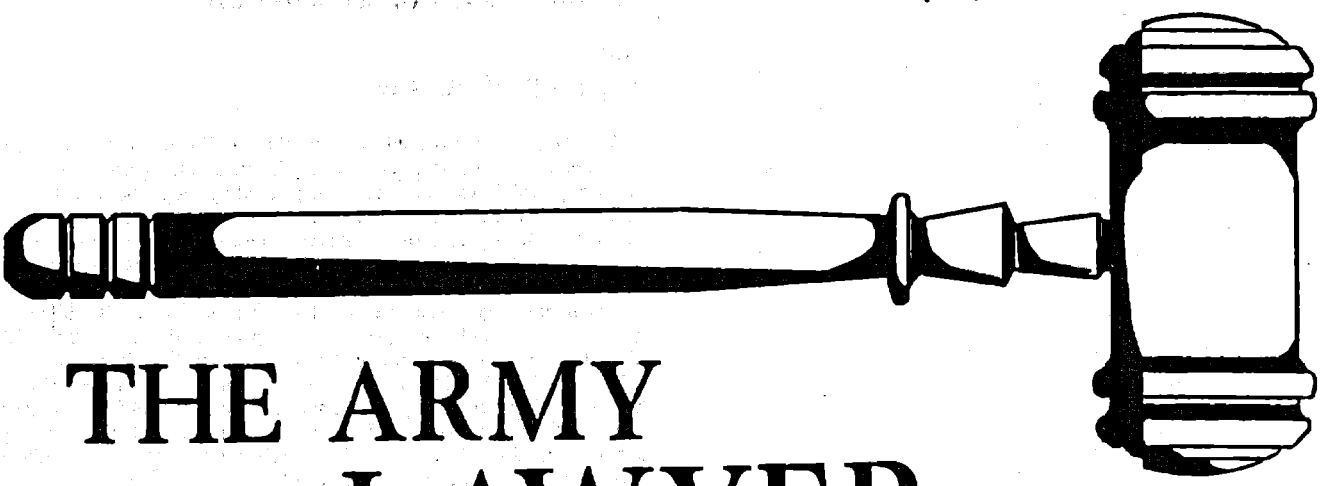
CPT O'K



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet
27–50–167

November 1986

Table of Contents

The Army Lawyer (ISSN 0364–1287)

Editor
Captain David R. Getz

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

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and the Uniform System of Military Citation (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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

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

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

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

By Order of the Secretary of the Army:

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

Official:

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

Distribution. Special.

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

REPLY TO
ATTENTION OF

JACS-Z

30 SEP 1986

SUBJECT: Tort Claims Management - Policy Letter 86-10

STAFF AND COMMAND JUDGE ADVOCATES

Effective management of tort claims against the United States is one way to minimize tort liability and conserve scarce fiscal resources. Each staff and command judge advocate should--

a. Ensure adequate staffing. Avoid policies that result in only new officers being assigned claims duties or limit the duration of claims assignments to less than a year.

b. Support your claims judge advocate by providing travel funds for investigations and negotiations with civilian lawyers; funds for expert opinions; and, if possible, an NCO investigator.

c. Review the status of pending tort claims monthly with the claims judge advocate, to ensure aggressive investigations and regular communications with the US Army Claims Service (USARCS) tort claims attorney servicing your geographical area.

d. Request USARCS assistance visits as needed.

e. Coordinate with the local hospital commander to facilitate early investigation of actual or potential medical malpractice claims. An MOU can help establish a close working relationship.

f. Coordinate with off-post supported organizations, such as Reserve and NG units, ROTC units, recruiting stations, and DOD entities, to ensure prompt reporting and investigation of potential claims incidents.

g. Be alert to current or proposed command activities and events which could create tort claim exposure and include claims judge advocates in the staff advice process to comment on tort liability aspects.

Hugh Overholt

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

Beginning with this letter, TJAG Policy Letters will be distributed only in The Army Lawyer. *This method is more cost-effective than other means of distribution.*

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

REPLY TO ATTENTION OF

DAJA-ZA

2 October 1986

SUBJECT: Encouraging Reserve Component Participation by Officers Leaving Active Duty - Policy Letter 86-11

STAFF AND COMMAND JUDGE ADVOCATES

1. Over 60% of the authorized strength of the Judge Advocate General's Corps is in the Reserve Components. The ability of the Corps to meet its wartime missions depends on maintaining that strength with capable, experienced judge advocates.

2. The ideal candidates for Reserve Component positions are the officers with active duty experience. Because these officers have the training and ability to be valuable assets to the Reserve Component JAGC, we need to intensify our effort to retain them as active participants in the Army National Guard or Army Reserve.

3. The staff judge advocate or the equivalent senior command legal counsel will personally meet with each officer scheduled for release from active duty to discuss service in the Reserve Components. Enclosed is a brief outline of the salient aspects of Reserve Component service (Enclosure 1). This outline should be used as a basis for your discussion with separating officers.

4. A report of the results of each interview will be forwarded to The Judge Advocate General's School, ATTN: JAGS-GRA, Charlottesville, Virginia 22903-1781, not later than three months prior to the officer's release from active duty (Enclosure 2). This report will be used to assist officers in locating available unit or Individual Mobilization Augmentee positions.

5. Additionally, a summary of the key points of interest concerning Reserve Component participation is provided in Enclosure 3, Reserve Component Information For Judge Advocates Leaving Active Duty. This enclosure should be posted on the office bulletin board or periodically routed to all officers. A copy of the handbook, "A Career in the Reserve Components," is also enclosed for your use and dissemination to separating officers (Enclosure 4). Additional copies can be obtained by returning the enclosed order form or by calling The Judge Advocate General's School, Guard and Reserve Affairs Department at (804) 293-6121 (commercial), or AUTOVON 274-7110 (ask for 293-6121).

Hugh Overholt

5 Encls

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

The Military, Religion, and Judicial Review: The Supreme Court's Decision in *Goldman v. Weinberger*

Major Thomas R. Folk, USAR

Recently, in *Goldman v. Weinberger*,[1] the United States Supreme Court held that the first amendment, United States Constitution, does not require the military to allow an Orthodox Jew to wear his yarmulke while on duty and in uniform. In some respects, the Court's holding in *Goldman* is quite unremarkable. It certainly is consistent with longstanding jurisprudence refusing to find religion-based exemptions from general military requirements[2] and according great deference to internal military decisions.[3] And, the *Goldman* decision leaves entirely intact the procedures of the Departments of Defense and Army for evaluating requests for religious accommodation[4] that were recently established following an extensive study of the issue.[5] Nonetheless, *Goldman* may have some important implications for future cases involving attempts to obtain judicial review of internal military decisions. This article briefly discusses the *Goldman* decision and some of its possible implications.

The *Goldman* Case

Facts of the Case

Goldman involved a first amendment challenge to Air Force regulations that did not permit wear of the yarmulke[6] while in uniform. The plaintiff, S. Simcha Goldman, was an Orthodox Jew and an ordained rabbi. In 1973, he entered the Armed Forces Health Professions Scholarship Program and studied psychology in a civilian school while on an inactive reserve status in the Air Force. Upon graduation, Goldman came on active duty as a commissioned officer to fulfill his scholarship obligation. He served as a clinical psychologist at the mental health clinic of an Air Force base.

Goldman wore his yarmulke while in uniform for several years without being ordered to remove it. He avoided controversy by keeping to the health clinic while indoors and wearing his service cap while outdoors. But in 1981, Goldman wore his yarmulke at a court-martial, and the trial counsel lodged a complaint with Goldman's commander. Goldman's commander advised Goldman that wear of the yarmulke while on duty violated Air Force uniform regulations and ordered him not to wear it outside the hospital. Later, after Goldman's lawyer protested, Goldman's commander extended the order to the hospital. When Goldman failed to obey the order, his commander issued a formal letter of reprimand and withdrew a recommendation to approve Goldman's application to extend his tour of active duty. Goldman then sued in the United States District Court for the District of Columbia, claiming that application of Air Force uniform regulations to prevent him from wearing his yarmulke violated his right to free exercise of religion under the first amendment.[7]

The District Court Decision

The district court granted Goldman a temporary restraining order and later a preliminary injunction prohibiting the Air Force from enforcing its uniform regulations to prevent Goldman from wearing his yarmulke while in uniform during the pendency of the litigation.[8] Following a trial on the merits, the district court held that application of Air Force uniform regulations to wear of the yarmulke violated the free exercise clause.[9]

In reaching this result, the court applied a balancing test purportedly derived from the Supreme Court case of *Rostker v. Goldberg*.[10] The district court acknowledged that, according to the testimony of Major General William Usher, the Director of Personnel Plans at Headquarters, Department of the Air Force, the Air Force regarded its uniform regulation as essential to the accomplishment of its military mission. The court also recognized that this military judgment was "based upon the experience of the Air Force in times of peace and in times of war."[11] But the court rejected this professional military judgment as far as wear of the yarmulke was concerned because it was not "the product of an empirical study, psychological study or the like."[12] Moreover, without basing its own judgments on any like studies, the court concluded that making religion-based exceptions to the Air Force uniform regulation "will not adversely affect the ability of the Air Force to carry out its mission" and "may enhance the effectiveness of the Air

---

[1] 106 S. Ct. 1310 (1986). For a further analysis of *Goldman*, see O'Neil, *Civil Liberty and Military Necessity—Some Preliminary Thoughts on* Goldman v. Weinberger, 113 Mil. L. Rev. 31 (1986).

