court-martial consisted of seven members; there was no showing the findings were reached by nonunanimous vote; there was no showing that military court-martial members reach unreliable decisions in small groups like their civilian counterparts; and there was no due process balancing test resulting from evidence of record probative of due process factors. United States v. Guilford, 8 M.J. 598 (A.C.M.R. 1979), *petition denied*, 8 M.J. 242 (C.M.A. 1980).

pleas.[66] Convening authorities always detail more than six members for general courts-martial to ensure the presence of at least five members after challenges.

The issue is not ripe until the court is assembled, after challenges, with only five or six members. Accordingly, counsel may wish to move, immediately after the granting of challenges, for the convening authority's detail of additional members to produce a court-martial capable of producing constitutional nonunanimous findings on the merits.

While a military judge is unlikely to adjourn the trial for detail of new members,[67] counsel's motion provides the military judge a timely opportunity to correct the constitutional infirmity of the soon-to-be-assembled court. Appellate courts like for trial judges to have had such opportunities. The issue is mooted if the military judge grants the motion. Counsel has ensured, however, that the client will not be convicted by a court prone to produce unreliable results.

Whether or not counsel moves for the detail of additional members prior to assembly, he or she must object to the military judge's instruction to five and six member courts-martial, prior to the close of the court for deliberation on findings, that only a two-thirds concurrence of the members is required to reach a finding of guilty.[68] Counsel must request an instruction requiring that any finding of guilty be unanimous. For support, counsel may offer and argue *Ballew, Burch,* the balancing test of *Ake,* and any other allowable evidence.[69]

Discovering the Nonunanimous Vote. Counsel's efforts may be futile if he or she is unable to show that the accused was convicted by nonunanimous vote of the five or six members. After moving for the detail of additional members prior to assembly, and after requesting an instruction that any finding of guilty be unanimous, counsel should be able to inquire of the members, after the announcement of findings, if the vote was unanimous for the purpose of preserving the issue for appeal. In fact, absent a request by counsel, the military judge has no duty to inquire.[70] That the accused may lack standing on the issue in the appellate courts ought to provide sufficient justification for discovering whether the vote was unanimous.

Counsel must avoid the notion that he or she is engaging in a prohibited "polling" of the members.[71] Asking the members only whether the entire panel's vote on each finding was unanimous does not constitute "polling" the members.[72] Jurisdictions that prohibit polling of individual members *do* allow a question to the panel *as a whole* whether they assent to the verdict.[73] Such a procedure eliminates the need for polling of individual members.[74]

Moreover, each court-martial member takes an oath not to "disclose or discover the vote or opinion *of any particular member* of the court upon the findings . . . unless required to do so in the course of law."[75] This prohibition of disclosure therefore extends only to the disclosure of a particular member's vote, not the vote of the panel as a whole.[76] Accordingly, counsel may make the limited inquiry whether a panel's vote on findings was unanimous.

A military judge may nevertheless ignore this distinction. Counsel who have moved to detail additional members, requested a unanimity instruction, and argued that the accused has no standing on appeal unless the vote is determined to be less than unanimous, will have built a record facilitating the appellate challenge of a military judge's ruling prohibiting disclosure whether the panel's vote was unanimous. The successful appellate resolution of this collateral issue may be necessary for the presentation of the central issue.

Counsel prohibited from inquiry during a court session may inquire of a particular member after trial. The junior member who collected and counted the votes or the president who checked the count[77] are in the best position to disclose whether the vote was unanimous. Counsel must be aware, however, that they have been cautioned they "should refrain from any discussion with court members that may result in a violation of the sanctity of the deliberation room."[78] Nevertheless, in seeking an affidavit from a court member stating only that a findings vote was not unanimous, counsel is neither intruding upon the member's mental processes during deliberation nor second-guessing those deliberations.[79] Counsel must inquire no further than

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[66] Cautious counsel may nevertheless be inclined to move prior to pleas that the members be instructed that any finding must be the result of a unanimous vote. Such a procedure surely preserves the issue but is inefficient as it would have to be followed in every trial of a non-petty offense before members.

[67] If the military judge does adjourn, an additional issue arises as to whether the new members may be peremptorily challenged. United States v. Wilson, 19 M.J. 271 (C.M.A. 1985) (grant of Issue II).

[68] Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook, para. 2-35 (May 1982) (C1, 15 Feb. 1985) [hereinafter Benchbook].

[69] *See* infra text accompanying notes 80-89.

[70] United States v. Paul, CM 447825 (A.C.M.R. 24 Jul. 1986).

[71] R.C.M. 922(e). The imperative is that "members may not be questioned about their deliberation and voting." Because this provision is "based on the requirement in Article 51(a) for voting by secret written ballot," R.C.M. 922(e) analysis, a rule designed to protect the disclosure of a member's individual vote, it should be interpreted to apply specifically to the voting of particular members as opposed to the panel as a whole.

[72] United States v. Connors, 23 C.M.R. 636, 640 (A.B.R. 1975) ("It might be possible to question the court as to whether or not the required number of members voted in favor of each finding, as announced by the president, without disclosing the vote or opinion of any individual member."). *See also* United States v. Herndon, 6 M.J. 171 (C.M.A. 1979) (defense counsel failed to request a poll of the members to determine the correct concurrence percentage); Caldwell, *Polling the Military Jury,* 11 The Advocate 53, 60 (Mar.-Apr. 1979).

[73] Annotation, *Accused's Right to Poll of Jury,* 49 A.L.R. 2d 619, 627-29 (1956).

[74] *Id.*

[75] R.C.M. 807(b)(2) discussion (emphasis added).

[76] General inquiry into actual votes of particular members is contrary to Article 51(a) and Article 39(b). R.C.M. 922(e) analysis.

[77] Benchbook, para. 2-35.

[78] United States v. Boland, CM 448266 (A.C.M.R. 15 Jul. 1986), slip op. at 4 n.2.

[79] *See id.*, slip op. at 6-7.

is necessary to secure the limited disclosure. The disclosure does not violate a member's oath not to "disclose or discover the vote or opinion of any particular member."[80]

Post-Trial Litigation. Having discovered a nonunanimous vote by either in-court disclosure or court member affidavit, counsel may seek a post-trial Article 39(a) session, directed by the military judge before the record is authenticated or the convening authority prior to his or her initial action.[81] Counsel's purpose is to resolve a matter substantially affecting the legal sufficiency of a finding of guilt.[82] Counsel's plan is to offer evidence, authority and argument to demonstrate that the nonunanimous finding violates the due process clause. Though persuading a military judge or convening authority to order a post-trial Article 39(a) session may prove difficult,[83] a properly made and documented request will improve the record for appeal.

The request for a post-trial session immeasurably supplements the record if a member's affidavit regarding lack of unanimity is attached. It is easier to supplement the record in this fashion than by offering the affidavit as a defense appellate exhibit. Making the affidavit part of the record does not, however, resolve the further inquiry whether it should be considered on the question of lack of unanimity.[84] Yet once the affidavit is in the record, appellate courts will have difficulty ignoring it.

Counsel provided an opportunity to litigate the issue in a post-trial session may offer expert opinion that small courts-martial decisionmaking differs little from that of civilian juries. The best way to offer this evidence is by calling an expert witness. Alternatively, counsel may qualify the staff judge advocate or chief of military justice as an expert witness in matters involving court-martial members[85] and offer Professor Saks' opinion or another expert's written opinion as a learned treatise in aid of the witness' testimony.[86]

Inclusion in the record of the members' summarized personnel records would also demonstrate how the members differ as persons, if at all, from their civilian jury counterparts. Counsel may elicit additional information of this kind during voir dire of the members before challenges. This evidence is especially relevant in cases of five and six members, a majority of whom are enlisted, inasmuch as courts[87] and observers[88] often posit that officer members are more competent factfinders than civilian jurors because of their education, training, and experience. All court-martial members are presumed competent for the additional reason that the convening authority selects them because of their age, education, training, experience, length of service, and judicial temperment.[89] This presumption is more easily rebutted when a majority of the members are enlisted.[90]

The staff judge advocate and the chief of military justice also possess a wealth of information not readily apparent to Supreme Court justices. Counsel may call these officers as witnesses to elicit evidence probative of the due process factors concerning the affected governmental interest and the risk of unreliable findings from five and six member courts-martial. Such evidence may include, but is not limited to, testimony regarding: the court-martial selection process, including the resource cost of detailing additional members to ensure that more than six members are assembled; the factors the convening authority considers in the selection process; the number of solicitors available to the convening authority for court-martial duty; that the detailing of court-martial members has the salutary additional purpose of educating soldiers in military justice matters; that court-martial duty has a priority over most other military duties; that the command structure provides a successor for those soldiers serving as members; that members receive no additional pay for courts-martial duty; the conviction rate; the relationship of the senior officer members to the convening authority; that court-martial panels tend to deliberate for short periods; and, the effect, if any, that rehearings have had on the swift or efficient administration of military justice in the command.

Presentation of this evidence probative of due process considerations, along with expert opinion and the evidence of a nonunanimous vote, permits argument based on the legal theories of *Ballew*, *Burch*, and *Ake*. Though counsel may be unsuccessful with this argument to the trial court, he or she has laid an adequate foundation for appellate review.

Conclusion

Defense counsel cannot determine before trial which case will present the issue of unanimity in voting on findings. Counsel should therefore be alert to the presence of only five or six members immediately after the challenge of members and when instructions are requested on findings. Proper motions, evidence, and argument may create the

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[80] Benchbook, para. 2–23.

[81] R.C.M. 1102.

[82] R.C.M. 1102(b)(2).

[83] The unanimity issue does not fall within the parameters of those matters of member deliberation into which R.C.M. 606(b) allows inquiry. *See* United States v. Boland, slip op. at 6–7.

[84] *See* United States v. Bishop, 11 M.J. 7 (C.M.A. 1981); United States v. West, 23 C.M.A. 77, 48 C.M.R. 548 (1974).

[85] The Regional Defense Counsel would be a more sympathetic, though less credible, expert witness.

[86] Mil.R.Evid. 803(18). Inasmuch as the Supreme Court has cited to Professor Saks as a reliable authority, the military judge should take judicial notice that he is such an authority. Ballew v. Georgia, 435 U.S. at 231 n.10.

[87] United States v. Boland, slip op., at 8–9, and cases cited therein.

[88] *See* Larkin, *supra* note 11, at 257–58.

[89] UCMJ art. 25(d)(2).

[90] The circumstances of United States v. Boland, CM 448266 (A.C.M.R. 15 Jul. 1986), illustrate the point. Six members, four of them enlisted, apparently decided to increase appellant's sentence of from three or five years to 20 years because they had been required to hear the evidence upon which they acquitted the accused of one specification and because they had not been informed, prior to the announcement of findings, that the accused had pleaded guilty to two other similar specifications. That these considerations caused the members to increase the accused's sentence by at least 15 years does not evidence the superior judicial temperment of this two-officer, four-enlisted member court-martial.

record which appellate courts will consider and discuss. There is no guarantee that the Supreme Court will ever review a case raising the issue. Yet even a definitive denial of a petition for certiorari will elude military counsel until the issue is adequately litigated at trial.

DAD Notes

A Question of Privacy

An accused challenging a government search or seizure must demonstrate that he or she had a reasonable expectation of privacy in the place searched or thing seized.[1] To do this he or she must establish both a subjective expectation of privacy and that society recognizes this expectation.[2] Whether a reasonable expectation of privacy exists is a legal conclusion,[3] but the inquiry is nevertheless fact-intensive.

While soldiers living in barracks have difficulty mustering the facts necessary to the requisite legal conclusion,[4] soldiers living in family housing quarters are generally thought to enjoy a reasonable expectation of privacy in their quarters. In *United States v. Ayala*,[5] the Army Court of Military Review recognized this general view. It nevertheless reached the legal conclusion that the accused had no reasonable expectation of privacy in his own family housing quarters.

The court's legal conclusion was based on specific predicate facts. The accused was awaiting retirement and had moved from his quarters to an on-post government motel-like facility for visitors and transient guests.[6] He had placed his household goods in storage and engaged a contract cleaner to whom he granted access to the quarters. The court found that the cleaner had locked the quarters last, although it opined that the accused would not have exhibited a subjective expectation of privacy even had he last locked the quarters.[7]

The court acknowledged that the accused had not cleared his quarters with the housing office. It nevertheless held that the accused had relinquished his right to use the quarters even though he retained a possessory interest in them.[8] The court's holding, if upheld,[9] establishes a rule that a soldier in possession of family quarters, though he exclude all others but the cleaners he has engaged, does not demonstrate a reasonable expectation of privacy in his quarters.

In the Army court's view, the accused had no standing to challenge the search of his family quarters because of a diminished expectation of privacy.[10] This holding was significant because the court also held there was a lack of probable cause for the search.[11] In *obiter dictum*, the court nevertheless indicated that the search authorization, though not predicated upon probable cause, had been relied on in good faith.[12] Additionally, the court reached findings that the incriminating fruits of the search would have been inevitably discovered, though it did not resolve an inevitable discovery issue.[13]

The court's three-prong approach demonstrates that defense counsel's work is not done upon a mere showing that no probable cause existed for a search. Counsel must aggressively build a record[14] even though the burden of proof is on the prosecution.[15] Counsel must put sufficient facts on the record to demonstrate a reasonable expectation of privacy.[16] He or she must show that the search authorization, though inadequate, was not relied on in good faith. Lastly, counsel must use available evidence to defuse the government's argument that the fruits of the search would have inevitably been discovered. The *Ayala* court has given notice that, absent record evidence to the contrary, the government has at least three chances to salvage a search not based on probable cause. Captain Richard J. Anderson.

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[1] Mil. R. Evid. 311(a)(2); *see* United States v. Miller, 13 M.J. 75, 77 (C.M.A. 1982).

[2] California v. Ciraolo, 106 S. Ct. 1809 (1986); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[3] United States v. Portt, 21 M.J. 333, 334 (C.M.A. 1986).

[4] *See, e.g.*, United States v. Bailey, 3 M.J. 799 (A.C.M.R.) *petition denied*, 4 M.J. 149 (C.M.A. 1977).

[5] 22 M.J. 777, 783 (A.C.M.R. 1986).

[6] The court held, contrary to the trial court, that the accused did have an expectation of privacy in his motel-like room wherein he was apprehended after the search of his family housing quarters.

[7] 22 M.J. at 785.

[8] *Id.* at 783–84.