[2] *See* Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 55–62 (1982).

[3] *Id.* at 75–79. *See also* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1 (1975).

[4] Dep't of Defense Directive No. 1300.17, Accommodation of Religious Practices within the Military Services (June 18, 1985) [hereinafter DOD Directive 1300.17]; Dep't of Army, Reg. No. 600–20, Personnel-General—Army Command Policy and Procedures, paras. 5–33 to 5–42 (20 Aug. 1986) [hereinafter AR 600–20].

[5] Department of Defense Joint Service Study Group on Religious Practice, Joint Service Study on Religious Matters (March 1985) [hereinafter Joint Service Study]. *See also* Folk, *Religion and the Military: Recent Developments*, The Army Lawyer, Dec. 1985, at 6.

[6] A yarmulke is a small religious skullcap worn by religious tradition by some male members of the Jewish faith.

[7] *See Goldman*, 106 S. Ct. at 1312.

[8] 530 F. Supp. 12 (D.D.C. 1981).

[9] 29 Empl. Prac. Dec. (CCH) ¶ 32,753 (D.D.C. Apr. 26, 1982).

[10] 453 U.S. 57 (1981), *cited in* 29 Empl. Prac. Dec. (CCH) ¶ 32,753, at 25,541.

[11] 29 Empl. Prac. Dec. (CCH) ¶ 32,753, at 25,540.

[12] *Id.* at 25,541.

Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution."[13]

The Court of Appeals Decision

The United States appealed the district court's decision, and the United States Court of Appeals for the District of Columbia reversed.[14] The court initially concluded that the appropriate test when a military regulation clashes with a fundamental right is neither a strict scrutiny nor a rational basis analysis. Rather, it held that the military regulation must be examined to determine whether "legitimate military ends are sought to be achieved," and whether the regulation is "designed to accommodate the individual right to any appropriate degree."[15] The court also acknowledged that the Air Force's judgment concerning the importance of maintaining uniform standards of appearance "was in the area of military governance on which military expertise is high and on which judicial competence is low."[16]

The court concluded, therefore, that it owed a high degree of deference to the Air Force's judgment. Further, the court noted that while the military's specification of uniform headgear was necessarily arbitrary, "enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience."[17] Accordingly, out of deference to military judgment that religion-based exceptions to the Air Force uniform regulation would undercut the values of strict uniformity and cause resentment by other service members, the court upheld the Air Force's refusal to make an exception to its uniform requirements for wear of the yarmulke.[18]

The Supreme Court

The Supreme Court subsequently granted certiorari and on March 25, 1986, affirmed the court of appeals in a 5–4 decision.

The Majority Opinion. The majority opinion, written by Justice Rehnquist, focused on several of the predominant themes present in prior Supreme Court cases involving judicial review of internal military decisions.

The first theme the majority opinion emphasized was the far more deferential constitutional test applied to military regulations challenged on first amendment grounds than applied to similar civilian laws or regulations challenged on a like basis. The majority opinion expressly rejected application in the military context of the "strict scrutiny" standard for evaluation of civilian free exercise challenges[19] adopted by the Supreme Court in *Sherbert v. Verner.*[20] But the opinion never expressly stated what test is to apply. The majority opinion appeared to imply that, at least when a challenged military regulation applies to an area of professional military judgment, it will be upheld against a first amendment challenge if applied "reasonably" and "even-handedly."[21] This test appears implicit from the majority opinion's holding, which stated: "[W]e hold that those portions of the regulations challenged here reasonably and even-handedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict religious beliefs."[22]

This aspect of the court's opinion rested on a long line of cases that have recognized that military society differs fundamentally from civilian society, particularly in its needs to "foster instinctive obedience, unity, commitment and esprit de corps" and that constitutional rights thus necessarily apply differently in military society than in civilian society.[23]

The second theme the majority opinion emphasized was that courts "must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[24] This aspect of the majority opinion focused on factual determinations rather than the particular constitutional test to be applied. The Court grounded this aspect of its opinion on the military's far greater expertise concerning the impact upon discipline that various encroachments on military authority might have, and on separation of powers concerns as the Constitution commits the Nation's military policy to the executive and legislative branches.[25] The majority opinion is perhaps more explicit on this point than any past Supreme Court decision. It notes in part: "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."[26]

The Concurring Opinion of Justice Stevens. Three of the majority who joined in Justice Rehnquist's opinion also joined together in a concurring opinion authored by Justice Stevens.[27] The concurring opinion recognized that

[13] *Id.* at 25,540.

[14] Goldman v. Secretary of Defense, 734 F. 2d 1531 (D.C. Cir. 1984).

[15] *Id.* at 1535–1536.

[16] *Id.* at 1539.

[17] *Id.* at 1540.

[18] *Id.* at 1541.

[19] 106 S. Ct. at 1312.

[20] 374 U.S. 398, 406 (1963).

[21] 106. S. Ct. at 1314.

[22] *Id.*

[23] *Id.* at 1313 (citing, *e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983); Schlesinger v. Councilman, 420 U.S. 738 (1975); Parker v. Levy, 417 U.S. 733 (1974); Orloff v. Willoughby, 345 U.S. 83 (1953)).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1314.

[27] *Id.*

Goldman presented "an especially attractive case for an exception from the uniform regulations."[28] Nonetheless, the concurring opinion appears implicitly to endorse a reduced level of constitutional scrutiny almost akin to a rational basis test.[29] A concern voiced in the concurring opinion not expressed at length by the majority is the interest in uniform or neutral treatment of service members of all religious faiths. The concurring opinion noted that the uniform rule challenged by Goldman was: "[B]ased on a neutral, completely objective standard—visibility. It was not motivated by hostility against, or any special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule."[30]

The Dissenting Opinion of Justice Brennan. Justice Brennan wrote a lengthy dissenting opinion joined in by Justice Marshall.[31] Justice Brennan's dissent complained that the majority had eliminated "in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel."[32] He characterized the majority opinion as adopting "a sub-rational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.' "[33] Justice Brennan's opinion indicated his belief, expressed in some of his prior dissents, that a strict scrutiny analysis should apply to first amendment challenges to military regulations.[34] Finally, Justice Brennan's dissenting opinion criticized the conclusion in Justice Steven's concurring opinion that the military's distinction between visible and nonvisible religious apparel furthered the goal of uniform or neutral treatment of members of all religious faiths. To Justice Brennan, the neutrality achieved by this distinction was "illusory" and resulted in favoring majority religions over minority faiths.[35]

The Dissenting Opinion of Justice Blackmun. Justice Blackmun wrote his own separate dissent.[36] He agreed with the majority "that deference is due the considered judgment of military professionals that, as a general matter, standardized dress serves to promote discipline and esprit de corps."[37] He also agreed that the Air Force had a strong interest in avoiding "serious problems of equal protection and religious establishment" caused by having to choose what religion-based exceptions to the uniform would be granted if it abandoned an objective standard of visibility.[38] Where Justice Blackmun disagreed with the majority was that he believed the Air Force "simply has not shown any reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticably impair the overall interests of the service."[39]

The Dissenting Opinion of Justice O'Connor. Justice O'Connor wrote her own separate dissent in which Justice Marshall joined.[40] Her opinion criticized the majority for failing to balance Goldman's free exercise interest against the military interest in uniformity. Her dissent noted "no test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity."[41] Justice O'Connor would have applied the same kind of strict scrutiny test applicable to the civilian context to first amendment free exercise claims in the military.[42] Under her view of this strict scrutiny test, the government would have to show two things to reject a free exercise claim: an unusually important interest at stake; and that granting the requested exception will do substantial harm to that interest.[43] While agreeing that the need for military discipline and esprit de corps was "unquestionably an especially important governmental interest," Justice O'Connor's dissent emphasized her belief that granting an exemption of the type requested by *Goldman* "would do no substantial harm to military discipline and esprit de corps."[44]

Goldman's Implications For Religious Practices in the Military

Goldman really changes little in the area of religious practices in the military. Throughout our nation's history, the military, as a matter of legislative and executive grace, has done a great deal to accommodate religious practices. Perhaps the two best known examples are the military

---

[28] *Id.*

[29] The concurring opinion notes:

> Because professionals in the military service attach great importance to that plausible interest [in uniformity itself rather than uniformity for functional, health or safety reasons] it is one that we must recognize as legitimate and rational, even though personal experience or admiration for the rag-tag band of soldiers that won us our freedom in the Revolutionary War might persuade us that the government has exaggerated the importance of that interest.

Id. at 1315–16.

[30] *Id.* at 1316.

[31] *Id.*

[32] *Id.* at 1317.

[33] *Id.*

[34] *Id.* at 1318.

[35] *Id.* at 1321.

[36] *Id.* at 1322.

[37] *Id.* at 1323.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1324.

[41] *Id.*

[42] *Id.* at 1325.

[43] *Id.* at 1325–26.

[44] *Id.*

chaplaincy[45] and exemption of conscientious objectors from compulsory military service.[46] The most recent example is the adoption by the Department of Defense on June 18, 1985 of DOD Directive No. 1300.17, Accommodation of Religious Practices within the Military Services. At the same time, courts have generally refrained from finding a constitutional right to religion-based exceptions to general military requirements, whether to compulsory military service,[47] duty on the sabbath,[48] immunizations,[49] saluting,[50] or uniform and appearance standards.[51]

While *Goldman* continues this general tradition, it does not preclude all meaningful judicial review of religion-based challenges to military requirements. In particular, five types of religion-based challenges to military practices appear to remain open to serious judicial review: religion-based discrimination; according less accommodation to religious practices than to similar secular practices; compulsory participation in religious activities; violation of regulations involving mandatory religious exemptions; and military requirements unrelated to discipline or to other military requirements that are the subject of professional military judgment.

The *Goldman* majority at least implicity leaves the door open to judicial challenges to religion-based discrimination by suggesting "evenhandedness" as one criteria for evaluating permissibility of military actions against free exercise claims.[52] And neutrality among religious sects is perhaps the primary concern of the three Justices who joined in the concurring opinion.[53] Moreover, neutrality among religious sects is perhaps one of the central values of the religion clauses of the first amendment.[54] Thus, challenges to religion-based discrimination should remain open to judicial review.[55] For example, in *Wilkins v. Lehman*,[56] a district court preliminarily enjoined separation of a Navy chaplain who had been considered and not selected for promotion by a chaplains' promotion board having denominational quotas. Specifically, the Navy required chaplains' promotion boards to include at least two Roman Catholic chaplains in order to give Catholics representation on the boards proportionate to their representation in the Navy. The *Wilkins* court noted that the Navy's policy "may be an excessive government entanglement with religion" and indicated there was "a substantial probability that the composition of the Chaplain Corps Selection Board . . . will be found to be . . . in violation of the Establishment Clause of the First Amendment."[57] The same result appears to obtain after the Supreme Court's decision in *Goldman*.

Similarly, the *Goldman* majority's requirement of "evenhandedness" and "reasonableness" would leave open to challenge refusal by the military to make at least the same accommodations for religious practices as for comparable nonreligious practices, absent legitimate establishment clause concerns.[58] For example, a military commander's allowing service members to have a card game or social discussion in the barracks or dining facility during off duty time but refusing to allow a similar religious activity or discussion could remain open to first amendment challenge and serious judicial review following *Goldman*.

Neither does *Goldman* preclude meaningful judicial review of challenges to compulsory participation in religious activities by service members. On one hand, such compulsory participation would appear to lack the "evenhandedness" and "reasonableness" the majority opinion implicitly required in *Goldman*. On the other hand, compulsory participation in religious services implicates perhaps the most basic of first amendment values under the religion clauses—voluntariness.[59] Thus, compulsory chapel attendance, such as that struck down in *Anderson v. Laird*,[60] appears to remain invalid and subject to judicial review.

The military's violation of its own regulations has also been an area traditionally open to judicial review in appropriate cases. There are a number of mandatory military regulations dealing with religion, including ones prohibiting discrimination based on religious belief,[61] allowing conscientious objector status,[62] allowing service members some options regarding immunizations and surgery,[63] and allowing certain deviations from uniform and appearance

---

[45] *See* Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

[46] *See* Folk, *supra* note 2, at 56–61.

[47] *E.g.*, Gillette v. United States, 401 U.S. 437 (1971).

[48] United States v. Burry, 36 C.M.R. 829 (C.G.B.R. 1966).

[49] United States v. Chadwell, 36 C.M.R. 741 (N.B.R. 1965).

[50] United States v. Cupp, 24 C.M.R. 565 (A.F.B.R. 1957).

[51] *E.g.*, Sherwood v. Brown, 619 F.2d 47 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980). *But see* Geller v. Secretary of Defense, 423 F. Supp. 16 (D.D.C. 1976).

[52] 106 S. Ct. at 1314.

[53] *Id.* at 1316.

[54] *See, e.g.*, Walz v. Tax Commission, 397 U.S. 664, 669–70 (1970).

[55] There may be rare occasions, however, when even claims of invidious discrimination may be wrapped up in such a far ranging challenge to internal military decisions that judicial review is inappropriate. *See, e.g.*, Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983).

[56] Civil No. 85-3031-6T (IEG) (S.D. Cal. Feb. 10, 1986) (order issuing preliminary injunction).

[57] *Id.*, slip op. at 9–10.

[58] Of course, courts must evaluate establishment clause concerns in the special military context, and consider the modified establishment clause test announced in *Katcoff v. Marsh*.

[59] *E.g.*, Zorach v. Calusen, 343 U.S. 306 (1952).

[60] 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) (mandatory chapel attendance at service academies held to violate first amendment).

[61] *E.g.*, Dep't. of Army, Reg. No. 600-21, Personnel—General—Equal Opportunity Program in the Army, paras. 2-1, 2-5*d* (1 Jan. 1984).

[62] *E.g.*, 32 C.F.R. Pt. 75 (1986).

[63] *E.g.*, AR 600-20, para. 5-39.

standards.[64] Challenges to violations of the mandatory provisions of these regulations appear equally as open to judicial review after *Goldman* as before.

Finally, the great deference *Goldman* accords professional military judgment appears limited implicitly to areas where professional military judgment applies. Uniformity of service members certainly is one of these areas. These areas of course would include a great number of other activities and practices related to military training, operational requirements, discipline, morale, and esprit de corps. Nonetheless, some military requirements would clearly appear to be outside the area of professional military judgment. In particular, military regulations pertaining to the military's role as government and landlord for various military communities that include civilians, and to off duty activities by service members, would at times appear not to involve professional military judgment and thus may remain open to serious judicial review after *Goldman*.

Goldman's Implications for Future Cases Seeking Judicial Review of Military Decisions

The Supreme Court's decision in *Goldman* has general implications beyond the area of religious practices in the military. As the Supreme Court's most recent word on judicial review of internal military decisions, *Goldman* can be expected to shape lower court responses to challenges to military decisions for years to come. This is especially true because the constitutional challenge in *Goldman* involved free exercise of religion, perhaps the most fundamental and highly protected of constitutional rights, and a factual context where professional military judgment was stretched to its logical extreme.

One interesting question *Goldman* raises is its impact on the nonreviewability test first developed in *Mindes v. Seaman*[65] and now used by the majority of courts of appeals. Under this test, courts will not review a challenge to internal military affairs absent an allegation of deprivation of constitutional right, violation of statute, or violation of regulation, and exhaustion of available intraservice administrative remedies. Even then, courts will at times forego review based on examination of the challenge in light of the policy reasons behind nonreview of military matters. In making this examination, courts have weighed the following four factors: the nature and strength of plaintiff's challenge to the military determination; the potential injury to the plaintiff if injury is refused; the type and degree of anticipated interference with the military function; and the extent to which the exercise of military expertise or discretion is involved.[66] Under this test, courts have refused to review a number of internal military decisions including military assignments,[67] military promotions,[68] and the military's policy on sole parents.[69]

The Supreme Court has never expressly accepted or rejected the *Mindes* nonreviewability test. At first impression, one might argue that *Goldman* is an implicit rejection of the test because the Court reviewed the merits of the case after a trial had been held at the district court level. But this does not appear to be the case for two reasons.

First, the issue was not raised before the Supreme Court. In its brief before the Supreme Court the government did not contend that Goldman's challenge to Air Force uniform regulations was totally nonreviewable, although it did note existence of the *Mindes* test.[70] The government's failure to raise the *Mindes* test before the Court was understandable as *Goldman* arose in a jurisdiction that does not use the *Mindes* test, and the government had thus not argued that the Air Force's decision was nonreviewable in the courts below.