[9] The appellant has filed a petition for grant of review with the United States Court of Military Appeals (C.M.A. 25 Jul. 1986).

[10] 22 M.J. at 783–84.

[11] *Id.* at 783.

[12] *Id.* at 782 n.9 (citing United States v. Leon, 468 U.S. 897 (1984).

[13] 22 M.J. at 785–86. *See* Nix v. Williams, 467 U.S. 431 (1984).

[14] *See* Mil. R. Evid. 311(f).

[15] Mil. R. Evid. 311(e)(1).

[16] For instance, counsel for Ayala might have called as witnesses Ayala's neighbors in family housing or housing office officials to testify that they recognized Ayala's expectation of privacy until the family housing office cleared the quarters.

Sentencing: It's Not Over 'Til the Convening Authority Says It's Over

Trial defense counsel's continuing representation of the client after sentencing can and often does make a critical difference in the punishment the client receives. Trial defense counsel must consider whether a response to the staff judge advocate's (SJA) post-trial recommendation under Rule for Courts-Martial 1106[17] or submission of matters under R.C.M. 1105 is warranted. A recent opinion from the United States Court of Military Appeals, *United States v. Mann,*[18] emphasizes the importance of the trial defense counsel's review of the SJA's recommendation and the value of post-trial submissions.

In the post-trial review in *Mann,*[19] the acting SJA opined that the sentence was "within legal limits" and was "appropriate."[20] In rebuttal, trial defense counsel protested the appropriateness of the sentence and submitted for the convening authority's consideration a list of cases tried in the same judicial circuit in 1983.[21] The cases that defense counsel cited were of the same general nature as Mann's, yet no discharge was adjudged in the cases. In the addendum to the staff judge advocate's review, the acting SJA did not question the accuracy of the defense counsel's representations. He asserted, however, that "[s]ince the cases counsel has presented are totally unrelated to [Mann's] case you may not as a matter of law, consider them."[22]

This assertion was contrary to the dictates of Article 38(c).[23] Similar to the current Article 38(c), the 1969 version provided that:

> In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate.[24]

In its decision in *Mann,* the Court of Military Appeals found that the convening authority may specifically consider certain matters outside the record. Further, when determining the appropriateness of each sentence, the convening authority may consider cases cited by defense counsel in which similar crimes resulted in lesser sentences.[25]

The Court of Military Appeals pointed out that the convening authority has enormous discretion in sentence approval[26] and that he has "relatively few limitations as to what [he] may consider in exercising his sentence review discretion."[27] Further, the convening authority has a strong interest in minimizing disparate sentences.[28] The convening authority is uniquely situated to "invariably have an implicit knowledge of typical sentences in analogous cases," because of his regular review of court-martial records and sentences.[29]

Trial defense counsel should review R.C.M. 1105 and 1106 to assure awareness of possible avenues of relief. *Mann* reminds trial defense counsel to pursue all reasonable relief. As in *Mann,* trial defense counsel may want to include, in appropriate cases, an extract of similar crimes that resulted in lighter sentences.

The importance of submitting matters under R.C.M. 1105 and 1106 in appropriate cases cannot be understated. If these matters are not submitted, they are waived.[30] These submissions also assist appellate defense counsel in identifying appropriate issues on appeal and may form the basis for clemency actions. The *Mann* decision re-emphasizes the importance of full and complete representation for the client even after the sentence has been adjudged. Captain Kevin T. Lonergan.

To Tell the Truth, the Whole Truth . . . ?

Trial defense counsel often represent clients who enter mixed pleas of guilty and not guilty. Sometimes the various crimes alleged are so similar that counsel anticipates court members, if informed of all pleas, may be skeptical of the accused's partial claim of innocence. In such difficult cases, it may seem better to refrain from informing the members prior to sentencing that the accused has pled guilty to some, but not all, of the charges. This would prevent the possibility that the members might conclude, for example, that because the accused was a drug dealer on day one he was likely a drug dealer on day two as well. The risks inherent in this approach are illustrated in the recent case of *United States v. Boland.*[31] Boland was found guilty in accordance with his pleas of distribution of marijuana on 18 April 1985 and distribution of marijuana and cocaine on 25 April 1985. He pled not guilty to one specification of distribution of marijuana on 24 April 1985. After findings on the specifications to which Boland pled guilty, the defense

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[17] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106 [hereinafter R.C.M.].

[18] United States v. Mann, 22 M.J. 279 (C.M.A. 1986).

[19] *Mann* was decided under the Manual for Courts-Martial, United States, 1969 (Rev. ed.), which required a legal review as opposed to the post-trial recommendation of R.C.M. 1106.

[20] 22 M.J. at 279.

[21] *Id.*

[22] *Id.* (citations omitted.)

[23] Uniform Code of Military Justice art. 38(c), 10 U.S.C. § 838(c) (1968). This was the governing law at the time of the trial.

[24] *Id.*

[25] 22 M.J. at 280.

[26] *Id.*

[27] *Id.* at 280 n.2.

[28] *Id.* at 280.

[29] *Id.*

[30] *See* R.C.M. 1105(d), 1106(f)(6); *see also* United States v. Christian, 20 M.J. 966 (A.C.M.R. 1985).

[31] CM 448266 (A.C.M.R. 15 Jul. 1986).

counsel asked that the members not be informed of those specifications until after the contested offense was decided. This request was granted. Thereafter, the court acquitted the accused of distribution on 24 April but sentenced him to twenty years confinement and a dishonorable discharge for the remaining crimes.

After the trial, it was apparent that Boland's rather stiff sentence was motivated at least in part by what the court members perceived as gamesmanship by the defense. The defense brief requesting a post-trial Article 39(a) session to examine the panel's conduct during deliberations alleged that one unidentified court member had stated: "We initially considered giving him (the accused) 10 years but got so p- - -ed off at him [for withholding information on the guilty plea] that we gave him 20," and "If they hadn't put us through the not guilty bulls- -t and pled to all of them (the charges) we'd probably have given him 3–5 (years)."[32] Though these statements were never fully substantiated,[33] they succinctly illustrate the type of reaction by panel members that does not bode well for the defense.

The Army Court of Military Review in *Boland* advised trial judges to inform court members of all pleas in every case. In doing so, it departed from the practice advocated in *United States v. Nixon,*[34] which encouraged judges to refrain from revealing guilty pleas to the panel members prior to findings on the merits. Under *Boland,* the military judge should withhold such information only upon request by the defense and after determining that the trial defense counsel has carefully considered the tactic.

Accordingly, defense counsel should weigh the potentially negative ramifications of withholding information on the pleas from the members prior to requesting that the military judge so order. Alternative tactics must also be considered. It may be better, for example, to inform the members of all pleas at the outset and then to argue on findings that the accused hid nothing and pled guilty to everything he could plead guilty to. If guilty pleas are withheld from the members until the pre-sentencing hearing, the military judge should be requested to give a strongly-worded instruction that punishment cannot be increased because the panel was not informed. Whether one approach is favored over another will depend on the facts of the individual case. The fundamental point that the reaction of the court members in *Boland* illustrates, however, is that defense counsel must be extremely careful at each stage of the trial to avoid the impression of playing games or "hiding the ball." Unfortunately, if the panel perceives that the defense is relying on such tactics, it may express its resentment in the sentence, no doubt to the dismay of the accused. Captain Robert P. Morgan.

The Army Court Looks at Discriminatory Challenges

Will trial counsel be allowed to exercise peremptory challenges in a racially discriminatory manner? What showing must the defense make to contest a challenge of a minority member? The discriminatory use of peremptory challenges by the prosecution during the selection of panel members has come under additional scrutiny since the Supreme Court's recent decision in *Batson v. Kentucky.*[35] In *Batson,* the Court examined the long struggle to remove racial discrimination from the courtroom, and explained its rationale as follows:

> By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our nation, public respect for our criminal justice and the rule of law will be strengthened if we insure that no citizen is disqualified from jury service because of his race.[36]

The Court also ruled that "[e]qual protection guarantees the defendant that the state will not exclude members of his race . . . on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors."[37]

The *Batson* Court held that a defendant need no longer show "systematic" discriminatory use of peremptory challenges. Rather, the defense need only make a prima facie showing based solely on the facts and circumstances of the individual case. This prima facie showing will raise an inference of "purposeful discrimination," triggering a requirement for the prosecution to articulate a neutral explanation for the use of the challenge. The trial court will then have a duty to determine if the defendant has established purposeful discrimination.[38]

The Army Court of Military Review has recently decided the first case challenging a trial counsel's peremptory challenge on *Batson* grounds. In *United States v. Santiago-Davila,*[39] the accused was a Puerto Rican and the trial counsel used his peremptory challenge to remove the only Puerto Rican member from the panel. There was no individual voir dire conducted that might have provided a non-racial motivation for the challenge. Trial defense counsel made a timely motion, requesting that the military judge inquire into the apparently discriminatory use of the challenge. The military judge offered the trial counsel an opportunity to state a rationale for the challenge, but the trial counsel declined.

In the *Santiago-Davila* decision, the Army Court of Military Review stated that "[i]t is unlikely that *Batson* would apply to trials by court-martial, primarily because our system allows only one peremptory challenge—a situation

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[32] *Id. slip op.* at 4 n.3.

[33] *Id.*

[34] 15 M.J. 1028 (A.C.M.R.), *petition denied,* 17 M.J. 183 (C.M.A. 1983).

[35] 106 S. Ct. 1712 (1986).

[36] *Id.* at 1728.

[37] *Id.* at 1717.

[38] *See* Cardillo, *Government Peremptory Challenges,* The Army Lawyer, Aug. 86, at 63.

[39] CM 447830 (A.C.M.R. 6 Aug. 1986).

which simply does not permit the government an opportunity to dramatically change the composition of a court-martial (jury) through challenge."[40] The Army court's rationale disregards the full import of the *Batson* decision, which strikes at the heart of *any* officially sanctioned racial discrimination. The *Batson* Court noted that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[41] To hold otherwise would support an unacceptable position that a single invidiously discriminatory government challenge is immunized by the absence of such discrimination in the making of other challenges. The rationale applied in *Santiago-Davila* seems to dictate that several must suffer discrimination before one could object to discrimination. Such a philosophy is inconsistent with the concept of equal protection.

The *Santiago-Davila* court went on to hold that "even assuming that *Batson* would apply, there is no showing in the case, *sub judice,* of 'purposeful discrimination,' as required by *Batson.*"[42] It is not clear from the court's ruling whether the defense failed to make a prima facie showing of discrimination (which *Batson* requires before the inference is raised) or if the court determined the ultimate issue and found that there was no discrimination in the trial counsel's actions.

Trial defense counsel should note that, although *Santiago-Davila,* as an unpublished opinion, is of limited precedential value, it displays the Army court's initial reluctance to apply *Batson* to trials by courts-martial. Defense counsel must be prepared to make a record that can overcome this reluctance. They should become familiar with *Batson,* be aware of the racial composition of the court-martial panels, be prepared to make timely objections to peremptory challenges, and place all relevant facts and circumstances on the record to preserve the issue for appeal. Captain William J. Kilgallin.

Total Forfeitures Without Confinement?

Formerly, the Manual for Courts-Martial provided in part that

> the convening authority will consider in taking his action that an accused who is not serving confinement should not be deprived of more than two-thirds of his pay for any month as a result of one or more sentences by court-martial or other stoppages or deductions, unless requested by the accused.[43]

With the adoption of the 1984 Manual, the above paragraph was incorporated in the discussion of Rule for Courts-Martial 1107(d)(2).[44] Previous decisions of the Army Court of Military Review and the other courts of military review have determined this language in the Manual to be the policy of the Department of Defense (DOD).[45]

For the first time since the development of this policy, one panel of the Army Court of Military Review held in *United States v. Spenny*[46] that a court-martial can adjudge, and a convening authority can approve, a sentence of more than two-thirds forfeitures when confinement is not adjudged.

In *United States v. Nelson,*[47] another panel of the Army Court of Military Review had stated that it is cruel and unusual punishment under contemporary standards of decency to deprive an officer of all pay and allowances without subjecting him to confinement or immediately releasing him from active duty.[48] In examining the facts, the court noted that Nelson was on voluntary excess leave status for several months. As such, he was due no pay but was free to seek outside employment. The court noted, however, that Nelson, similar to other appellants on excess leave, could have the leave terminated virtually at will by the appropriate military authority and returned to active duty.[49]

In *United States v. Spenny,* the court held that because the policy language governing more than two-thirds forfeitures was removed from the text of the MCM, 1984 and placed in the discussion, it was no longer DOD policy or commanded by law. Moreover, the court construed the language of the policy as being permissive. Thus, the *Spenny* court concluded that the discussion to R.C.M. 1107(d)(2) was not binding on any authority and that failure to comply with it did not constitute error.[50]

This recent decision, while purportedly clarifying the DOD policy and case law, actually obscures the policy and case law. As the *Spenny* court noted, its decision and rationale are contrary to the court's previous holding in *Nelson* and every other decision on this issue. Ultimately, the Court of Military Appeals may have to resolve the conflict on this issue. Captain Clayton A. Aarons.

When the Escalator Does Not Go Up

Under Rule for Courts-Martial 1003(d)(3), an accused who is found guilty of two or more offenses with a combined maximum punishment totaling six months or more may be adjudged a bad-conduct discharge and total forfeiture of all pay and allowances in addition to the punishment authorized by the underlying offenses. This escalator clause, however, is subject to all other limitations on

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

[41] *Batson,* 106 S. Ct. at 1716.

[42] *Santiago-Davila,* slip op. at 2.

[43] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 88(b).

[44] R.C.M. 1107(d)(2) discussion.

[45] *See* United States v. Williams, CM 447791 (A.C.M.R. 18 Apr. 1986); United States v. Nelson, CM 446858 (A.C.M.R. 7 Aug. 1985); United States v. Worrell, 3 M.J. 817, 825 (A.F.C.M.R. 1977); United States v. Mundy, 44 C.M.R. 780, 781 (N.C.M.R. 1971).

[46] CM 448335 (A.C.M.R. 10 July 1986).

[47] 22 M.J. 550 (A.C.M.R. 1986).

[48] *Id.* at 551.

[49] *Id.* at 552.