Second, the first court of appeals to consider the question following the Supreme Court's decision in *Goldman* has held that the *Mindes* test survives *Goldman*. In *Khalsa v. Weinberger*,[71] the United States Court of Appeals for the Ninth Circuit had originally found that a free exercise challenge by a Sikh to Army uniform regulations was nonreviewable. The court subsequently withdrew submission of the case and stayed proceedings pending the Supreme Court's decision in *Goldman*. Following *Goldman*, the Ninth Circuit reaffirmed its opinion. The court stated, "We find nothing in the *Goldman* decision that undermines the conclusion or reasoning in our earlier decision in the *Khalsa* case."[72]

The Ninth Circuit noted that *Goldman* arose in the U.S. Court of Appeals for the District of Columbia, one of the two circuits that rejects the *Mindes* nonreviewability test. Thus, *Goldman* "presented the Supreme Court only with the question of the merits of the claim, not whether it was subject to review."[73] The court also noted that the Supreme Court's failure to refer to *Mindes* showed it had elected not to address the reviewability issue in *Goldman*.[74] Finally, the court observed that much of *Goldman's* analysis was consistent with and reinforced the analysis applied in *Mindes* and its progeny.[75] Thus it appears likely that the *Mindes* nonreviewability test will survive *Goldman*.

Goldman's rejection of a strict scrutiny test in the military context does somewhat clarify an area of law that had become confusing, particularly in the first amendment, free exercise context. Although the majority opinion did not

---

[64] *E.g.*, AR 600–20, para. 5–40.

[65] 453 F. 2d 197 (5th Cir. 1971).

[66] *Id.* at 201–02.

[67] *E.g.*, Arnheiter v. Chaffee, 435 F.2d 691 (9th Cir. 1970).

[68] Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983).

[69] *E.g.*, Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

[70] Brief for the Respondents at 21, *Goldman v. Weinberger.*

[71] 759 F.2d 1418 (9th Cir. 1985), *amended*, 779 F.2d 1393 (9th Cir.), *stay vacated and reaffirmed*, 787 F.2d 1288 (9th Cir. 1986).

[72] 787 F.2d at 1289.

[73] *Id.*

[74] *Id.* at 1289 n.1.

[75] *Id.* at 1289.

clearly state what precise test applies to judicial review of military regulations, this may not make a great deal of difference in most cases. This is because *Goldman* requires courts to give deference to professional military judgment concerning the importance of a military interest.[76]

Certainly, *Goldman's* explicit requirement that courts defer to professional military judgment will lead to fewer challenges to military requirements that involve professional military judgment. Moreover, more challenges to internal military decisions will doubtless be disposed of on motions to dismiss or motions for summary judgment. Indeed, after *Goldman*, it makes little sense to try a case challenging a military decision when the decision clearly falls within an area of professional military judgment and professional military judgment supports the decision. *Khalsa v. Weinberger*, in which the court granted a motion to dismiss after examining the complaint and concluding that military expertise was involved, may thus be a harbinger of a greater tendency to dispose of challenges to military decisions prior to trial.

What precise limits exist to *Goldman's* requirement that courts defer to professional military judgment is unclear. The majority in *Goldman* did imply that there must be "reasonableness" and "evenhandedness," but did not articulate any further analysis of the limits on deference. Perhaps in future litigation, lower courts will develop more precise methods. Some lower courts have managed to do so in other contexts. In *St. Claire v. Cuyler*,[77] the Third Circuit developed a standard for the deference owed to the expert judgment of such officials. Under the *St. Claire* test, deference is afforded the testimony of a prison official concerning an opinion he holds "sincerely" and that is "arguably correct" unless the inmate challenging the opinion shows by substantial evidence that the opinion represents an exaggerated response to prison interests or is unreasonable.[78] Whether the lower courts will develop a similar test to review professional military judgments and the precise limits of any such test, remains to be seen.

Conclusion

In *Goldman v. Weinberger*, the United States Supreme Court held that the first amendment did not require the military to allow an Orthodox Jew to wear his yarmulke while on duty and in uniform. The Court's majority opinion found that a strict scrutiny test did not apply in the military context and that courts owe great deference to professional military judgments about the importance of a military interest. Under *Goldman*, the primary limits the first amendment places on military requirements in areas of professional military judgment are reasonableness and evenhandedness.

Goldman changes little in the area of religious practices in the military. Traditionally, religious accommodation in the military has been a matter of legislative and executive grace rather than judicial right. Following *Goldman*, most religious accommodation analysis should fall under DOD Directive 1300.17 or other military regulations. Nonetheless, some religion-based challenges to internal military affairs appear to remain open to active judicial review. These are challenges to religion-based discrimination, according less accommodation to religious practices than to similar secular practices, compulsory participation in religious activities, violations of regulations involving mandatory religious exemptions, and military requirements unrelated to discipline or to other military requirements and not the subject of professional military judgment.

Goldman may have several important implications for future cases seeking judicial review of military decisions. First, the *Mindes* nonreviewability test appears to survive *Goldman*. Second, *Goldman's* rejection of the strict scrutiny test in the military context and its requirement that courts defer to professional military judgment about the importance of military interests should clarify a confusing area of jurisprudence. *Goldman* should thus lead to fewer challenges to military requirements that involve professional military judgment and to disposal of more challenges to internal military decisions based on the pleadings. *Goldman* leaves unclear what precise limits exist to judicial deference to professional military judgment. The standards that lower courts will develop remain to be seen.

[76] *See Goldman*, 106 S. Ct. at 1313.

[77] 634 F.2d 109 (3d Cir. 1980).

[78] *Id.* at 114–15. *See also* Khalsa v. Weinberger, 779 F.2d at 1400 n.4 (indicating higher scrutiny of military claims that are "palpably untrue" or "highly questionable").

Waiver of Motions in Pretrial Agreements

*Captain Robert M. Smith**
OSJA, Munich Branch Office, VII Corps, FRG

Introduction

"We do not think the justice system is impugned when an accused seeks concessions from a convening authority by offering the inducement to waive motions concerning issues which would be waived in any case by the acceptance of his guilty plea."[1]

*This article was originally submitted as a research paper in partial satisfaction of the requirements of the 34th Judge Advocate Officer Graduate Course.

[1] United States v. Jones, 20 M.J. 853, 855 (A.C.M.R.), *petition granted*, 21 M.J. 389 (C.M.A. 1985).

With these words, then-Chief Judge Suter reopened the dialogue in military law over whether motions may be waived in a pretrial agreement. This article traces the development of that dialogue and suggests that the Court of Military Appeals has never held that all motions are per se excluded from the arena of pretrial negotiations. The article concludes that reconsideration of the extent to which motions may be waived in pretrial agreements should lead to greater flexibility for both the accused and the government in proposing terms for waiver of motions during pretrial negotiations.

Background

The Birth of Military Plea Bargaining

Plea bargaining is a twentieth-century development in American criminal procedure arising largely from the compulsion of crowded criminal court dockets that accompanied the country's urbanization.[2] The practice developed out of necessity and somewhat covertly in the civilian jurisdictions.[3] It was on questionable legal footing until the Supreme Court pronounced it "an essential component of the administration of justice" in *Santobello v. New York.*[4] Prior to the initiation of the practice in the Army on 23 April 1953,[5] approximately ninety percent of the cases tried in some civilian jurisdictions involved a guilty plea, the majority the result of plea bargaining.[6] In the military service, on the other hand, only ten percent of the cases were disposed of by pleas of guilty and pleading guilty "for a consideration"[7] was not an option for the military accused.[8]

In an effort to bring military practice into line with its civilian counterpart and to deal with a growing backlog of courts-martial,[9] Major General Franklin P. Shaw, Acting The Judge Advocate General of the Army, sent a letter dated 23 April 1953 to the staff judge advocates of major commands in which he advised them to follow the civilian practice and encourage pretrial agreements between the convening authority and the accused.[10] Although General Shaw gave little guidance on implementing plea bargaining in the Army,[11] several principles espoused in his initial letter have endured. Chief among these are the suggestion that pretrial agreements be executed between the accused and the convening authority,[12] that the offer to plead guilty be initiated by the accused,[13] and that caution be exercised to guard carefully every legal right to which an accused might be entitled.[14]

The Early Cases in the Military Courts

In the absence of regulation, questionable practices arose in the administration of plea bargaining that required the military courts to act to ensure the "effectiveness and integrity of the trial and appellate processes."[15] The earliest military cases concerning plea bargaining were decided by the Army Board of Review.

In *United States v. Callahan,*[16] the board was faced with a command practice at Fort Meade, Maryland, which strongly encouraged, if not required, an accused to waive his right to present matters in extenuation and mitigation to obtain a pretrial agreement.[17] Although the board found plea bargaining in general "legal, proper, and under appropriate circumstances, highly desirable,"[18] it condemned

---

[2] *See* Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. Chi. L. Rev. 50, 50–51 (1968).

[3] *Id.*

[4] 404 U.S. 257, 260 (1971).

[5] *See infra* notes 9–11 and accompanying text.

[6] Hughes, *Pleas of Guilty—Why So Few?,* Judge Advoc. J. Bull. 13, Apr. 1953, at 1, 1–3; C. Bethany, The Guilty Plea Program 4–5 (Apr. 1959) (unpublished Advanced Course thesis available in The Judge Advocate General's School, U.S. Army, Library).

[7] Hickman, *Pleading Guilty for a Consideration in the Army,* 12 JAG J. 11 (1957).

[8] Hughes, *supra* note 6, at 3.