[50] *Spenny,* slip op. at 4.

punishments set forth in R.C.M. 1003.[51] The Navy-Marine Corps Court of Military Review recently held in *United States v. Beard*[52] that the escalator clause of R.C.M. 1003(d)(3) was inapplicable when the underlying offenses were found to be multiplicious for sentencing under R.C.M. 1003(c)(1)(C). The Navy court reasoned that the intent behind R.C.M. 1003(c)(1)(C) of prohibiting punishing an accused twice for what is one offense was superior to the intent of increasing an accused's punishment when he was convicted of two offenses.[53]

Preventing a bad-conduct discharge is obviously a great concern to most military accuseds. The Navy court's decision provides a helpful theory for use by trial defense counsel in protecting the client's interest in avoiding a punitive discharge when the client is charged with two relatively minor offenses stemming from the same act or impulse. When confronted with such a situation, trial defense counsel should prepare to mount a two-pronged attack: first, establish multiplicity; then assert the invalidity of the escalator clause. Captain Scott A. Hancock.

[51] R.C.M. 1003(d) discussion.

[52] NMCM 86 0656 (N.M.C.M.R. 22 Jul. 1986).

[53] *Id.*, slip op. at 2 (citing R.C.M. 1003(c)(1)(C) discussion.

Trial Judiciary Note

Challenging a Member for Implied Bias

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Establishing a challenge for cause against a court-martial member is a difficult venture. While Rule for Courts-Martial 912(f)[1] enumerates fourteen permissible grounds for challenge, the most fertile area for challenge is when a member "should not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[2] Despite the broad language in this provision and the axiom that challenges should be liberally granted,[3] case law demonstrates that challenges for cause are not easily established at trial[4] and, where denied, are seldom reversed on appeal.[5] The reasons for a denied challenge are numerous. Among them could be the reluctance of the military judge to reduce the membership below the required quorum,[6] the intelligence of the members,[7] the reluctance of members to expose their prejudices,[8] the perception by members that court-martial duty is a required mission,[9] and the tenacity of the trial counsel.[10] Another consideration might be the readiness of members

[1] Manual for Courts-Martial, United States, Rule for Courts-Martial 912(f) [hereinafter MCM, 1984, and R.C.M., respectively].

[2] R.C.M. 912(f)(1)(N).

[3] The Manual for Courts-Martial, United States, 1969 (Rev. ed.), contained this specific language in paragraph 62*h*(2). The 1984 Manual does not. The analysis does say, however, that its absence should not be viewed as a deviation from the guidance expressed by that statement. *See* MCM, 1984, at A21-54. Furthermore, the most recent Court of Military Appeal decision on this subject used this statement. United States v. Smart, 21 M.J. 15, 18 (C.M.A. 1985).

[4] *See* United States v. Mason, 16 M.J. 455, 457-59 (C.M.A. 1983) (Chief Judge Everett, dissenting).

[5] *See* United States v. McQueen, 7 M.J. 281 (C.M.A. 1979), which held that a military judge's denial of a challenge for cause will only be reversed if it is a clear abuse of discretion. For an excellent history of how military appellate courts have made it increasingly difficult to win a reversal for a denied challenge on the grounds of inflexible sentencing attitude, see United States v. Heriot, 16 M.J. 825 (N.M.C.M.R. 1983).

[6] While the quorum requirements for a general or special court-martial, five and three respectively, do not at first blush appear to be difficult requirements, a granted challenge for cause frequently will create a quorum problem. This problem is even more acute if enlisted representation is requested. Putting more than the customary eight and six members on a court-martial is a possible solution; nevertheless, some military courtrooms are not large enough to handle more members and, of course, as the number of members increases, the greater the drain that the military justice system causes on the military's other missions. See Chief Judge Everett's comments on this problem in *United States v. Mason,* (dissenting opinion), and *United States v. Smart.*

[7] Members of the military must meet certain minimum intelligence standards to gain admittance. Further, Article 25, Uniform Code of Military Justice, 10 U.S.C. § 825 (1982) [hereinafter UCMJ], requires the convening authority to consider a soldier's educational background in selecting members. Thus the average court member should be more intelligent than his or her civilian counterpart. Furthermore, as court members usually serve on several courts-martial during a set period of time, the member becomes educated to the intricacies of the court-martial, especially the voir dire process. Thus, court members may tend to give the "right" answers during voir dire.

[8] While court members are no longer rated on their court-martial performance, a court member may still have reason to fear that a voir dire response that admits a bias will cause future career problems. For example, as military regulations forbid a soldier from being racially or gender prejudiced, a member may hesitate to admit such a prejudice, especially in front of the military judge, lawyers, fellow court members, and spectators. The likelihood that a revealing remark may find its way back to the member's chain of command is not so remote that a member can speak with confidence of non-attribution. *See* Chief Judge Everett's remarks on this problem in United States v. Heriot, 21 M.J. 11, 13 (C.M.A. 1985).

[9] Military service trains its members to accomplish any assigned mission. A soldier does not expect or relish the thought of being excused for cause from any duty. Therefore, being challenged for cause from a court-martial may be seen by the member as a personal slight and is something the member may consciously or unconsciously attempt to avoid.

to disclaim bias and the willingness of military courts to accept these assertions.[11] To combat the great weight generally attributed to disclaimers, the military practitioner should be alert to probe the area where disclaimers are irrelevant: implied bias.

Implied bias occurs where a member, despite assertions denying any adverse effect, identifies personal circumstances that would cause the normal person encountering the same events to be prejudiced. The Court of Military Appeals has made this observation about implied bias: "Prejudice must be suspected when most people in the same position would be prejudiced."[12] Statutory juror disqualifiers, which are found in nearly every jurisdiction, usually include provisions excluding any person from a class of people presumed by the lawmakers to be biased.[13] Many of the grounds for challenge found in R.C.M. 912(f) merely reflect a concern for presumed partiality.[14]

The distinguishing factor between actual and implied bias is that the former can be cured if the member effectively disclaims any partiality.[15] Appellate courts tend to blur the distinction because a denied challenge can often be approached from either angle, *i.e.*, the disclaimer was not strong enough (actual bias) or despite the disclaimer, these circumstances create the appearance of unfairness (implied bias). This article will attempt to focus on cases in which the latter analysis is found.

The rationale for removing a member where an implied bias is identified is two-fold. First, if the average person with this frame of mind would be biased, then a strong probability exists that the affected member would also be biased. Where a disclaimer is rendered, the underlying premise is that the member either is less than candid or fails to recognize the subjective impact that such circumstances would have. Additionally, even if the member can be fair, the appearance of evil exists. If most people under the same circumstances would be prejudiced, the casual observer will surmise that the affected member was prejudiced. It is important that justice be dispensed in such a manner as to foster the image of fairness and integrity.[16] Appellate courts are sensitive to "the realities of military life which create unique problems with respect to perception of fairness in criminal trials,"[17] and expect military judges to show a similar concern when ruling on challenges.

The concept of implied bias is not a new development in American jurisprudence. In fact, Chief Justice Marshall recognized the appropriateness of the doctrine nearly 200 years ago when he stated "[A person] may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice, because in general persons in a similar position would feel prejudice."[18] One of the earliest military cases to discuss this issue was *United States v. Dealn,*[19] where the court-martial president's duty required a fitness report on two subordinate members evaluating their court-martial performance. Despite disclaimers from all three affected members, the Court of Military Appeals found error because "disinterested observers might discern the parallel of a packed jury [and] an appearance of evil must be avoided as much as the evil itself."[20]

The leading military case in the area of implied bias is *United States v. Harris,*[21] authored by Judge Fletcher. In *Harris,* the president of the court rated or endorsed three other members, he worked in the same office with two of the accused's larceny victims and had discussed the larcenies with these victims prior to trial, and he chaired a base committee responsible for protecting against personal and government property losses. When the president disclaimed personal interest in the case and asserted his impartiality, the military judge denied a challenge against this member, citing his disclaimer. The Court of Military Appeals found error on two grounds. After finding the disclaimers were inadequate to overcome actual bias because nothing in the record indicated their sincerity, the opinion focused on the implied bias issue. Assuming the disclaimers were found unequivocal by the military judge, should the court impute bias to this member? The appearance of evil created when the court president was in a position of influence over other members, had a personal relationship with two of the victims, and had an official interest in preventing larcenies could not be eradicated by disclaimer, no matter how sincere. The court concluded by saying "[w]hen circumstances are present which raise the appearance of evil in the eye of disinterested observers, mere declarations of impartiality,

[10] Most trial counsel will fight a defense challenge for cause as fiercely as a motion for a finding of not guilty! Trial counsel may attempt to rehabilitate a member whose voir dire responses were suspect or may try to educate or clue the members to expected defense probes before the defense counsel begins voir dire. While a trial counsel should not stand idly by when the defense challenges a member on frivolous grounds, the government's best interest is not necessarily served by keeping a member whose presence may cast doubt on the fairness of the proceedings or jeopardizes the success of the case on appeal. *See* Chief Judge Everett's dissenting opinion in United States v. Mason, 16 M.J. at 458.

[11] For examples of how effective a disclaimer can be, see United States v. Tippett, 9 M.J. 106 (C.M.A. 1980), and United States v. Lane, 18 M.J. 586 (A.C.M.R. 1984).

[12] *Smart,* 21 M.J. at 20.

[13] As an example, Colorado excludes from jury service in criminal trials anyone who is kin to the defendant or any attorney in the trial, is in a business or fiduciary relationship with the defendant, has been an adverse party in a civil action against the defendant, has served on a prior judicial or quasi judicial proceeding involving the case of the defendant, or is a potential witness. Colorado Rules of Criminal Procedure, Rule 24.

[14] All the grounds for challenge under R.C.M. 912(f)(1) presume bias except R.C.M. 912(f)(1)A and B.

[15] *See United States v. Lane.*

[16] United States v. Cockerell, 49 C.M.R. 567, 573 (A.C.M.R. 1974).

[17] United States v. Miller, 19 M.J. 159, 164 (C.M.A. 1985).

[18] *United States v. Burr,* 25 Fed. Cas. 49, 50 (CC Va 1807) (No. 14,692g), *cited in Smith v. Phillips,* 455 U.S. 209, 238 n.19 (1982) (Marshall J., dissenting).

[19] 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954).

[20] *Id.* at 53, 17 C.M.R. at 53.

[21] 13 M.J. 288 (C.M.A. 1982).

no matter how sincere, are not sufficient by themselves to insure legal propriety."[22]

The most recent court case discussing implied bias is *United States v. Smart*,[23] a guilty plea robbery case. In *Smart*, an enlisted member disclaimed any partiality despite being a robbery victim on several occasions. Finding the disclaimer to be clear and unequivocal, Chief Judge Everett, nevertheless, ruled the military judge erred in denying a challenge because implied bias existed:

> Armed robbery is a traumatic event, which usually has great impact on the victim. [The member] had been subjected to this trauma at knife-point on six or seven occasions. Furthermore, his father had been robbed with a pistol. We do not doubt [his] sincerity when he asserted that, despite his experience, his mind was open; but we disagree that this assertion sufficed to permit his inclusion on the panel. . . . Under these circumstances the risk is too great that—even with the best of intentions—[the member] could not remove from his mind the recollection of his own experiences as a victim. Therefore in the interest of fairness and the appearance of fairness he should not have been allowed to participate.[24]

As *Smart* illustrates, the dual problems encountered in an implied bias issue, latent prejudice and perception of impropriety, are often interwoven. The enlisted member in *Smart* was disqualified because anyone who has had that type of experience with robberies must be influenced by those encounters. Even if his disclaimer was completely truthful, there is a great probability these events will have a subconscious impact. Furthermore, even if these circumstances would have no effect whatsoever on the member, allowing the member to sit will have an appearance of evil. An independent reviewer of this case would doubt the member's impartiality. Thus, the member should have been removed to ensure fairness and avoid a perception of unfairness.

Smart and *Harris* demonstrate that implied bias can be proven in two ways. One method is to identify a single serious impediment that casts doubt on a member's impartiality despite his disclaimer. The other method requires identifying several less serious factors which, viewed separately, are insufficient but which, in combination, rise to the requisite level of impropriety. What is required to establish an impermissible appearance of evil? How much implied bias is too much?

A survey of military cases involving implied bias reveals no clear answer to this question. The easiest means to assist the practitioner is to review the relevant cases. In all of these cases, the member disclaimed partiality and stated he could retain an open mind. The cases can be grouped into the following general areas: (1) duty position of the member; (2) the member's relationship to a trial participant; (3) when the member (or a loved one) was a victim of a similar crime; (4) a member's prior knowledge of the incident; and (5) a combination of the above.

The duty position of a member can create an appearance of evil under certain circumstances. Where a member was a line officer performing administrative functions in the trial counsel's office, the court found error because allowing a member of the prosecution's staff to remain on the jury would appear unfair.[25] Law enforcement duties have received mixed reviews. Error was found when the court president was the installation provost marshal[26] and where the member had worked as a narcotics investigator for ten years.[27] No error was found when the member was a security officer[28] or when the member was the deputy provost marshal.[29] An enlisted member who was the accused's former first sergeant and who had knowledge of his poor service record and attitude was presumed to be biased.[30] Assertions of implied bias based on duty position were rejected where a member was on the convening authority's staff[31] and where the member was the deputy base commander.[32]

No cases were found in which the member's relationship to one of the participants, standing alone and accompanied by an effective disclaimer, amounted to an implied bias. A hybrid of implied bias was found when a member had not only a prior social and professional relationship with a key government witness but also a predisposition to believe him, and the member's disclaimer was not absolute.[33] Allegations of implied bias were rejected when the member had daily contact with two government witnesses,[34] where a critical government witness had served on earlier court-martial panels with members,[35] and where a member was a "running buddy" of the trial counsel.[36]

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[22] *Id.* at 292.

[23] 21 M.J. 15 (C.M.A. 1985). For a further discussion of *Smart*, see McShane, *Questioning and Challenging the "Brutally" Honest Court Member:* Voir Dire *in Light of* Smart *and* Heriot, The Army Lawyer, Jan. 1986, at 17.

[24] *Id.* at 20.

[25] United States v. Hampton, 50 C.M.R. 232 (A.C.M.R. 1975).

[26] United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). This panel of the court of review opined that a provost marshal was per se disqualified. Contrast this with the United States v. Brown, 13 M.J. 890 (A.C.M.R. 1982).

[27] United States v. Dawdy, 17 M.J. 523 (A.F.C.M.R. 1984). In this case, the defense waived the error.

[28] United States v. Brown, 1 M.J. 1161 (N.C.M.R. 1977).