[9] *See id.* at 4–6; Gray, *Negotiated Pleas in the Military,* 37 Fed. B.J. 49 (1978).

[10] JAGJ 1953/1278, 23 Apr. 1953. The initiation of plea bargaining in the Army was immediately attended with success in terms of a dramatic increase in the number of guilty pleas and a simultaneous decrease in backlogs, processing time, and required personnel at trial and appellate levels. *See* Bethany, *supra* note 6, at 6–9. Despite this success, the Navy delayed adoption of the practice for four years, *id.* at 9–10, and the Air Force continued to proscribe it until 1975, four years after the Supreme Court's decision in *Santobello* resolved the issue of the legitimacy of plea-bargaining practice. Gray, *supra* note 9, at 1 n.4. *But see* United States v. Rahn, 33 C.M.R. 945, 953 (A.F.B.R. 1963) (indicating that notwithstanding Air Force policy proscribing pretrial agreements, such agreements were, nonetheless, used in various forms).

[11] The leadership of The Judge Advocate General's Corps at the time felt that the practice should be developed at the convening authority level. Bethany, *supra* note 6, at 6. Eventually, procedures were adopted in service regulations. *See* Gray, *supra* note 9, at 1 n.4. It was not until promulgation of the Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], that the MCM gave guidance on pretrial agreements. *See* MCM, 1984, Rule for Courts-Martial 705 analysis [hereinafter R.C.M. 705 analysis]. No provision of the Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (1982) [hereinafter UCMJ] directly regulates pretrial agreements.

[12] *See, e.g.,* United States v. Crawford, 46 C.M.R. 1007 (A.C.M.R. 1972) (convening authority's power to enter into pretrial agreements is judicial in nature and cannot be delegated); R.C.M. 705(a). In the early development of military plea bargaining, however, this departure from civilian practice, where plea bargains are normally executed between the defense counsel and the prosecutor, was not taken for granted. *See, e.g.,* United States v. Troglin, 21 C.M.A. 183, 44 C.M.R. 237 (1972) (pretrial agreement between counsel); United States v. Proctor, 19 C.M.R. 435 (A.B.R. 1955) (pretrial agreement with the staff judge advocate); R. Everett, Military Justice in the Armed Forces of the United States 183–85 (1956) (recognizing pretrial agreements for the staff judge advocate's recommendation to the convening authority).

[13] *See, e.g.,* United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (suggesting such practice helps curb undue pressure to plead guilty); R.C.M. 705(d)(1) (requiring the offer to plead guilty to initiate from the accused).

[14] United States v. Callahan, 22 C.M.R. 443, 447 (A.B.R. 1956). *See* R.C.M. 705(c) analysis.

[15] United States v. Mitchell, 15 M.J. 238, 240–41 (C.M.A. 1983) (Everett, C.J., concurring).

[16] 22 C.M.R. 443 (A.B.R. 1956).

[17] *Id.* at 446–47.

[18] *Id.* at 447.

this pretrial agreement in which the accused waived his right to present matters in extenuation and mitigation.[19] The board held that "this right is an integral part of military due process, and the denial of such a right is prejudicial to the substantial rights of the accused."[20] The case forecast the appellate courts' continuing concern with the waiver of fundamental rights through plea bargaining. But the central concern of the board was that this agreement deprived the trial court of the "essential facts" required to adjudge an appropriate sentence.[21] Because the effectiveness of the sentencing hearing had been compromised by the pretrial agreement, the board concluded that the agreement violated public policy.

Subsequently, the Army Board of Review decided *United States v. Banner,*[22] which involved a complicated factual issue concerning personal jurisdiction. Pursuant to a pretrial agreement, the accused waived his right to litigate the jurisdiction motion.[23] On appeal, the board held that there was no jurisdiction and that the pretrial agreement provision was void. The court said that "in the usual case involving jurisdiction, neither law nor policy could condone the imposition by a convening authority of such a condition."[24] Noting that jurisdiction can be raised at any time, even for the first time on appeal or in collateral proceedings, the court said that "where questions of fact must be determined . . . due process of law may require that the accused's opportunity to litigate the jurisdictional matter at trial be not foreclosed by pretrial negotiations between the accused and the convening authority."[25] The board was primarily concerned that the failure to litigate the jurisdiction issue at trial when it could still be raised on appeal "imposed a burden on appellate review which [it was] not well-equipped to discharge," and thus compromised the effectiveness of the appellate process.[26]

In *United States v. Allen,*[27] the Court of Military Appeals first explicitly acknowledged the validity of the Army's plea bargaining program.[28] The case was very similar to *United States v. Callahan*; the defense counsel stood mute during the sentencing portion of the trial.[29] The court recognized the validity of agreements between the convening authority and the accused but said that "the agreement cannot transform the trial into an empty ritual."[30] The court in *Allen* was concerned with the adequacy of the defense on sentencing and remanded the case for a factual inquiry due to conflicting affidavits on what, if any, mitigation or extenuation evidence was available.[31] The significance of the case is that the Court of Military Appeals was here primarily concerned with protecting the effectiveness of the trial process.[32]

Development of the Law Concerning Waiving Motions—The Rise of the *Cummings*[33] Dictum

Although initially received fairly well in the military courts, plea bargaining was soon subjected to a chilling paternalism in the Court of Military Appeals. The disfavor with which pretrial agreements were viewed by some judges on the court led to pronouncements not always based upon sound reason or proper legal principles.

United States v. Cummings

Perhaps the most significant early opinion of the Court of Military Appeals dealing with waiver of motions in pretrial agreements is *United States v. Cummings.* The accused, a Marine, pled guilty at Camp Pendleton, California, pursuant to a pretrial agreement which included a chronology of the processing of his case and provided that "[t]he accused waives any issue which might be raised which is premised upon the time required to bring this case to trial (and specifically waives any issue of speedy trial or of denial of due process)."[34] The court, in an opinion authored by Judge Ferguson, concluded that "the inclusion in this agreement of a waiver of accused's right to contest the issues of speedy trial and due process are [sic] contrary to public policy and void."[35] The court cited the opinions of the Army Board of Review in *Callahan* and *Banner* and found, as with the jurisdiction issue raised in *Banner,* that neither the statutory right nor the constitutional due process right to speedy trial were waived by a guilty plea. Like the board in *Banner,* the court thought itself faced with an unresolved legal issue

[19] *Id.* at 447–48.

[20] *Id.* at 448 (citations omitted).

[21] *Id.* at 447–48.

[22] 22 C.M.R. 510 (A.B.R. 1956).

[23] *Id.* at 519.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 520.

[27] 8 C.M.R. 504, 25 C.M.R. 8 (1957).

[28] Earlier decisions of the Court of Military Appeals had implicitly recognized the validity of plea bargaining. *See, e.g.,* United States v. Hamil, 8 C.M.A. 464, 24 C.M.R. 274 (1957); United States v. Peterson, 8 C.M.A. 241, 24 C.M.R. 51 (1957).

[29] 8 C.M.A. at 506, 25 C.M.R. at 10. There was no evidence in the opinion that the pretrial agreement in *Allen* expressly precluded the presentation of matters in extenuation or mitigation, but the court apparently assumed that defense counsel's silence was pursuant to the pretrial agreement. *See id.* at 507, 25 C.M.R. at 11.

[30] 8 C.M.A. at 507, 25 C.M.R. at 11.

[31] *Id.* at 508, 25 C.M.R. at 12.

[32] *Id.* at 507, 25 C.M.R. at 11.

[33] United States v. Cummings, 17 C.M.A. 376, 38 C.M.R. 174 (1968).

[34] *Id.* at 378, 38 C.M.R. at 176.

[35] *Id.* at 379, 38 C.M.R. at 177.

which, owing to the pretrial agreement, had not been litigated below, and accordingly, it lacked an adequate record for review.[36]

Limited to this holding, *Cummings* should be read to say only that waiver of a motion, pursuant to a pretrial agreement, which is not waived upon entry of the plea of guilty, is against public policy because it undermines the ability of the appellate court to review the issue when raised for the first time on appeal. This is consistent with the earlier cases that were concerned with protecting the effectiveness of the trial and appellate processes.

Another concern in *Cummings*, was raised in Chief Judge Quinn's dissent. He found the waiver of speedy trial motions unobjectionable because affidavits from the defense counsel and the staff judge advocate indicated that there was "an affirmative defense decision not to raise any speedy trial issue" and no command policy to require such waivers.[37] The majority, on the other hand, cited numerous cases from Camp Pendleton involving this provision and concluded that the staff judge advocate has an "unsavory" policy not to "approve any pretrial agreement in which a question of speedy trial was to be litigated."[38] Thus, all members of the court were apparently of the opinion that a command policy requiring waiver of a speedy trial motion in every case in which a pretrial agreement would be approved would violate public policy, while Chief Judge Quinn found such a waiver unoffensive if the result of "an affirmative defense decision."[39]

Finally, in explaining the court's holding in *Cummings*, Judge Ferguson, who looked upon pretrial agreements in the military with disfavor,[40] asserted in a broad dictum that pretrial agreements "should concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions regarding waiver of fundamental rights."[41] He restated that proposition in these words:

> We reiterate our belief that pretrial agreements are properly limited to the exchange of a plea of guilty for approval of a stated maximum sentence. Attempting to make them into contractual type documents which forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as on appeal, substitutes the agreement for the trial, and, indeed, renders the latter an empty ritual. We suggest, therefore, that these matters should be left for the court-martial and appellate authorities to resolve and not be made the subject of unwarranted pretrial restrictions.[42]

Thus it appears that Judge Ferguson believed waiver of a speedy trial motion in a pretrial agreement was against public policy, because he believed that waiver of any fundamental right in such agreements was per se improper. In his words, "such a waiver provision has no place in any pretrial agreement."[43] Should his restrictive view of the waiver of rights in pretrial agreements prove unfounded, it would provide no basis for disapproving provisions involving waiver of motions.

In summary, three threads run through the *Cummings* decision: the traditional public policy of protecting the appellate process by prohibiting waiver of nonwaivable motions in pretrial agreements; a tangential concern with command policies requiring waiver of such motions; and judicial disfavor of plea bargaining seeking to limit the scope of pretrial agreements.

Beyond Cummings—The Road to United States v. Holland[44]

To some extent, *Cummings* marked a change in focus of the courts from assessing the impact on the trial and appellate processes of particular waiver of motions provisions to

---

[36] 17 C.M.A. at 379, 38 C.M.R. at 177. The court in *Cummings*, however, failed to distinguish lack of speedy trial from lack of jurisdiction. The former can be affirmatively waived by the accused, avoiding the necessity of review of the issue for the first time on appeal. *See* United States v. Schalck, 14 C.M.R. 371, 34 C.M.R. 151 (1964); United States v. Hounshell, 7 C.M.A. 3, 21 C.M.R. 129 (1956). The latter can never be waived. *See* United States v. Moschella, 20 C.M.A. 543, 43 C.M.R. 383 (1971); United States v. Dickinson, 6 C.M.A. 438, 20 C.M.R. 154 (1955). The *Cummings* court said only that any affirmative waiver by the accused at trial was pursuant to a "palpably void condition in his pretrial agreement with the convening authority." 17 C.M.A. at 379, 38 C.M.R. at 177.

[37] 17 C.M.A. at 381, 38 C.M.R. at 179. Chief Judge Quinn also found from the stipulated chronology that no speedy trial issue was raised in this case, and thus the accused could have suffered no prejudice from the agreement to waive the right to raise a speedy trial motion. *Id.* at 382, 38 C.M.R. at 180. In subsequent cases from Camp Pendleton involving the same speedy trial waiver provision, the court found no prejudice to the accused and refused to reverse on that ground. *See* United States v. Pratt, 17 C.M.A. 464, 38 C.M.R. 262 (1968); United States v. Lance, 17 C.M.A. 470, 38 C.M.R. 268 (1968); United States v. DeShazo, 17 C.M.A. 472, 38 C.M.R. 270 (1968); United States v. Dyer, 17 C.M.A. 475, 38 C.M.R. 273 (1968) (all requiring a showing of prejudice from an illegal pretrial agreement provision). *See also* United States v. McNally, 2 M.J. 782 (A.C.M.R. 1976) and cases cited therein.

[38] 17 C.M.A. at 380–81, 38 C.M.R. at 178–79.

[39] *Id.* at 381, 38 C.M.R. at 179. Chief Judge Quinn's opinion, however, should not be interpreted to mean that every term in a pretrial agreement must be initiated by the accused. Rather, his opinion means that even if a term in a pretrial agreement is void as against public policy, there may be no prejudice to the accused when the term was "an affirmative defense decision." *Id. Accord* United States v. Cross, 19 M.J. 973, 976 (A.C.M.R. 1985) (Wold, J., dissenting) (concluding that "concessions in pretrial agreements which would otherwise be objectionable on public policy grounds may be rendered acceptable by the circumstance that they are the product of an informed and voluntary choice which originated with the [accused]," but going beyond the mark in concluding that certain provisions are, in the first instance, against public policy).

[40] *See* United States v. Villa, 19 C.M.A. 564, 42 C.M.R. 166, 172 (1970) (Ferguson, J., dissenting).

[41] 17 C.M.A. at 379, 38 C.M.R. at 177.

[42] *Id.* at 380, 38 C.M.R. at 178.

[43] *Id.* at 378, 38 C.M.R. at 176. Such a belief was not inconsistent with Army policy at the time. *See* United States v. Elkinton, 49 C.M.R. 251, 253–54 (A.C.M.R.), *petition denied*, 49 C.M.R. 889 (C.M.A. 1974).

[44] 1 M.J. 58, 50 C.M.R. 461 (C.M.A. 1975).

summary rejection of any provision involving waiver of motions.[45] To that extent, the broad dictum in *Cummings* had a stifling effect on the development of the law and elucidation of the underlying public policies in the area of waiver of motions in pretrial agreements.

In *United States v. Troglin*,[46] the Court of Military Appeals held that a sub rosa agreement between counsel not to raise a motion of former jeopardy was contrary to public policy.[47] The court relied on *Cummings*, but, in applying the public policy of maintaining the effectiveness of the appellate process, the court observed that former jeopardy, unlike jurisdiction and speedy trial, is waived if not raised at trial, absent unusual circumstances.[48] The court then found unusual circumstances from the fact that the accused knew nothing of the sub rosa agreement and held the waiver should not operate against the accused.[49] Because waiver did not occur in the case, the court would be required to hear the double jeopardy motion without the aid of a trial record on the issue, owing to the provision in the pretrial agreement. Accordingly, the court said: "We hold that the facts of this case are sufficiently similar to those presented in *Cummings* to justify the same result. The understanding between counsel not to raise the question of former jeopardy obviously was contrary to public policy."[50]

Thus in its narrowest sense, *Troglin* merely reaffirms the public policy of ensuring the effectiveness of appellate review by prohibiting waiver of the right to present motions that will not be waived at trial and, therefore, may be raised on appeal in the first instance. *Troglin* did not simply invalidate this waiver-of-motions provision by relying on Judge Ferguson's broad dictum in *Cummings* that such waivers have no place in pretrial agreements. On the contrary, it gave substantive consideration to the public policy concerns in *Cummings*. But *Troglin* arguably goes beyond *Cummings*, because it deals with waiver of a motion that is normally waived if not raised at trial. The court did not discuss, however, what the result would have been had the accused known of the agreement to waive former jeopardy and made such waiver affirmatively upon inquiry by the military judge at trial.[51]

A question left unanswered following *Cummings* and *Troglin* was whether the Court of Military Appeals would follow its broad dictum in *Cummings* and invalidate a provision in a pretrial agreement calling for waiver of waivable motions such as motions to suppress evidence obtained by search and seizure or pretrial confessions. One commentator suggested a form for pretrial agreements that provided for waiver of all non-jurisdictional motions, by requiring entry of plea "prior to presentation of any evidence on the merits and/or presentation of motions going to matters other than jurisdiction."[52] The proposed agreement would "be automatically cancelled" upon "failure to enter a plea of guilty prior to presentation of evidence on the merits and/or presentation of non-judicial [sic] motions."[53] Of course, entering a guilty plea prior to the presentation of non-jurisdictional motions would waive any motion that was automatically waived by a plea of guilty.[54] Thus, the "Hunter provision" was an attempt to indirectly accomplish by pretrial agreement the waiver of all motions that were waived by a plea of guilty.[55]

The Hunter agreement was immediately used in the field and the Army Court of Military Review was soon faced with a test of its validity in *United States v. Elkinton*.[56] Elkinton pled guilty at a general court-martial to wrongful sale of heroin; his pretrial agreement contained the Hunter provision. On appeal, the court found that "the intent of the agreement executed by the convening authority and the appellant . . . was to require the appellant to refrain from making any motion, including objections to admissibility of evidence except motions relating to jurisdiction."[57] The court noted that included within the waiver were motions to suppress evidence as a result of a search.[58] Citing Judge Ferguson's dictum in *Cummings*, the court held that such waivers were "contrary to public policy and therefore

[45] *See, e.g.*, United States v. Elkinton, 49 C.M.R. at 254 (opining that *Cummings* precludes waiver of any motion in a pretrial agreement); United States v. Schaffer, 46 C.M.R. 1089 (A.C.M.R. 1973) (invalidating a provision requiring waiver of all motions under *Cummings* without analysis); United States v. Peterson, 44 C.M.R. 528 (A.C.M.R. 1971) (per curiam decision upon concession of the government that a pretrial agreement term, which voided the agreement upon presentation of any motion other than speedy trial, was against public policy where defense counsel stated he was not raising a search and seizure motion because of the agreement. No analysis of the possibly different public policy concerns with waiver of search and seizure motions was made).