[29] United States v. Brown, 13 M.J. 890 (A.C.M.R. 1982).

[30] United States v. Downing, 17 M.J. 636 (N.M.C.M.R. 1983).

[31] United States v. Ambalada, 1 M.J. 1132 (N.C.M.R. 1977).

[32] United States v. Carfang, 19 M.J. 739 (A.F.C.M.R. 1984).

[33] *United States v. Downing.*

[34] United States v. Aikens, 16 M.J. 821 (N.M.C.M.R. 1983).

[35] United States v. Reeves, 17 M.J. 832 (A.C.M.R. 1984).

[36] United States v. Porter, 17 M.J. 377 (C.M.A. 1984).

The *Smart* case is the only case in which a member was found disqualified because he was the victim of a similar offense. Perhaps *Smart* is an anomaly in that the member had been a robbery victim numerous times and also a close family member had also been a victim. In his concurring opinion, Judge Cox stated he opposed any per se rule that implied bias existed where a prospective court member had been the victim of a crime similar to the one charged, preferring to analyze each case individually.[37] Implied bias has not been found in the following cases in which the member or his family member had been a victim only once: the member's spouse had received obscene phone calls (case alleging malicious giving of false information by telephone);[38] the member was a larceny victim the day before the trial (robbery case);[39] the member was an attempted rape victim (rape case);[40] and the member's spouse was an assault victim (indecent assault case).[41]

Prior knowledge of the facts proved to be prejudicial when a member discussed the arson incident with the victim accuser, who was upset and wanted a stiff punishment,[42] and where members sat on a related case in which the defense theory was that the accused was the big drug dealer.[43] Mere familiarity with misconduct in the accused's background (prior Article 15s)[44] has been held insufficient.[45]

The *Harris* case illustrates how a combination of questionable circumstances can rise to prejudicial level. Other combination cases where error was found occurred when only one factor was identified yet several members were infected by it (7 of 9 members were involved in crime prevention[46] and several members had discussed the facts with the victim).[47] *United States v. Porter,*[48] a contested robbery case, illustrates how the combination approach will sometimes fail to demonstrate enough prejudice to warrant reversal. In *Porter,* the challenged member was a running associate of the trial counsel who had experienced a $40.00 larceny from his briefcase the day before trial. On appeal, the defense conceded that neither circumstance, standing alone, was a disqualification, but argued that the two factors, in combination, would "prompt a synergistic reaction from [the member] in favor of the government."[49] Rejecting the alleged implied bias, Judge Cook relied on language used by the United States Supreme Court in *Smith v. Phillips:*[50] "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it."[51] Judge Cook found the two allegations against the member were not so significant that the disclaimer was ineffective. In conclusion, Judge Cook stated: "[W]e do not mean to foreclose entirely the concept of implied bias. . . . However, we prefer to reserve the application of that doctrine to those situations where there are implications of fifth and sixth amendment violations."[52]

He cited Justice O'Connor's concurring opinion in *Smith v. Phillips.* Chief Judge Everett concurred in this opinion, stating that the reference to *Smith v. Phillips* was appropriate because the challenge did not involve grounds unique to the military.

The facts in *Smith v. Phillips* are somewhat incongruous with military practice because that case involved the sufficiency of a post-trial hearing concerning juror partiality. Nevertheless, the principles discussed are applicable. The allegations of implied bias stemmed from a juror in a murder case who submitted, during the trial, an application for employment as an investigator with the prosecutor's office. The prosecution did not disclose this information until after the case concluded. The case came to the Supreme Court because, in a habeas corpus action, the federal district court imputed bias to the juror, despite agreeing with the state trial court that insufficient evidence existed to demonstrate actual bias. The district court held "the average man in [this juror's] position would believe that the verdict of the jury would directly affect the evaluation of his job application."[53] In reversing, the majority opinion in *Smith v. Phillip* appeared to reject the concept of implied bias and cited the following language from a 1950 Supreme Court case: "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."[54] Justice O'Connor concurred in the result, but she was careful to point out that implied bias is still a viable concept under certain circumstances:

> Determining whether a juror is biased or has prejudiced a case is difficult, partly because the juror

[37] *Smart,* 21 M.J. at 21.

[38] United States v. Klingensmith, 17 M.J. 814 (A.C.M.R. 1984).

[39] *United States v. Porter.*

[40] United States v. Inman, 20 M.J. 773 (A.C.M.R. 1985).

[41] United States v. Yarborough, 14 M.J. 968 (A.C.M.R. 1982).

[42] United States v. Miller, 19 M.J. 159 (C.M.A. 1985).

[43] United States v. Barnes, 12 M.J. 956 (A.F.C.M.R. 1982).

[44] UCMJ art. 15.

[45] United States v. Watson, 15 M.J. 784 (A.C.M.R. 1983).

[46] United States v. Hedges, 11 U.S.C.M.A. 642, 29 C.M.R. 450 (1960).

[47] *United States v. Miller.*

[48] 17 M.J. 377 (C.M.A. 1984).

[49] *Id.* at 379.

[50] 455 U.S. 239 (1982).

[51] 17 M.J. at 379.

[52] *Id.* at 380.

[53] Smith v. Phillips, 485 F. Supp. 1365, 1371–72 (1980).

[54] 455 U.S. at 216 (citing Dennis v. United States, 339 U.S. 162 (1950).

may have an interest in concealing his own bias and partly because the juror may be unaware of it. . . . [I]n most instances a post conviction hearing will be adequate to determine whether a juror is biased. . . . [H]owever, . . . in certain instances a hearing may be inadequate for uncovering a juror's bias. . . . Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. . . . Moreover, this Court has used implied bias to reverse a conviction. [In that case] the Court held that prospective jurors who had heard the trial court announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.[55]

Clearly, the present state of military law on this subject is more akin to the concurring opinion, and even the dissenting opinion,[56] than to the majority. Yet the language employed by the majority cannot be ignored and if future pronouncements from the Supreme Court follow the majority on this issue, a more conservative response by the Court of Military Appeals may be expected.

Practice Pointers

The holdings identified by the preceding cases and the principles that they illustrate should be valuable to the military practitioner. Some practical considerations should also be kept in mind when dealing with implied bias. The following suggestions for the defense counsel, trial counsel, and military judge, while neither exhaustive nor overly complex, are offered to assist the practitioner in addressing this issue.

The trial defense counsel has the burden of establishing a challenge for cause. The primary defense objective should always be to identify a prejudice that the member does not disclaim (actual bias). Failing there, the fallback position is to rely on implied bias. Establishing an implied bias should be easier than demonstrating actual partiality because disclaimers are irrelevant and rehabilitation cannot cure this defect. Pretrial questionnaires can be helpful in this area. Identification of the rating chain, present and past duty positions, law enforcement contacts, trial participant contacts, and experiences with the charged offenses should be addressed. When challenging under this theory, clearly identify this for the military judge. The standard argument should be the disclaimer was ineffective but even assuming it was, the appearance of evil still lingers. Stress the principles underlying the doctrine—avoiding the appearance of evil and protecting against subconscious prejudice.

When the defense identifies an implied bias problem, the trial counsel must assess the issue and decide if the challenge should be resisted. If the trial counsel decides to oppose the challenge, a clear and unequivocal disclaimer must be exacted from the member. While this is theoretically irrelevant, in practice a strong disclaimer goes a long way toward curing the problem. The trial and appellate courts may view the issue as simply one of actual bias. Next, attempt to show that the member's experiences are common to a significant element of the military population. This argument was persuasive in *Porter,* and incorporates the doctrine approved in *Smith v. Phillips.* Finally, argue that the standard is whether *most* people in the same position would be prejudiced and give examples of how this challenge fails to meet this requirement.

The military judge has to decide if an implied bias is established. In doing so, the military judge should be liberal in granting challenges. The potential for inconvenience should not influence the military judge's ruling. Where the decision is close, the more prudent approach is to grant the challenge.

Certainly, the appearance of fairness is enhanced when a colorable claim of partiality is sustained. Giving the members preliminary instructions on their responsibilities and the purposes of voir dire can minimize challenge problems.[57] Nevertheless, where the military judge denies the challenge, the following action by the military judge may make reversal less likely. Encourage the member to explain why his or her disclaimer should be believed.[58] Where the member's response raises the issue, give additional instructions and ask clarifying questions.[59] Where appropriate, describe for the record the member's demeanor during voir dire.[60] Explain the rationale for denying the challenge to include stating why the implied bias was not established.[61]

Conclusion

The long-term fate of implied bias in military law is uncertain. Clearly Chief Judge Everett supports the doctrine. His long standing displeasure with the military judge's hesitancy to grant challenge and his apparent support for increasing the number of preemptory challenges underscore his concern with this area of military justice.[62] While accepting the doctrine, Judge Cox has gone on record as saying he will, almost always, defer to the discretion of the military judge.[63] One may thus conclude that only the most blatant set of facts will stir Judge Cox to find prejudicial error. Therefore, Judge Sullivan's view, yet unknown, should play an important role in deciding whether implied bias will remain an active issue. Future decisions by a more conservative Supreme Court may cause the Court of Military

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[55] *Id.* at 221–24 (O'Connor, J., concurring).

[56] The dissent, authored by Justice Marshall, opined that implied bias has been recognized as a valid juror challenge throughout the Court's history and then concluded that the conflict of interest which this juror had was prejudicial to the fairness of the proceedings. The dissent does contain an excellent summary of federal cases in which implied bias was identified. *Id.* at 224–44.

[57] *See Mason,* 16 M.J. at 457 n.1 (Everett, C.J., dissenting).

[58] *Miller,* 19 M.J. at 164.

[59] United States v. Heriot, 21 M.J. 11, 13–14 (C.M.A. 1983).

[60] United States v. Montgomery, 16 M.J. 516 (A.C.M.R. 1983).

[61] *Smart,* 21 M.J. at 20.

[62] *See* Part C of Chief Judge Everett's opinion in *Smart,* his dissent in *Mason,* and his dissent in *Harris.*

[63] *See* Judge Cox's concurring opinion in *Smart.*

Appeals to limit this doctrine. At the present time, however, implied bias is a viable doctrine and the military practitioner must be alert to its application.

Clerk of Court Note

In the July issue of *The Army Lawyer*, we reported that court-martial processing times had increased for cases received by the Clerk's office in the second quarter of Fiscal Year 1986. Now, for cases received in the third quarter, GCM and BCD Special Court-Martial processing times have decreased significantly. The table below compares the third quarter Army-wide averages with those for the fiscal year to date (including the third quarter) and with the Fiscal 1985 averages. Special and Summary Court-Martial processing times are shown, too, but only through the second quarter of Fiscal 1986.

General Courts-Martial

	FY86–3	FY86	FY85
Records received by Clerk of Court	379	1179	1767
Days from charges or restraint to sentence	45	48	51
Days from sentence to action	50	52	52

BCD Special Courts-Martial

	FY86–3	FY86	FY85
Records received by Clerk of Court	263	681	892
Days from charges or restraint to sentence	29	32	31
Days from sentence to action	43	46	47

Other Special Courts-Martial

	FY86–3	FY86	FY85
Records received by SJAs	NA	220	536
Days from charges or restraint to sentence	NA	41	37
Days from sentence to action	NA	33	30

Summary Courts-Martial

	FY86–3	FY86	FY85
Records received by SJAs	NA	666	1286
Days from charges or restraint to sentence	NA	14	15
Days from sentence to action	NA	7	8

Regulatory Law Office Note

The Court Litigation Function

Although the primary work of the Regulatory Law Office involves participating in proceedings before federal, state, and local administrative tribunals and providing advice in environmental law matters, the office also has a substantial court litigation role. Most of the court cases pertain to transportation of military traffic by railroads, motor carriers, and freight forwarders, and arise from the audit function of the General Services Administration (GSA). Under 31 U.S.C. § 3726, GSA reviews government freight bills for discrepancies such as erroneous tariff applications, mis-classification of commodities, or simple mathematical errors. If a disparity is found and it appears that the government was overcharged for the particular transportation service involved, the difference is offset against other moneys owed to the transportation company for other shipments.

If the company disagrees with the GSA action, it can seek recovery of the amounts set off by filing an action in the proper federal court, usually the United States Claims Court. Upon receipt of the case, the Department of Justice (DOJ) requests a litigation report from the affected agency. Where a military shipment is involved, DOJ requests reports from GSA and the Department of the Army. Because almost all military land traffic comes under the management control of the Military Traffic Management Command (MTMC), an Army agency, such cases are referred to the Regulatory Law Office under the provisions of AR 27–40.

When review of the pleading reveals that the case involves a military shipment, the matter is further referred by this office to the Office of the Staff Judge Advocate, MTMC, for investigation. Thereafter, the required report is made to DOJ by the Regulatory Law Office, and assistance is provided throughout the course of the lawsuit.

Over the last several years, a new competitive rate program was instituted by MTMC for the international transportation of household goods by freight forwarders called the International Through Government Bill of Lading Competitive Rate Program. It has generated a substantial amount of litigation, as have other competitive initiatives. At the present time, the amounts in controversy in these types of cases total over $180 million.

Worldwide Litigation

Captain Rose J. Anderson
&
Captain Chris Puffer

It is Monday morning at the Nassif Building in Falls Church, Virginia. Following a week in Grand Forks, North Dakota; Dallas, Texas; Rock Island, Illinois; or any other location in the Continental United States (CONUS), Panama, Europe, Korea, Hawaii, or Alaska, the Contract Appeals Division (CAD) trial attorney returns to the office. Awaiting the trial attorney are telephone call memos, correspondence from the Armed Services Board of Contract Appeals (ASBCA) with suspense dates, stacks of documentary evidence for assigned cases, and two or three green folders, the sign that the trial attorney has been assigned new cases. A brief look through the telephone memos indicates that calls must be returned to a Defense Contract Audit Agency (DCAA) auditor about a million dollar defective pricing case, to an expert witness on a complicated engineering design case, to a contracting officer with questions about a contractor's twenty-six pages of written interrogatories, and to three opposing counsel who want to schedule trial dates and trial locations for their client's hearings. Thus begins a fairly typical week back at the office after the third week of TDY in a two month period.

The name Contract Appeals Division can be misleading. The mission of CAD and its twenty-six trial attorneys is to represent the Army in litigation before the Armed Services Board of Contract Appeals. As of 1 October 1986, CAD's mission will be expanded to include representing the Army before the General Services Board of Contract Appeals in bid protest cases involving Automated Data Processing Equipment acquisitions. Hearings before the boards of contract appeals are not appellate arguments but adversarial, evidentiary hearings before government employed civilian administrative judges. Before discussing the function of CAD and its trial attorneys, a quick review of the contract disputes process may be of help.