[46] 21 C.M.A. 183, 44 C.M.R. 237 (1972).

[47] *Id.* at 188, 44 C.M.R. at 242.

[48] *Id.* at 187–88, 44 C.M.R. at 241–42 (citing United States v. Schilling, 7 C.M.A. 482, 22 C.M.R. 272 (1957)). The case also involved a subject-matter jurisdiction motion and a speedy trial motion that were not presented by defense counsel, but neither of these motions was part of the pretrial agreement. *Id.* at 183–86, 44 C.M.R. at 237–40.

[49] *Id.* at 187–88, 44 C.M.R. at 241–42.

[50] *Id.* at 188, 44 C.M.R. at 242.

[51] In that event, the provisions waiving former jeopardy would not have presented the evil condemned in *Cummings* and arguably would have been valid.

[52] Hunter, *A New Pretrial Agreement*, The Army Lawyer, Oct. 1973, at 23, 24.

[53] *Id.* at 25.

[54] *See* United States v. Elkinton, 49 C.M.R. at 254 (noting that "all defects which are neither jurisdictional nor amount to deprivation of due process of law" and "many defenses and objections not raised before a plea is entered are considered waived").

[55] This term of the Hunter agreement was based on United States v. Patton, 46 C.M.R. 1207 (N.C.M.R. 1973), in which the court found no error in a military judge exercising his discretion to defer consideration of a motion to supress illegally seized marijuana and LSD until after pleas were entered, notwithstanding the fact that his decision required the accused to elect between his pretrial agreement or his evidentiary motion. *See* Hunter, *supra* note 52, at 27 n.5. The Hunter provision has been criticized as not consistent with prior case law. *See* Gray, *supra* note 9, at 58–59. To the extent that the provision was not sufficiently narrow in defining which motions were waived, this criticism is correct.

[56] 49 C.M.R. 251 (A.C.M.R.), *petition denied*, 49 C.M.R. 889 (C.M.A. 1974).

[57] *Id.* at 254.

[58] *Id.* at 253.

void."[59] The court ventured no explanation as to why waiver in a pretrial agreement of a suppression motion would violate public policy where it would be waived automatically upon entry of a plea of guilty. Although the court made passing reference to the fact that the military judge, not the convening authority, had discretion to decide when motions would be entered,[60] the court based its holding on the belief that waiver of evidentiary motions, and in fact of any motion, in a pretrial agreement was condemned in *Cummings*. Thus, for the Army Court of Military Review the question of the scope of Judge Ferguson's dictum was apparently decided.

The Court of Military Appeals entertained an attack on the Hunter provision in *United States v. Holland*. Holland pled guilty to larceny at a general court-martial pursuant to a pretrial agreement including the Hunter provision.[61] Judge Cook's lead opinion surveyed the continuing Army practice of plea bargaining in words reflecting cautious acceptance of the system and said "Our approval of these arrangements . . . was not intended either to condone or to permit the inclusion of indiscriminate conditions in such agreements, even when initiated or concurred in by the accused."[62] Then, citing in detail the public policy concern for a fair sentencing hearing recognized in *United States v. Allen*,[63] he made passing reference to "more positive attempts to preclude the exercise of one's rights by means of a prior waiver" condemned in *Cummings*.[64] Judge Cook cited Judge Ferguson's dictum in *Cummings* and stated:

> Under this particular standard, as well as the more general one implicit in opinions dealing with command control, extrajudicial infringement or interference with the trial and its procedures is forbidden. Even though well-intentioned, the limitation on the timing of certain motions controlled the proceedings. By orchestrating this procedure, there was an undisclosed halter on the freedom of action of the military judge, who is charged with the responsibility of conducting the trial, it also might have hampered defense counsel in his function of faithfully serving his client. Being contrary to the demands inherent in a fair trial, this restrictive clause renders the agreement null and void.[65]

Deciphering the true meaning of *Holland* is no easy matter.[66] But notwithstanding the lack of clarity in the opinion, *Holland* holds not that waiver of motions in pretrial agreements is per se a violation of public policy, but that the Hunter provision is invalid because it compromises the effectiveness and integrity of the trial process by attempting command control of judicial discretion.[67] In this sense, *Holland* is consistent with the court's proper public policy concerns in the early cases. It is also significant that, faced with the opportunity to extend the *Cummings* dictum to preclude per se any waiver of motions provision, as the Army Court of Military Review presumed to do in *Elkinton*,[68] the court did not do so, but grounded its opinion instead on proper public policy concern for judicial autonomy.[69]

Other Cases Involving Waiver of Rights—The Demise of the *Cummings* Dictum

Not since *United States v. Holland* has the Court of Military Appeals directly addressed a case involving waiver of motions in a pretrial agreement. It has, however, been faced with numerous cases involving waiver of rights pursuant to a pretrial agreement which lead to the inescapable conclusion that the *Cummings* dictum that pretrial agreements should be limited to charges and sentence and should not involve waiver of fundamental rights is dead. A review of some of these cases sheds some light on how the Court of Military Appeals will likely handle waiver of motions provisions in the future.

Pre-Holland *Cases*

Prior to *Holland*, the Court of Military Appeals decided *United States v. Lallande*[70] and *United States v.*

---

[59] *Id.*

[60] This was the flaw in the Hunter provision that the Court of Military Appeals later condemned in United States v. Holland, 1 M.J. 58, 60, 50 C.M.R. 461, 462–63 (C.M.A. 1975).

[61] *Id.* at 59, 50 C.M.R. at 461–62.

[62] *Id.*

[63] 8 C.M.A. 504, 25 C.M.R. 8 (1957). *See supra* notes 27–32 and accompanying text.

[64] 1 M.J. at 59, 50 C.M.R. at 462.

[65] *Id.* at 60, 50 C.M.R. at 462–63 (footnotes omitted).

[66] What, for instance, did Judge Cook mean by "inclusion of indiscriminate conditions" in pretrial agreements? *Id.* at 59, 50 C.M.R. at 462. Perhaps he meant the Hunter provision was indiscriminate in the sense that it was used in every case without consideration of the special circumstances in any given case. If so, the opinion is reminiscent of the concern implied in Chief Judge Quinn's dissent in *Cummings*. *See supra* notes 37–39 and accompanying text. Or perhaps he simply meant that the Hunter provision was indiscriminate because it failed to distinguish between motions the waiver of which was prohibited under the *Cummings* line of cases and those which may not be, or because it sought to control judicial discretion.

Next, on the one hand, he said the provision might hamper defense counsel in serving the client, while on the other hand, he found the purpose of the provision "well-intentioned." 1 M.J. at 60, 50 C.M.R. at 462. Thus one is left to wonder what the opinion really says about the waiver of waivable motions in general. It can be argued, of course, that a rule that prevents the defense counsel from waiving motions with dubious prospects for success to get a better deal for the client hampers counsel in "faithfully serving his client." *Id.*

Finally, Judge Cook arguably confines *Cummings* to its public policy concern for maintaining the effectiveness of the trial and appellate processes and yet he cites Judge Ferguson's broad dictum in *Cummings* with apparent approval, leaving us to wonder how a provision not presenting the evil of tampering with judicial discretion, but directly and specifically waiving waivable motions, would be treated.

[67] *Id.* at 60, 50 C.M.R. at 462–63.

[68] 49 C.M.R. at 254.

[69] *But see* United States v. Elmore, 1 M.J. 262, 265 (C.M.A. 1976) (Ferguson S.J., dissenting) (interpreting *Holland* to preclude per se any provision which prevented presentation of a motion prior to plea). In *Elmore*, the court held that a provision in a pretrial agreement requiring entry of a guilty plea prior to presentation of evidence on the merits did not interfere with judicial discretion because such was the usual practice. *Id.* at 263–64.

[70] 22 C.M.A. 170, 46 C.M.R. 170 (1973).

Schmeltz.[71] In *Lallande*, the accused pled guilty to two specifications of wrongful possession of marijuana under a pretrial agreement calling for suspension of part of the sentence under specified terms of probation. The conditions required law-abiding conduct, no association with known traffickers or users, and submission to search at any time without a warrant. The issue on appeal was whether these terms of probation, which involved waiver of the accused's first and fourth amendment rights, were violative of public policy.[72] Judge Quinn, writing the opinion of the court, returned to the theme he had raised in *Cummings*,[73] noting that the terms were offered by the accused "not in response to the government that they be accepted 'or else.' Nor [did] it appear that the accused obtained the conditions only at the price of surrendering a constitutional right that could affect his guilt or the legality of his sentence."[74] Judge Quinn found the accused's consent to the terms "factual, not fictional," and concluded that "the accused ought not be allowed now to retain the advantages of the pretrial offer but cast off its restraints."[75] In holding the conditions consistent with public policy, Judge Quinn found them similar to those used in civilian practice and appropriate for use in courts-martial.[76] Judge Duncan, in dissent, reiterated the *Cummings* dictum as the holding of the court "that plea arrangements 'should concern themselves with nothing more than bargaining on charges and sentence, not with ancillary conditions regarding waiver of fundamental rights.' "[77] Despite Judge Duncan's protestation, *Lallande* holds that fundamental rights during probation may be waived in a pretrial agreement.