Millions of government contract actions run to completion without incident each year. For those that do not, however, CAD ultimately gets involved. For example, if a contractor believes it is entitled to an adjustment in the contract price because of something the government did or failed to do; or because of an ambiguity in the contract itself, its first step is to file a claim with the contracting officer. If the contracting officer does not agree with the contractor, a written response, called a final decision, is prepared and given to the contractor. The contractor is permitted, under the Contract Disputes Act of 1978,[1] to appeal the final decision to either the ASBCA or the United States Claims Court. Once the appeal is docketed at the ASBCA, a CAD trial attorney is assigned to represent the Army.[2]

Kinds of Cases

Contractor claims involve much more than installation procurement of supplies, services, and construction. The cases handled at CAD range from major weapon systems acquisitions, to research and development projects, to Army & Air Force Exchange Service (AAFES) concessionaires, and more. Examples of recent cases include a five million dollar claim for the leasing of an oil pipeline in Korea, the acquisition of herbs for research at a medical command, seizure and sale of an AAFES concessionaire's property, and the repair of tugboats.

The majority of cases at CAD involve contractors terminated for default. A termination for default case often involves defending against allegations of defective specifications or of government caused delay that prevented timely performance of the contract.

Most of the remaining cases involve contractors' claims for more money that have been denied, in whole or in part, by the contracting officer. Issues frequently raised in these cases include differing site conditions, defective specifications, and changes directed by the contracting officer or caused inadvertantly by a government employee.

The remaining cases involve government claims for money for excess reprocurement costs, liquidated damages, recovery of progress payments, and defective pricing. In these cases, the contractor is contesting the government's right to recover money or the amount claimed.

Approximately 60% of all cases handled by CAD involve disputes of over $50,000; of these, 20% involve cases where the disputed amount is over $1,000,000. At the present time, the Army is claiming approximately $53,000,000; contractors' claims total approximately $140,000,000.

Attorney Caseloads

The number of pending cases has increased over the last eighteen months from 380 to 442. The average caseload per attorney is twenty-two active cases. Not all trial attorneys maintain identical caseloads because many major cases require disproportionate amount of work to complete.

During the first six months at CAD, a trial attorney is expected to reach a caseload of fifteen active cases. Many of the cases assigned during that period are "accelerated" or "expedited" cases pursuant to ASBCA Rule 12 that will allow the trial attorney to get into the courtroom early. Accelerated cases are those that involve a dispute of $50,000 or less in which the board must render a decision within 180 days. Expedited cases involve disputes of

[1] 41 U.S.C. §§ 601–613 (1982).

[2] If the appeal is to the Claims Court, the government is represented by the Civil Division, Department of Justice.

$10,000 or less in which the board must render a decision within 120 days.

How To Get Assigned to CAD and What To Do Once You Get Here

How does a JAGC officer get assigned to Contract Appeals Division? First and foremost, ask for the job. Those attorneys with both trial experience and a knowledge of procurement law are the most likely candidates. Lack of previous contract experience does not prevent an assignment to CAD, however. An attorney with excellent litigation skills can learn contract law on the job. Many in CAD have an extensive contract background and readily share it with others. Most of the trial attorneys are graduates of the Judge Advocate Officer Graduate Course with career status.

The primary duty of the trial attorney is preparing and trying cases before the ASBCA. All work at CAD proceeds with this primary duty in mind. The hearing follows an often lengthy process of interviewing witnesses and marshalling evidence—not unlike preparation for a large general court-martial. Contract witnesses, however, are located throughout the country. One cannot telephone the first sergeant and tell him or her to have the witnesses present at the SJA office at 0800 tomorrow.

During the process of preparing for litigation, the trial attorney is called on to investigate the facts, talk to the parties, and in some instances, negotiate a settlement. Each aspect of the trial attorney's duties requires communication skills, human relation skills, and patience. The trial attorney's world is one of contracting officers, contract specialists, engineers, expert witnesses, judges, contractors and their lawyers.

Processing of the "Typical" Case

The first action taken by a CAD attorney on a new case usually involves preparation of the answer to the appellant's complaint. This process requires review of the Rule 4[3] file and the Trial Attorney's Litigation File (TALF). The Rule 4 file contains documentary evidence pertinent to the appeal that goes before the board. Additional evidence will be marshalled and presented at the hearing, but the Rule 4 file is the basic evidentiary material upon which the dispute is to be resolved. The Rule 4 file is also utilized by the trial attorney when cases are submitted for decision "on the record." In such cases, the record consists of the Rule 4 file and any affidavits submitted to support the case. The TALF contains a legal opinion and contracting officer's statement of the case prepared to inform the Army's trial lawyer of the client's position in the dispute. Both files are prepared by the installation procurement office in conjunction with the local legal office, and comprise extremely important parts of the pre-hearing process.

In an ideal setting, preparation of the answer would involve trial attorney review of the evidence submitted directly by the field in the Rule 4 file and the TALF, assuming both were complete. Rarely can the facts concerning the dispute be completely understood by only looking at the documents, however. In most cases, the trial attorney must contact government and contractor's witnesses to fill in the holes that are apparent from reviewing the documents. If the facts are complicated, a trip to the particular installation or command may be necessary, not only to talk to witnesses, but also to examine and collect additional evidence from the contract and technical files.

Answer preparation is followed by discovery, a skill not often refined in courts-martial practice. Discovery includes both preparation of discovery to be answered by contractors and responding to contractors' discovery requests. The method of discovery—interrogatories, requests for production of documents, or depositions—depends upon the nature of each case. For example, if the contractor is *pro se*, written interrogatories may not be very productive and depositions are usually the best way to elicit all of the facts upon which the contractor bases its allegations. On the other hand, if the issues are complicated and involve engineering concepts, initial written interrogatories may be necessary to elicit the contractor's theory of the case and the names of its witnesses. In complex cases, these initial interrogatories enable the trial attorney to better prepare for deposing contractors' experts.

Assuming that both paries schedule depositions, the trial attorney will have to travel to the field to take depositions of contractors' witnesses and defend depositions of government witnesses. Deposing contractors' witnesses requires extensive preparation, particularly in complicated engineering or defective pricing cases.

At some point, the parties and the board must decide the trial date(s). Once this date has been set, discovery must be completed, additional documentary evidence must be assembled, indexed, and reproduced, and *all* witnesses prepared for their testimony.

The hearings are conducted at sites throughout CONUS, Panama, Europe, Korea, Alaska and Hawaii. The hearings last from one day to several weeks, with the average hearing requiring 3–4 days.

Following the hearing, the trial attorney submits the government's post-hearing brief and reply brief to the board. The post-hearing brief presents proposed findings of fact arguing the evidence of record and the inferences to be drawn from the evidence. It also includes the legal arguments upon which the government relies. These briefs are, in effect, written closing arguments presenting the parties' factual and legal positions. If a case is properly prepared, the brief is fully written before trial. Minor refinements and citations to the record are then added before it is filed with the board.

Disposition of Cases

The lengthy process of discovery serves principally to narrow the issues and assess each side's strengths and weaknesses. Following discussions between the trial attorney and the contractor or its counsel, both parties often realize that a settlement may be in their best interests. Approximately sixty percent of all cases are settled prior to trial.

Because a majority of cases are settled, trial attorneys must develop and employ negotiation skills. Settlement negotiations may be conducted telephonically, or they may

[3] ASBCA Rule 4.

require travel by the trial attorney to conduct discussions in person. Sometimes the negotiations are initiated at the suggestion of the judge.

The Army wins almost two-thirds of the cases that proceed to hearing. For the one-third in which contractors' positions are sustained, they are sustained for a small part of the disputed amount, or they are sustained on parts of the dispute to which the Army has previously conceded entitlement. For issues in which the Army does not concede liability, CAD is currently winning ninety percent of the time.

Scope of Work By Trial Attorneys

The job of the CAD trial attorney is far from simply poring over contracts. By the time a case is completed through the trial stage, a trial attorney will spend as much time eliciting facts and opinions from witnesses and preparing them for trial as reviewing documents. In-depth discussions will be held with all people involved in a case, including contracting officers, contract specialists, contracting officer's representatives, quality assurance representatives, engineers, auditors, legal advisors, and others.

The practice of law at CAD is national and international civil trial work. A trial attorney may have to prepare for trial at distant locations anywhere. Consequently, hearings can sometime become logistical and management nightmares. For example, a week long trial may be scheduled for Los Angeles. Some of the government's witnesses may be located at Picatinny Arsenal in Dover, New Jersey, some at the United States Army Tank Automotive Command in Detroit, and still others may be located in Minnesota.

After the trial attorney has traveled to the locations of all witnesses and prepared them for trial, their arrival at the hearing site must be coordinated to ensure that all arrive at the correct time and are lodged at the same place as the trial attorney to allow for the always-needed conferences.

Additionally, the trial attorney may have to obtain subpoenas and have them served at various locations. Because the local United States Marshall does not always assist CAD in serving the subpoenas, the trial attorney must seek out other sources of assistance, such as local JAG or Criminal Investigation Division (CID) offices.

The criminal attorney has CID or military police investigators to assist in gathering evidence. Contract trial attorneys must do extensive investigation themselves to obtain relevant evidence not revealed through normal discovery methods. For example, subcontractors and materialmen can provide information concerning statements made to them by the prime contractor. Ex-employees of the contractor, especially those who have been fired, are also excellent sources of evidence.

Subcontractors are sometimes not very willing to be of assistance because they do not want to "bite the hand that feeds them." When letters and phone calls do not work and the subcontractor possesses critical information, the trial attorney may have to travel to the subcontractor's location to obtain the required information. In these instances, communication and human relations skills become extremely important in gathering the needed information, while not creating a hostile environment.

Throughout the course of preparing for trial, the CAD attorney has frequent contact with contractors' attorneys. While many of these conversations are pleasant and designed to coordinate future discovery events, they may become adversarial and border on hostile. For example, an appellant's attorney may object to answering a discovery request that the trial attorney considers relevant to the case. Rather than immediately racing to the judge with a motion to compel, it is best to try to persuade the attorney that the information sought is discoverable while preventing the development of hard feelings. In instances where the parties cannot resolve a pretrial problem themselves, conference calls or prehearing conferences with the judge may be arranged.

Conclusion

CAD presents the opportunity to practice civil litigation law in the Army. It offers the chance to travel, gain legal expertise, and develop an in-depth knowledge in areas of contract law. In addition to the experience and opportunity the job provides, it also means a high stress environment, and weeks away from home and family. Some attorneys experience frustration at the length of time (often 1–2 years) it takes some of the complicated cases to reach decisions. For those who like a challenge, it is a great way to go!

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Administrative Law Notes

Digests of Opinions of The Judge Advocate General

DAJA–AL 1986/1571, 11 April 1986. Administrative Reductions for Misconduct—AR 600–200, chapter 6.

The Judge Advocate General responded to a request from MILPERCEN concerning an NCO who was reduced upon conviction by a civil court. Due to the nature of the sentence imposed, reduction to E–1 was mandatory UP AR 600–200, para. 6–3*c*(1) (sentence to death or confinement for 1 year or more that is not suspended). On appeal, however, the sentence was reassessed to one not requiring the mandatory reduction. MILPERCEN asked what action, if any, must or may be taken because of the sentence reassessment.

The Judge Advocate General opined that first the soldier must be restored to his previous grade UP paras. 6–3*c*(1)(d) and 6–17*c*. If the conviction were reversed, the restoration would be final and no further administrative reduction could occur. In this case, however, the restoration was based on sentence reassessment. Therefore, the soldier remained subject to reduction under either para. 6–3*c*(2) or 6–3*c*(3), depending on the ultimate sentence.

The Judge Advocate General noted that this procedure is different when a soldier is convicted of a serious offense (maximum penalty is one year or more under both the UCMJ and local law) and sentencing is delayed for more than thirty days. UP para. 6–3*c*(1)(b), the soldier is mandatorily reduced to E–1. If, after the delay, the soldier receives a sentence that does not require mandatory reduction, restoration is not automatic. Rather, the soldier will be considered for restoration to the previous or any intermediate grade.

DAJA–AL 1986/1653, 22 April 1986. Use of "Denver Boot" device to immobilize vehicles as aid to enforce traffic regulations.

The United States Army Military Police Operating Agency forwarded a request for an opinion from the USAREUR Provost Marshal on the legality of the use of a "Denver Boot" device to enforce traffic regulations. The Judge Advocate General opined that the "Denver Boot" may be used for administrative purposes other than deterrence, such as the immobilization of unsafe or unregistered vehicles, compelling the presence of multiple offenders, or controlling heavily congested parking areas. Booting should not be used where a reasonably effective, less restrictive alternative means of enforcement is available.

The courts that have reviewed the booting issue agree that the seizure of a vehicle by booting involves a substantial deprivation of property which requires some due process protections. The courts vary, however, on the degree of due process required. Although most courts have ruled that pre-deprivation hearings are not necessary, the Louisiana Supreme Court has held that a pre-deprivation notice and informal hearing is necessary before a vehicle may be booted. *Wilson v. The City of New Orleans,* 479 So.2d 891 (La. 1985).

The remaining, better reasoned cases, hold that so long as some form of post-booting notice and hearing is provided, lesser procedural constraints are sufficient to satisfy due process requirements. Although there is no consistent analytical approach, the courts emphasize a primary theme in upholding booting enforcement schemes: does the plan limit booting to those situations where immobilization is necessary in order to control a safety problem, to compel the appearance of "scofflaw" multiple offenders, or to respond to some other unusual enforcement problem? *See Grant v. City of Chicago,* 594 F. Supp. 1441 (N.D.Ill. 1984); *Gillam v. Landrieu,* 455 F. Supp. 1030 (E.D.La. 1978); *Patterson v. City and County of Denver,* 650 P.2d 531 (Colo. 1982); *Baker v. City of Iowa City,* 260 N.W.2d 427 (Iowa 1977).

An enforcement ordinance permitting booting for any traffic violation was deemed overbroad and violative of due process in *Gillam* because it permitted immediate seizure of vehicles where not necessary to promote safety, health, or welfare. In *Gillam,* however, and in other cases where there was some clearly articulable enforcement objective relating to a special circumstance such as habitual offenders, safety, or heavily congested parking areas, the courts upheld booting schemes for parking violations.

The enforcement scheme in *Grant* allowed booting after ten unpaid tickets. It was attacked as a bill of attainder and an ex post facto law because the scheme imposed "punishment" without trial, and because it permitted a greater punishment than the maximum punishment for the offense. In upholding the scheme, the court found that the policy was serving the valid administrative purpose of forcing *repeat* offenders to respond, and therefore was not merely attempting to "punish" offenders. The court found a valid

administrative purpose because the ordinance imposed reasonable limits focused on the need to compel the appearance of multiple offenders. Accordingly, it follows that a scheme that allows booting for *any* parking violation is vulnerable to a charge that it is imposed primarily as a deterrent and is punitive because no clearly articulable objective is evident that could not be as well served by less restrictive enforcement alternatives.

Contract Law Note

Installation Contracting: Plan for Success

At many Army installations, contracting officers, attorneys, activity chiefs and directors, and supply officers have endured a nightmare during the last several weeks of Fiscal Year 1986—one that seems to recur every September. Here is a typical example from Fort Wobegon, Minnesota—the little Army Post that time forgot and the decades cannot improve.

In August, Lieutenant Colonel (LTC) Clarence Bunson, the Director of Engineering and Housing (DEH), received word that some "year-end" funds would become available. He wanted to tackle the highest priority projects on the BMAR—Backlog of Maintenance and Repair—and the DMAR—the list of Deferred Maintenance and Repair—applicable to family housing. He instructed his engineers to prepare statements of work and specifications for those projects.

LTC Bunsen's August acquisition plan assumed—quite correctly—that not enough time remained for him to follow "ordinary" procedures: prepare specifications, statements of work and government cost estimates; publish a synopsis in the Commerce Business Daily (CBD) for the minimum of fifteen days; issue an invitation for bids for a thirty-day period; open and evaluate bids; and award contracts.

LTC Bunsen—covertly encouraged by the comptroller, who would rather listen to heavy metal rock music than turn back funds to the MACOM—wanted to negotiate sole-source contracts with local companies in nearby St. Cloud. Captain John Smith, JAGC, late of the 34th Graduate Class, opined that LTC Bunsen's plan was legally objectionable.

LTC Bunsen stormed into the JAG office and demanded to see the SJA. He argued forcefully that he needed an exception to policy so he could negotiate with local companies, award contracts, and obligate funds before 1 October. He claimed his plans were examples of unusual and compelling urgency and cited Federal Acquisition Reg. § 6.302–2 (1 Apr. 1984) [hereinafter FAR]. The SJA backed Captain Smith, noting, among other facts, that the top projects on the BMAR and DMAR been identified and awaiting funds for two years.

In the subsequent showdown in the Chief of Staff's office, the SJA explained that LTC Bunsen's plan was against the law. "Chief," he said, "we have to bite the bullet this year, but there are things we can do to ensure this doesn't happen again. Let me explain."

Here is the essence of what the SJA told his Chief of Staff.

The law requires competition. Congress enacted statutes that require the Army to seek full and open competition in acquisition of construction, goods, and services. *See* Competition in Contracting Act of 1984, Pub. L. No. 98–369, 98 Stat. 1175. Steps to achieve the appropriate level of competition require an irreducible minimum amount of time.

In the presolicitation phase of the contracting process, LTC Bunsen first needs to prepare specifications, statements of work, and a government cost estimate. For the projects selected by the LTC Bunsen, the contracting officer is obliged by law to contract for supplies, services, and construction by competitive methods—either by sealed bidding or competitive negotiation. 10 U.S.C. §§ 2301–2304 (Supp. III 1985). In either case, a proposed acquisition of $10,000 or more must be advertised in the Commerce Business Daily (CBD) for at least fifteen days prior to issuance of invitations for bids (IFB) or requests for proposals (RFP). 41 U.S.C. § 416(a)(3)(A) (Supp. III 1985); FAR § 5.203(a). The fact of publication cannot be presumed as suggested in FAR § 5.203(f); it must be verified and documented. Army Acquisition Letter (AL) 85–42; Army FAR Supplement § 5.203 (1 Dec. 1984). The IFB or RFP must allow thirty days for submission of bids or proposals. 41 U.S.C. § 416(a)(3)(B)(i) (Supp. III 1985); FAR § 5.203(b). Once the CBD synopsis is published, the minimum time to award a contract is forty-five days. Realistically, one must add time to the contracting process to allow for preparation of specifications, reviews and approvals, dispatch and publication of the CBD synopsis, receipt of offers, evaluation, award, and Murphy's Law (what can go wrong will go wrong) and its corollary (any project will take twice as long as the estimate). Notwithstanding Murphy's Law, fifty-five days from dispatch of synopsis to award of contract is a useful planning factor for *accelerated acquisitions.*

If it is too late to compete, it is too late, period. If LTC Bunsen had started the contracting process sooner, he could have complied with the statutory mechanism designed to foster full and open competition. None of his projects meet the narrowly defined, statutory criteria justifying less than full and open competition. *See* FAR subpart 6.3. The particular basis cited by LTC Bunsen—FAR § 6.302–2, Unusual and Compelling Urgency—contemplates serious injury to the agency from, *inter alia*, sudden, unforeseen disaster, interruption of the operational mission of ships and aircraft, or impairment of missile systems. Defense FAR Supplement § 6.302–2 (1 Apr 1984) [hereinafter DFARS]. Projects on the BMAR and DMAR would rarely qualify as matters of unusual and compelling urgency unless a state of disrepair had become so extreme that construction was needed *at once* to preserve a structure or its contents from damage. DFARS § 6.302–2(b)(4).

In 10 U.S.C. § 2304(f)(5) (Supp. III 1985), Congress anticipated LTC Bunsen's argument and recognized that no responsible official willingly turns back unspent funds at year end. The FAR essentially recites the statute:

> Contracting without providing for full and open competition shall not be justified on the basis of (1) a lack of advance planning by the requiring activity or (2) concerns related to the amount of funds available (*e.g.*, funds will expire) to the agency or activity for the acquisition of supplies or services.

FAR § 6.301(c). The statutes and implementing regulations place a premium on advance planning and *do not forgive* failure to plan.

Avoid LTC Bunsen's mistake. Most requirements can be forecast well in advance of the fourth quarter. Accordingly, contract actions can be initiated throughout the fiscal year. It should be the policy of the commander (not merely of the Director of Contracting) to obligate funds throughout the year. Establishing target rates of obligation or similar milestones will reduce the crush of paperwork that overwhelms the local contracting office near year end.

The commander should also require that specifications and statements of work be prepared and reviewed well in advance of the time that contracts need to be awarded. Sadly, it is too common that a Director of Contracting will set a deadline for submitting specifications by requiring activities, only to have the deadline ignored. The last minute rush creates choke points in the requiring activity as well as in the contracting office.

Inevitably, year-end funds will be made available for obligation during the fourth quarter even at an installation that has planned well and steadily obligated funds during the year. Do not *wait* for funds to be made available to start the paperwork. Have the necessary contract documents prepared and waiting at the contracting office so the CBD synopsis can be issued immediately upon notice that funds are forthcoming. If the local comptroller is alert, he or she will know that funds are going to be available before the Funding Authorization Document (FAD) arrives at the installation. Consider issuing the CBD synopsis and the IFB or RFP "subject to availability of funds." Thus, the fifty-five day clock can start running even before the money is available.

In order to obtain needed goods and services during the fourth quarter, it is critical that:

(1) Priorities for commitment of funds are determined systematically and stated clearly, as people in the requiring activities, contracting, and legal offices can spare no time to push paper for unfunded projects;

(2) All contract documents for the highest priority projects are completed and reviewed, awaiting only funding;

(3) Defense, Army, and Major Command restrictions on obligations during the fourth quarter be considered when planning milestones; and

(4) Acquisitions that can be made prior to fourth quarter have been made.

Establish a system to review effectiveness of the contracting process. Too often, the government's needs have not been met because requiring activities failed to plan ahead, personnel missed deadlines, managers failed to enforce milestones, policies were not established or enforced, or staff agencies failed to communicate. These failures occur repeatedly because no system exists to identify them, establish causes, fix responsibility, and effect remedies. The Inspector General might argue with the proposition that no system exists, but the fact that failures are repeated year after year speaks for itself. A working committee of staff principals is one oversight mechanism to consider.

Why bother? The chain of command, the Congress, and the American People want the Department of Defense to spend tax dollars wisely. The rules and mechanisms designed to promote full and open competition will presumably lead to lower prices and better contractor performance. If that is not sufficient incentive, remember that the General Accounting Office, the General Services Board of Contract Appeals, the U.S. Claims Court, and U.S. district courts issue orders to halt the award or performance of contracts solicited in violation of the rules. In the name of expediency, an agency may skip a step or "interpret" a requirement in order to complete a purchase. The world is full of contractors who are only too happy to bring the contracting process to a halt by filing a protest or lawsuit.

Doing it right in the first place is faster and cheaper. Lieutenant Colonel David C. Zucker.

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 JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in The Army Lawyer.

Corrections to *The Army Lawyer*, July 1986

Information provided by Captain Richard M. Morton, Assistant Staff Judge Advocate, Headquarters, Maine National Guard, indicates that information regarding current Maine law that appeared on pages 73 and 74 of the July 1986 issue of *The Army Lawyer* has been superceded by 1985 enactments. With respect to " 'Lemon Law' Developments" addressed on page 73, the current Maine statute, entitled "Warranties on New Motor Vehicles." is: Me. Rev. Stat. Ann. tit. 10, § 1161–67 (1985). Additionally, the article entitled "Living Will Update" on page 74 should be corrected to reflect the current Maine law, which is: Me. Rev. Stat. Ann. tit. 20, §§ 2921–31 (1985).

Consumer Law Notes

General Motors Consumer Mediation/Arbitration Program

Under the terms of a 1983 Federal Trade Commission order, all owners of General Motors (GM) cars and light trucks with engine or transmission problems may recover the money spent on repairs or receive repairs by GM at no expense. Repairs and repayment may be sought through an informal arbitration program run by the Better Business Bureau (BBB). With respect to most engine and transmission problems, the person requesting arbitration must still own the car. The consumer need not currently own the car, however, to be eligible for arbitration if the repair involved a component specified in the arbitration order and the component was built before 26 April 1983. If a consumer has already sought relief from both the dealer and the GM zone office, the consumer may contact the nearest BBB office to get into the mediation/arbitration program by calling the appropriate toll-free number listed below (the numbers marked with an asterisk should be called collect). For a free handbook about the mediation/arbitration program, legal assistance officers and consumers may call 800–824–5109 toll-free.

Better Business Bureau Toll-Free Numbers:

Alabama	*(205) 933–2999
Alaska	*(907) 276–5901
Arizona	(800) 352–3038
Arkansas	(800) 482–8448
California (North)	(800) 772–2599
California (South)	(800) 252–0410
Colorado	(800) 332–6446
Connecticut	(800) 221–3555
Delaware	(800) 368–5638
District of Columbia	(202) 393–8000
Florida	(800) 432–7159
Georgia	(800) 282–7765
Hawaii	*(808) 531–4964
Idaho	(800) 632–7182
Illinois	(800) 572–6072
Indiana	(800) 622–4800
Iowa	(800) 622–8227
Kansas	(800) 362–0178
Kentucky	(800) 722–5080
Louisiana	(800) 392–9468
Maine	(800) 322–3236
Maryland	(800) 368–5638
Massachusetts	(800) 325–1222
Michigan	(800) 482–3144
Minnesota	(800) 832–6428
Mississippi	*(601) 948–2322
Missouri	(800) 392–7309
Montana	*(303) 691–0979
Nebraska	(800) 642–9332
Nevada	(800) 992–3094
New Hampshire	(800) 343–3437
New Jersey	(800) 221–3555
New Mexico	(800) 432–5916
New York (Downstate)	(800) 522–3800
New York (Upstate)	(800) 252–2522
North Carolina	(800) 532–0477
North Dakota	*(612) 646–4638
Ohio	(800) 545–0209
Oklahoma	(800) 522–3654
Oregon	(800) 452–6321
Pennsylvania	(800) 462–0425
Rhode Island	(800) 343–3437
South Carolina	*(704) 375–8305
South Dakota	*(612) 646–4638
Tennessee	*(901) 278–4653
Texas (North)	(800) 442–1456
Texas (South)	(800) 392–6911
Utah	(800) 662–7182
Vermont	(800) 343–3437
Virginia	(800) 368–5638
Washington	(800) 542–1304
West Virginia	(800) 368–5638
Wisconsin	(800) 242–1555
Wyoming	*(303) 691–0979

Buying a Used Car

Each year, Americans spend about $85 billion to buy more than 17 million used cars. A recent Federal Trade Commission (FTC) rule, called the Used Car Rule (16 C.F.R. Part 455), requires all used car dealers to place a large sticker, called a "Buyers Guide," in the window of each used vehicle offered for sale. The Buyers Guide must state: 1) whether the vehicle comes with a warranty and, if so, what specific warranty protection the dealer will provide; 2) whether the vehicle comes with no warranty ("as is") or with implied warranties only; 3) that the consumer should ask to have the car inspected by an independent mechanic before buying the car; 4) that the consumer should get all promises in writing; and 5) a list of some of the major problems that may occur in any car.

Used car buyers should receive the original or an identical copy of the Buyers Guide that appeared in the window of the purchased vehicle. The Buyers Guide, which must reflect any changes in warranty coverage negotiated between the buyer and the seller, will become a part of the sales contract and will override any contrary provisions in the contract.

Dealers are required to post the Buyers Guide on all used vehicles, including used automobiles, light-duty vans, and light-duty trucks. A "used vehicle" is one that has been driven more than the distance necessary to deliver a new vehicle to the dealership or to test drive it. Therefore, "demonstrator" vehicles are covered by the rule. Private car sales (through classified newspaper advertisements, for example) and motorcycles are excluded from the rule's coverage.

Even without the Buyers Guide, however, the consumer should follow the suggestions offered in the FTC rule. For example, any consumer should be aware of the list of potential problems displayed in the Buyers Guide and should ask the seller whether the buyer may have the vehicle inspected by an independent mechanic. Of course, it is always advisable to reduce the agreement between the seller and the buyer to writing.

Consumers or legal assistance officers who have further questions about the Used Car Rule can contact the FTC either at its Headquarters Office (6th & Pennsylvania Avenue, N.W., Washington, D.C. 20580, (202) 376–2805) or at the nearest Regional Office.

The Ten Hottest Consumer Protection Items

In the July 1986 issue of the Consumer Protection Report, Stuart M. Statler, Commissioner of the U.S. Consumer Product Safety Commission from 1979 until June 1, 1986, identified the ten items that he believes most urgently require attention by consumer protection agencies and state attorneys general. These items frequently concern serious problems or risks involving the use of popular consumer products. Legal assistance officers should be aware of these from a preventive law viewpoint and because a products liability suit may provide an important remedy for those injured by these products.

1) Ban or otherwise more effectively regulate the risks associated with "all-terrain" vehicles (ATVs). Because of substantial increases in injuries and deaths related to ATVs (injury rates were 10 times as great in 1985 as in 1982 and during the spring and summer months of 1985 there were 2 deaths every 3 days), state bans should be considered. Short of a full ban, states should establish a minimum age for ATV use of 14 years and should require mandatory ATV licenses, training, and cautionary labeling on the vehicle itself.

2) Enact state laws or regulations requiring descriptive age labeling of toys. Because toys intended for children of one age may be dangerous to younger children for safety-related reasons not immediately obvious to parents, toys should be packaged and labeled to indicate both the nature of the hazard to younger children (*e.g.*, small parts) and the risk itself (*e.g.*, choking).

3) Initiate suits to compel manufacturers and retailers of paint strippers and aerosol spray paint to cease production and distribution of products that emit methylene chloride (DCM) at unnecessarily high levels. Studies suggest that 1,400 to 4,000 Americans may contract cancer each year as the result of exposure to DCM in paint stripping applications in poorly-ventilated areas of the home. Consequently, the recent FDA proposal to ban the use of this substance in cosmetics and the OSHA guidelines to control work place exposure should be expanded to provide greater protection to the public.

4) Institute or improve amusement ride safeguards to diminish the risks associated with amusement rides and attractions. With injuries averaging over 10,000 per year, an average increase of 26% each year since 1980, state regulation of all fixed and mobile rides and attractions should: require reporting of all accidents and possible hazards discovered by owners and operators and permit prosecution for failure to do so; require all owners and operators to maintain current insurance for all rides and attractions and to undergo regular inspections by insurance underwriters; include state regulation, inspection, and licensing of such rides and attractions; and confer state-wide authority for prosecuting any violations by state attorneys general.

5) Require the child-proofing of cigarette lighters. A requirement that lighters resist operation by children under five years of age could appreciably reduce the 200 annual deaths of Americans resulting from fires associated with cigarette lighters, of which approximately 140 are caused by children playing with lighters.

6) Initiate suits to remove from the marketplace children's products containing di(2-ethylhexyl) phthalate (DEHP), a known carcinogen. Although this substance has been virtually eliminated from squeeze toys and pacifiers, the chemical should also be prohibited in plastic infant pants, plastic crib bumpers and pads, and other products which babies may mouth or from which babies may absorb DEHP into the skin.

7) Prohibit the sale or distribution of residential hot water heaters that permit temperatures exceeding 130 degrees Fahrenheit. Although at 130 degrees it takes approximately 30 seconds for adult skin to sustain severe scars, at 150 degrees (not uncommon today) adults are scalded in less than 2 seconds. Limiting hot water heater temperatures in home water heaters would reduce the 2,500 scalds each year that are sufficiently serious to require emergency room treatment.

8) Prohibit the sale of automatic garage door openers unless necessary safety measures are added to prevent further injuries to youngsters. In order to prevent the deaths and injuries of children accidentally caught under closing doors or unsuccessfully playing "beat the door," states should encourage or require: child-resistant wall-mounted switches; built-in locks or coding mechanisms for control switches; a means to make remote-control units inoperable by or inaccessible to children; direct sensing devices to detect obstructions; and/or electric eyes at low levels of garage doorways.

9) Bring suits to prevent the sale of wood products that emit excessive levels of formaldehyde fumes which post acute health risks and which may also cause cancer. The formaldehyde emitted by many wood products, including numerous types of particle board, plywood, and fiberboard, may cause dizziness, headaches, and/or nausea in as much as twenty-five percent of our population, and chronic exposure may cause cancer.

10) Give attorneys general expanded authority to require reporting, to monitor, and to redress the hazards created by dangerous products.

Limits Placed on Vitamin Advertising

Pursuant to the efforts of the New York Attorney General's Office, Lederle Laboratories Division of American Cyanamid Company, a pharmaceutical company, has agreed to alter its advertising and packaging of Stresstabs, the nation's largest selling "stress" vitamin, in order to stop implying that Stresstabs can reduce the effects of psychological and ordinary physical stress. Although it has admitted no wrongdoing, Lederle has paid New York $25,000 in costs and entered into an agreement to modify its advertising. The attorney general's action was based on the absence of a scientifically recognized need for stress vitamins to relieve everyday stress, although it is recognized that these vitamins are needed when someone has suffered severe physical stress such as burns, surgery, prolonged illness, or the extended use of fad diets.

Diet and Energy Pill Sales Regulated

The Iowa Attorney General's Office has recently obtained court judgments requiring the companies that sell the "diet pill" Amitol/AM and the "energy pill" Energene/500 to refund money to Iowa consumers of these products and to refrain from advertising the products in Iowa unless they can provide scientific substantiation for their claims.

Producers advertised that Amitol/AM users could lose weight quickly and safely without dieting, claiming that their product works by surrounding fat producing foods and preventing them from forming into fat, subsequently flushing the excess fats out of the system. Energene/500 was sold as a "sensational energy pill" that provided instant energy without stress and improved the user's sexual performance.

Family Law Notes

Divorce American Style . . . Overseas

The following article was prepared by Major Mark E. Sullivan, USAR, who is a member of the American Bar Association's Standing Committee on Legal Assistance for Military Personnel. Major Sullivan is currently assigned as the Chief (IMA), Legal Assistance Section, Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, North Carolina.

"So why did the colonel fly back from Italy?" asked the judge in chambers to the lawyer representing the now-divorced Colonel Bullmoose after the hearing in court. The judge was taking a break after the morning's uncontested divorce docket in a small city in eastern North Carolina.

Colonel Bullmoose was stationed in Italy and all his domestic problems (except his final divorce) had been resolved by a well-drafted separation agreement that was fair to him, his wife, and the children. The next step was to file for divorce at once and conclude the matter as quickly as

possible. His first contact was with a legal assistance officer at brigade headquarters.

"We'd best retain a lawyer in North Carolina," said the young captain after a quick glance at the *All States Marriage and Divorce Guide.* "You already have grounds for divorce there—separation for more than one year with the intent to remain permanently separate and apart. What's more, North Carolina is where your wife and children are living and it's also your legal residence."

The Colonel was therefore referred to an attorney near his wife's residence in North Carolina. The lawyer wrote back to Colonel Bullmoose about the fee, the filing costs, and the documents to be signed, filed, and served on the wife. He sent the colonel a fee contract and told him that he would schedule a hearing for divorce within the next thirty days as the wife was willing to file an answer to the divorce complaint as soon as she was served.

Once the wife's answer was filed and the case docketed, the lawyer wrote Colonel Bullmoose about the date and time of the hearing, the questions he would be asked on the witness stand, and what to wear in court. Colonel Bullmoose's plane arrived on time and the lawyer met him at court for a smooth and straight forward hearing on an uncontested divorce.

"But why did the colonel fly back from Italy?" repeated the judge in chambers with a note of genuine curiosity in his voice. "Surely it must have cost him at least $1,000.00 for travel and lodging."

"Sure it did," replied the lawyer for Colonel Bullmoose, "but I had to have him here to testify. You know there can't be divorce by consent or collusion—we must present testimony."

"Of course I know that, I'm the judge!" came the response. "But that doesn't mean you need the colonel's in-court testimony. What about the other options?"

"Other options?" The lawyer was beginning to feel a bit uneasy. "What other options? I'm not sure I understand."

"Of course you do. You use them all the time in any other civil trial—why not in a divorce hearing?" The judge was now beginning to wax eloquent.

"Why didn't you call the wife as a witness? The Rules of Civil Procedure don't say that only the Plaintiff can establish the case by testimony. What about the Defendant? Surely you could have arranged for her to come to court this morning—a ten-minute drive—rather than have the good colonel fly all the way back here from Italy!"

"A good question, your honor," stammered the lawyer, "but I've got an answer for you. The wife is visiting relatives and will be away for the next two available court dates. The colonel wanted his divorce immediately after she filed her answer. In addition, the wife said that her religion would not allow her to go to court to obtain a divorce, even if it only means providing testimony so Colonel Bullmoose can be granted the divorce. So you see—I thought of that already and I'm way ahead of you. Of course, the colonel didn't want to pay all that money and take leave just to fly back here for an uncontested divorce hearing. But I had no alternative—we have to have *testimony* in a divorce case."

"Balderdash!" replied the judge. "We still haven't talked about *depositions*—surely you thought about that, counsellor."

"A deposition? Well, . . . not exactly. What are you getting at, your honor?" The lawyer began to feel as if a large hedgehog had just landed in his stomach to roost.

"Under the state Rules of Civil Procedure," said the judge, "the testimony of a witness—including a Plaintiff or Defendant—may be taken by deposition if the witness is more than 100 miles from the location of the trial or is outside the United States. You could have scheduled Colonel Bullmoose's deposition before a civilian court reporter overseas and served the notice of deposition on Mrs. Bullmoose with the complaint. The Rules allow telephone depositions, so you don't need to hire a lawyer in Italy—just make sure you have the witness *affirmed* instead of *sworn,* because you won't be able to tell by telephone whether or not there's a Bible under the Colonel's left hand at the other end of the line."

The judge went on to explain to the awestruck attorney that the reporter would transcribe the half-dozen routine questions and answers that make up the divorce hearing and would obtain the sworn signature of Colonel Bullmoose at the end of the typed transcript. Once the mailed transcript was received by the lawyer, he could go ahead and schedule the hearing, introducing the transcript as the Plaintiff's testimony in lieu of live testimony by the Plaintiff. For the cost of a deposition in front of a court reporter and an overseas call, the lawyer could have saved the colonel a much larger amount of money and the need for several days' leave time.

The point to the story, which is based on the actual experience of a certified family law specialist in Florida, is simple. Know the law or know how to research the question when you are discussing divorce procedures.

Sometimes you can get your client a divorce where he or she is stationed—whether in the United States of overseas. It will be necessary to check the laws of the jurisdiction to see if your client qualifies for divorce because of domicile or residence under the laws of the forum, and to be sure that the divorce will be considered valid in the state of domicile of each of the parties. Your office library should contain the necessary information about divorce under the laws of the local jurisdiction.

Next, check to see if the soldier or spouse is eligible for divorce in his or her state of domicile. Sometimes the process is faster, simpler, or less fault-oriented than in the jurisdiction where your client is presently stationed. Your best resource for this endeavor is TJAGSA's *All States Marriage and Divorce Guide.*

Finally, be careful to find out if there are ways of avoiding unnecessary travel and expense for your client, whether the Plaintiff or Defendant in the lawsuit. Check carefully with the retained civilian counsel for your client in such areas as depositions, use of summary judgment, and other techniques to cut down on expenses for personal appearances in divorce hearings.

The proceedings leading to a divorce judgment are getting to be more and more a simple matter of formality. This is especially true if the parties have settled all their disputes

and differences through a separation agreement and property settlement. All states now have a straightforward no-fault divorce procedure, based upon some period of separation or upon some standard of breakdown of the marriage (*e.g.*, "irreconcilable differences").

Do the right thing for your client. Go the "extra mile" and check out the prospects and procedures for that divorce—both here and there, at home or abroad. Know how to advise your client about "divorce American-style," even if he or she is overseas. That way, you will never have to answer the question, "So why did the colonel fly back from Italy?"

Claims Report

United States Army Claims Service

Increased Valuation of Personal Property Shipments

Since 1967, domestic personal property shipments have been "released" to commercial household goods carriers at a value of $.60 per pound, per article. Thus, if a soldier is paid $450.00 for a lost 100-pound TV by the command claims office, the government can recover only $60.00. This liability for loss or damage pays only a small fraction of the amount required to restore our soldiers' property to the condition it was in prior to shipment. Statistics from the U.S. Army Claims Service (USARCS) show that, in FY85, carrier's payments averaged only about twenty-three percent recoupment on the $36.5 million paid by the Army to soldiers for lost or damaged household goods. Equally important, at this rate of recovery there is little incentive for a carrier to provide the high quality of service that we should expect for our soldiers.

The military services have proposed increasing the released valuation for domestic personal property shipments. This increased valuation will make the carrier liable for loss or damage at the depreciated replacement cost or actual repair cost of each article, whichever is less, without regard to the weight of the article. Under this proposal, the government would recover $450.00 for the TV described above, which results in no loss to the government.

This proposal stems from a 1979 Air Force Inspector General management inspection conducted to examine problem areas concerning the shipment and storage of personal property within the Air Force. One of the findings from that inspection was that carrier liability for loss or damage occurring during shipment was inadequate. Liability had not changed for many years and did not cover increases in the cost of repair or replacement of damaged or lost goods.

Notwithstanding the government's release value, the Military Rate Tender offered by carriers for government personal property shipments contains a provision for increasing carrier liability for loss and damage. The option has been available for many years to *individual* soldiers *at their own expense.* This provision requires that the minimum increase from the standard valuation be a valuation of at least $1.25 per pound based on the total net weight of the shipment. Thus, on a shipment weighing 10,000 pounds, the declared value would be $12,500 and the carrier would be liable for up to that amount. The carrier charges $.50 per $100 of declared valuation for this coverage. The most important part of the distinction between this coverage and the standard release valuation is that the liability of the carrier on increased valuation shipments is no longer limited by the weight of the individual item. The carrier becomes liable for loss or damage at the depreciated replacement cost or actual repair cost of each article, whichever is less.

To determine if better service for military members or monetary savings to the government could be obtained from increasing the released valuation of personal property shipments, the Air Force ran a test. The program, named Project REVAL, was approved for the period from 1 June until 30 November 1981. During that period, all Air Force members moving within the United States were offered the option of receiving an increased released valuation for their shipment. The Air Force paid for the cost of the increased minimum valuation, and in return, participating members agreed to file any claims arising from the shipment within forty-five days of delivery. This voluntary reduction from the statutory two-year period for filing claims was instituted to speed up the recovery of claims information for analysis of the test.

To compare the results of both standard and increased valuation shipments, transportation and claims data was collected for both REVAL and Non-REVAL shipments moving during the exact same period of time. All Air Force claims information and a total of 12,252 rated REVAL transportation documents from origin transportation offices throughout the United States were analyzed. The analysis determined that the Air Force paid Non-REVAL shippers an average of $2.47 in claims for every 100 pounds moved, and recovered $.92 of that amount from the responsible carriers. The claims cost of Non-REVAL was, therefore, $1.55 per hundredweight (CWT). As anticipated, the REVAL program reflected much better results. The Air Force paid REVAL shippers an average of $1.64 in claims for every 100 pounds moved, and recovered $1.28 per CWT of that amount. This made the claims cost $.36 per CWT. After adding the increased valuation charge of $.74 per CWT, the total claims-related cost was $1.10 per CWT. It is interesting to note that, even if the average claims payment for REVAL shipments had risen to the Non-REVAL level, the improved recovery rate would have compensated for the cost of the coverage.

The Air Force found that the claims payments to members on REVAL shipments were thirty-four percent less than the payments on Non-REVAL movements, and it appeared that REVAL shipments received significantly less loss or damage than did Non-REVAL shipments. As the data for both groups was taken from the same time period, the difference could not be attributed to the effects on service of changing seasonal shipment volumes. The carriers selected to move REVAL shipments were chosen in the same low-rate manner as Non-REVAL shipments. Also, REVAL's better showing was not due to a group of select carriers giving preferred service to those shipments. The most likely explanation appears to be that REVAL shipments received better care from all carriers due to the carriers' awareness of their greater liability for any loss or damage incurred during shipment.

This analysis demonstrated the dollar savings to the government from REVAL; it did not address the issue from the viewpoint of the individual service member. In an attempt to determine any change in member satisfaction due to Project REVAL, a survey was mailed to members of both groups (REVAL and Non-REVAL). A total of 540 forms were mailed, and 301 were returned; of those returned, 160 were REVAL and 141 were Non-REVAL.

Five major areas were examined in the survey: the percentage of shipments with loss or damage; the percentage of shipments with pilferable items lost; the amount of damage compared to previous shipments; the perception of care compared to previous shipments; and overall satisfaction with the move. REVAL ratings were better than those of Non-REVAL shippers in every category. There was, however, a very significant difference in the amount of damage category. In that category, there was an almost 100% confidence level that members felt they received less damage on the REVAL shipment than on Non-REVAL moves.

The results from Project REVAL indicated that an increased released valuation for personal property shipments will eventually result in savings for the government. It must be emphasized, however, that the protection offered by increased valuation only applies to domestic shipments, including storage in transit, and does not apply to nontemporary storage. If increased valuation proves a success for domestic shipments, similar protection should then be tested for overseas shipments.

While the implementation of increased valuation on a full-time basis will be a plus for the soldier and the Army, there will be an added demand placed upon all claims offices. The carrier industry will be even more concerned that our adjudications for lost or damaged property are fair and reasonable. Much, if not all, of their profit margin under increased valuation will depend on keeping their claims costs to a minimum, and we can anticipate many challenges to our adjudication system. It will be essential for adjudicators to strictly follow established procedures. Pre-existing damage to household goods must be noted and properly evaluated. Depreciation schedules must be used accurately and interpreted in a fair manner. The most important procedure, however, is the use of proper documentation. Notes on the adjudicated DD Form 1844 must be accurate and detailed. Where unusual circumstances exist, they must be carefully noted in a memorandum for record and attached to the form. Everyone in the claims system needs to rededicate themselves to quality adjudication and professional management in order to maintain this big plus with the implementation of the increased valuation system.

The estimated annual cost to the Army for increased valuation is $2.1 million. The savings in reduced costs for claims through carrier reimbursement will be substantial. The Deputy Chief of Staff For Personnel has concurred in this proposal and approved the budget authorization for increased valuation, with an implementation date of 1 May 1987. The Commander, Military Traffic Management Command has been requested to implement this increased valuation proposal. After almost twenty years, $.60 per pound, per article, may be laid to rest. Claims personnel must be prepared to meet this new challenge in an effective, professional manner.

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 tip concerns providing appropriate assistance to our soldiers. This tip was published elsewhere, but it is of sufficient importance to warrant being repeated.

Soldiers have a right to file a claim for loss or damage to their household goods when transported on PCS orders. Some commercial companies are advertising a service to aid soldiers in preparing claims against the United States for loss and damage to items during a move. They charge a fee for this, which the law limits to ten percent of the payment of the claim. The personnel at your claims office do not charge a fee and stand ready to provide all the assistance you need to file a claim for damage or loss as a result of a move.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Reserve Component Judge Advocate Study

In May 1986, The Judge Advocate General ordered a broad study of the JA Reserve Component Program. In August 86, five study committees composed of Reserve and Active Force JAs were established. The committees, chairpersons, and general topical areas are as follows:

COMMITTEE: The Judge Advocate General Services Organization (JAGSO) Committee

CHAIRPERSON: Colonel Bryan S. Spencer
Staff Judge Advocate
HQ, Fifth U. S. Army
ATTN: AFKB-JA
Fort Sam Houston, TX 78234
(512) 221-2208/4329
AUTOVON 471-2208/4329

TOPICAL AREA: Evaluation of the JAGSO structure and concept with exploration of alternatives. Validity of the JAGSO concept, its design, configuration, CAPSTONE alignments, and mobilization and peacetime missions. Total Army Analysis (TAA) and need for adjustment of JAGSO strength.

COMMITTEE: Reserve Component Judge Advocate Training Committee

CHAIRPERSON: Colonel Leroy R. Foreman
Staff Judge Advocate
HQ, FORSCOM
ATTN: AFJA
Fort McPherson, GA 30330
(404) 752-2262/2453
AUTOVON 588-2262/2453

TOPICAL AREA: Examination and evaluation of Reserve Component judge advocate training with a review of all modes of training to include AT, IDT, ODT, and Mutual Support Examination will be made of the effectiveness of these modes vis-a-vis CAPSTONE and other mobilization requirements. Other areas of examination will include feasibility and extent of use of RC JAs in support of the Active Component mission, *e.g.* mutual support, standardized training, the role of Active Component judge advocates, and training detractors/impediments.

COMMITTEE: USAR Judge Advocate Technical Chain of Command Committee

CHAIRPERSON: Colonel Peter J. Kane
Staff Judge Advocate
HQ, Second U. S. Army
ATTN: AFKD-JA
Fort Gillem, GA 30050
(404) 362-3843/3344
AUTOVON 797-3343/3344

TOPICAL AREA: Evaluation of the existing technical chain of command relationship between OTJAG, GRA/TJAGSA, FORSCOM, CONUSAs, ARCOMs and JAGSOs to determine effectiveness/shortcomings, and to make recommendations for improvements.

COMMITTEE: Reserve Component Judge Advocate Brigadier Generals Mission Statement Committee

CHAIRPERSON: Colonel Benjamin A. Sims
Director
Judge Advocate Guard and Reserve Affairs Department
The Judge Advocate General's School
Charlottesville, Virginia 22903-1781
(804) 293-6121/6122
AUTOVON 274-7110, ext. 293-6121/6122

TOPICAL AREA: Identification of missions appropriate to each of the Reserve Component Brigadier General Officers and clarification of specific tasks included within the mission statements.

COMMITTEE: Army National Guard Committee

CHAIRPERSON: To be determined.

TOPICAL AREA: Two committees were proposed to study and discuss distinctly unique National Guard areas of interest. Because such proposals require coordination with the National Guard Bureau, committee membership and chair personnel have not been finalized at this time. Once coordination has been made between the Chief, National Guard Bureau and The Judge Advocate General of the Army, the committees will proceed on generally the same schedule as the USAR study committees.

These committees will pursue their topical areas of study during the next several months, with final reports due in May 1987. Interested persons are invited to send comments and suggestions to the appropriate committee chairperson. It is expected that the study will have a major impact on the RC judge advocate program.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 928-1304).

2. TJAGSA CLE Course Schedule

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).

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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: Chief Legal NCO 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

January 1987

11–16: NJC: Traffic Court Proceedings, Las Vegas, NV.

11–16: NJC: Advanced Computers in Courts, Las Vegas, NV.

12–13: PLI, Investment Companies—New Directions, New York, NY.

15–16: PLI, Advanced Litigation Workshop for Legal Assistants, San Francisco, CA.

15–16: PLI, Advanced Antitrust: Distribution & Marketing, Los Angeles, CA.

15–16: PLI, Domestic & Foreign Technology Licensing, New York, NY.

15–16: PLI, Preparation of Annual Disclosure Documents, Atlanta, GA.

15–16: PLI, Real Estate & the Bankruptcy Code, San Francisco, CA.

19–20: PLI, Environmental Problems & Business Transactions, San Francisco, CA.

29–30: PLI, Current Problems in Federal Civil Practice, San Francisco, CA.

29–30: PLI, Domestic & Foreign Technology Licensing, San Francisco, CA.

29–30: PLI, Preparation of Annual Disclosure Documents, New York, NY.

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.

Current Material of Interest

1. Back issues of the *Military Law Review* and *The Army Lawyer*

Back issues of the *Military Law Review* and *The Army Lawyer* are now available. Limited quantities of the following issues of the *Military Law Review* are available: 46, 47, 51, 52, 54, 61, 62, 65, 66, 69, 71, 72, 74, 75, 79, 81, 82, 84, 87, 89, 90, 93, 94, 95, 107, 108, 109, 110, 111, 112, and 113. There are a few copies of *The Army Lawyer* from 1971 to 1982, as well as copies of all issues from 1983 to the present.

Back issues are available to all Active Army law libraries, as well as individual Active Army, National Guard, and US Army Reserve officers. Chief Legal NCOs or Legal Administrators should prepare a request list for their offices that should be consolidated to include office and individual requests. Individual Mobilization Augmentee officers must make their own requests. Forward requests to the The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. Postage will be paid by TJAGSA. Telephone requests will not be accepted.

Requests will be filled on a first come, first served basis. All requests must be received by 15 February 1987. After that time, excess back issues will be disposed of.

2. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

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

Contract Law

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

Legal Assistance

AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS-ADA-83-1 (379 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS-ADA-86-8 (183 pgs).
AD-B100233	Model Tax Assistance Program/ JAGS-ADA-86-7 (65 pgs).
AD-B100252	All States Will Guide/JAGS-ADA-86-3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS-ADA-85-7 (355 pgs).
AD-B094235	All-States Law Summary, Vol II/ JAGS-ADA-85-8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS-ADA-85-9 (226 pgs).

Claims

AB087847	Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).

Administrative and Civil Law

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

AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).
AD B100235	Government Information Practices/ JAGS-ADA-86-2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS-ADA-86-1 (298 pgs).
AD B087850	Defensive Federal Litigation/ JAGS-ADA-86-6 (377 pgs).
AD B100756	Reports of Survey and Line of Duty Determination/JAGS-ADA-86-5 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management (146 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS-DD-84-2 (38 pgs.)

Criminal Law

AD B100238	Criminal Law: Evidence I/ JAGS-ADC-86-2 (228 pgs).
AD B100239	Criminal Law: Evidence II/ JAGS-ADC-86-3 (144 pgs).
AD B100240	Criminal Law: Evidence III (Fourth Amendment)/JAGS-ADC-86-4 (211 pgs).
AD B100241	Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS-ADC-86-5 (313 pgs).
AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
AD 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.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 55-355	Defense Traffic Management Regulation		31 Jul 86
AR 135-2	Full-Time Support Program		6 Aug 86
AR 140-120	Medical Examinations		31 Jul 86
AR 600-8	Military Personnel Operations		1 Aug 86
AR 600-20	Army Command Policy and Procedure		20 Aug 86
CIR 310-86-4	Distribution Restriction Statement and Destruction Notices		15 Aug 86
DA Pam 420-9	Installation Commander's Executive Guide to Directorate of Engineering and Housing Operations		4 Aug 86
DA Pam 525-14	Joint Operational Concept for Air Base Ground Defense		Jul 86
DOD Index	DOD Index		30 Jun 86
FM 21-20	Physical Fitness Training		Aug 85

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Boyd, *Who Pays for Superfund Cleanups at DOD-Owned Sites?*, 2 Nat. Resources & Env't 11 (1986).

Brennan, *In Defense of Dissents*, 37 Hastings L.J. 427 (1986).

Brown, *Enforcing Child and Spousal Support Obligations of Military Personnel*, Cal. Law., Aug. 1986, at 49.

Geldon, *Government Contract Law*, Case & Com., July-Aug. 1986, at 27.

Graham, *Evidence and Trial Advocacy Workshop: Expert Witness Testimony—Disclosure of Basis*, 22 Crim. L. Bull. 360 (1986).

Graham, *Evidence and Trial Advocacy Workshop: Expert Witness Testimony; Basis of Opinion Testimony "Reasonable Reliance"*, 22 Crim. L. Bull. 252 (1986).

Gregory, *Voice Spectrography Evidence: Approaches to Admissibility*, 20 U. Rich. L. Rev. 357 (1986).

Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

Jones, *The Rights to Marry and Divorce: A New Look at Some Unanswered Questions*, 63 Wash. U.L.Q. 577 (1985).

Marcus, *The Entrapment Defense and the Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses*, 22 Crim. L. Bull. 197 (1986).

Miner, *Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y.L. Sch. L. Rev. 757 (1985).

Quigley, *Parachutes at Dawn: Issues of Use of Force and Status of Internees in the United States-Cuban Hostilities on Grenada, 1983*, 17 U. Miami Inter-American L. Rev. 199 (1986).

Schwartz, *Patients' Right To Refuse Treatment: Legal Aspects, Implications and Consequences*, 32 Med. Trial Tech. Q. 430 (1986).

Westenberg, *The Safety Belt Defense at Trial and in Out-of-Court Settlements*, 37 U. Fla. L. Rev. 785 (1985).

Youngblood, *The Constitutional Right to a Speedy Trial*, Case & Com., July–Aug. 1986, at 12.

Note, *Justice Sandra Day O'Connor: Trends Toward Judicial Restraint*, 42 Wash. & Lee L. Rev. 1185 (1985).

Comment, *The Constitutionality of Federal Income Taxation of Interest Earned on State Municipal Bonds*, 50 Alb. L. Rev. 55 (1985).

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