In *United States v. Schmeltz*,[78] the Court of Military Appeals was asked to decide whether waiver of trial by members in a pretrial agreement is contrary to public policy. Senior Judge Ferguson, writing for the court, paid homage to his dictum in *Cummings*, but said the court "need not decide the issue of public policy" because "there is not the slightest indication . . . that the accused's agreement or any of its terms originated with the convening authority or any agent of the government."[79] Finding the waiver a "freely conceived defense product" that "did not concern the waiver of a constitutional right or a fundamental principle," he found the waiver unobjectionable.[80] Although Senior Judge Ferguson apparently found no conflict between his holding in *Schmeltz* and his dictum in *Cummings*, Chief Judge Everett later pointed out that "as a practical matter, our court has removed the bite from its criticism of pretrial agreements that do not 'concern themselves only with bargaining on the charges and sentence' by upholding an agreement to elect trial by military judge alone because this provision originated with the accused."[81]

*Post-*Holland *Cases—The Influence of Chief Judge Everett.*

Several cases decided since Chief Judge Everett joined the Court of Military Appeals reflect a more favored treatment of pretrial agreements and foreshadow a more reasoned approach to waiver of motions in pretrial agreements.[82]

In *United States v. Dawson*,[83] the Court of Military Appeals struck down a provision in a pretrial agreement that released the convening authority from his obligation to reduce the sentence in the event the accused violated the UCMJ between the time of trial and action (a post-trial misconduct clause).[84] The court found the clause insufficiently definite to be enforced primarily because it did not define the procedures to be used to invoke the provision.[85] Judge Fletcher's lead opinion reiterated in passing the court's "longstanding position of refusing to encourage expansive pretrial agreement[s]" and again cited the *Cummings* dictum.[86] He stated, however, that *Holland* and *Cummings* were concerned primarily with "pretrial agreement provisions which entail waivers of constitutional or codal rights otherwise not waived by a guilty plea."[87] Judge Cook, dissenting, found the post-trial misconduct clause unobjectionable under the "*Cummings* line of cases because . . . [it] does not render the final procedure a hollow-shell, nor does it involve a nonwaivable right."[88] He went out of his way to explain that *Cummings* struck down the speedy trial waiver "because the plea of guilty under military law does not waive such rights."[89] Chief Judge Everett filed a concurring opinion, agreeing that the post-trial misconduct provision was insufficiently definite to be enforced, but spelling out conditions under which such a provision might

---

[71] 1 M.J. 8, 50 C.M.R. 83 (C.M.A. 1975).

[72] 22 C.M.A. at 172, 46 C.M.R. at 172.

[73] *See supra* notes 37–39 and accompanying text.

[74] 22 C.M.A. at 173, 46 C.M.R. at 173.

[75] *Id.*

[76] *Id.* at 172–74, 46 C.M.R. at 172–74. Judge Quinn's analogy to civilian practice in the search for proper public policies should be applied in the waiver-of-motions area as well. *See infra* notes 134–37 and accompanying text.

[77] 22 C.M.A. at 179, 46 C.M.R. at 179.

[78] 1 M.J. 8, 50 C.M.R. 83 (C.M.A. 1975).

[79] *Id.* at 11, 50 C.M.R. at 85.

[80] *Id.* at 12, 50 C.M.R. at 86.

[81] United States v. Schaffer, 12 M.J. 425, 427 (C.M.A. 1982).

[82] Chief Judge Everett has long held a generally favorable view of military plea bargaining. *See, e.g.*, Everett, *supra* note 12, at 85.

[83] 10 M.J. 142 (C.M.A. 1981).

[84] *Id.* at 145–46.

[85] *Id.*

[86] *Id.* at 148.

[87] *Id.* at 150.

[88] *Id.* at 152.

[89] *Id.*

be enforced.[90] Although *Dawson* disapproved of the particular provision before it, the message in both the majority opinion and the dissent is clear that the court was retreating from the broad dictum in *Cummings* and returning to substantive concern with the effect of waiver of rights provisions on the effectiveness and integrity of the trial and appellate processes.

That same year, Chief Judge Everett authored an opinion in *United States v. Mills*[91] approving a complex "offer to stipulate" waiving the right to personal appearance of witnesses during a sentence rehearing in exchange for clemency actions by the convening authority.[92] The case reflected a willingness by the court to approve more complex pretrial agreements. Chief Judge Everett attached significance, however, to the fact that "[u]nlike some cases where, although the offer . . . originates with the defense, it is shaped by well-established policies of a convening authority as to the pretrial agreements that he will accept, here the 'offer to stipulate' was clearly the product of the defense counsel's ingenuity."[93]

Similarly, in *United States v. Schaffer*,[94] the court held that waiver of investigation of the charges under Article 32, UCMJ was permissible, at least if proposed by the accused.[95] Chief Judge Everett authored the opinion of the court in which he referred to the *Cummings* dictum and its demise.[96] He concluded that "[s]ince in military practice pretrial agreements typically originate with the accused and his counsel, the exception recognized in *Schmeltz* for a pretrial agreement offered by the accused and to which he gives his 'factual' consent undercuts generally our criticism of the complex plea bargain."[97] He noted with approval civilian systems that permitted an accused to preserve motions notwithstanding a guilty plea upon agreement of the parties,[98] a procedure now available in the military as well.[99]

Chief Judge Everett also pointed out the danger "of overreaching by the prosecutor, so that from the accused's standpoint the agreement is only a contract of adhesion, whereby he yields valuable procedural rights solely because his bargaining position is so inferior."[100] He categorized these procedural rights into three groups: those involving "defenses to being tried at all" (jurisdiction, speedy trial, and former jeopardy would apparently be included here); those involving "the accuracy of the fact-finding process," "such as confrontation and the presumption of innocence;" and those involving neither "the accused's amenability to trial [nor] the accuracy of the fact finding process."[101] He then concluded that adequate protections existed against "prosecutorial excesses in the plea bargaining process."[102] As for waiver of rights in the first group, he noted the power of appellate courts to invalidate waivers of defenses not involving factual guilt. As to the waiver of other rights, he found adequate protection in the "careful providence inquiry" required in military law which "helps assure that plea bargaining does not result in the conviction of innocent persons," and in "the usual military practice requiring the proposal for a pretrial agreement to originate with the accused" which "helps curb undue pressure for an accused to 'cop a plea.' "[103]

Turning to the issue before the court, the chief judge called attention to the similar civilian practice of waiving preliminary inquiry or grand jury indictment and noted the "obvious reasons why a military accused, with the advice of counsel, may wish to initiate waiver of an Article 32 investigation."[104] Here, where even the provision waiving the Article 32 investigation was proposed by the accused, Chief Judge Everett found no reason in public policy to preclude such a provision in a pretrial agreement, asserting that the court's "paternalism need not extend to that extreme."[105]

Finally, in *United States v. Mitchell*,[106] in response to Judge Fletcher's lead opinion referring restrictively to plea bargaining, citing *Holland* and *Cummings*, Chief Judge Everett, in his concurring opinion, said:

> Moreover, I should note that the cases on plea bargaining cited in the majority opinion must be applied in light of our more recent precedents on the same subject. As long as the trial and appellate processes are

---

[90] *Id.* at 157. Such provisions are now authorized by R.C.M. 705(c)(2)(D) provided that a hearing under R.C.M. 1109 be conducted prior to invoking the provision.

[91] 12 M.J. 1 (C.M.A. 1981).

[92] *Id.* at 4.

[93] *Id.* at 4 n.2.

[94] 12 M.J. 425 (C.M.A. 1982).

[95] *Id.* at 429–30.

[96] *See supra* note 81 and accompanying text.

[97] 12 M.J. at 427.

[98] *Id.* at 427–28.

[99] *See* R.C.M. 910(a)(2) (authorizing a conditional plea of guilty). One might argue that because this procedure was adopted from civilian practice, where otherwise motions are generally waived in plea bargaining, unless state law provides otherwise (*see* McMann v. Richardson, 397 U.S. 759, 766 (1970)), its adoption in the military supports adoption also of the right to waive motions by agreement between the parties. If the parties can agree to permit litigation and preservation of a motion, they ought also to be permitted to agree to forego litigation of a motion.

[100] 12 MJ. at 428.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 428–29.

[104] *Id.* at 429.

[105] *Id.*

[106] 15 M.J. 238 (C.M.A. 1983) (striking down a provision in the convening authority's referral offering to take unspecified clemency action if the case was completed within fifteen days, on the grounds that it was irregular and ambiguous and discouraged the careful preparation of the defense case).

not rendered ineffective and their integrity is maintained, some flexibility and imagination in the plea-bargaining process have been allowed by our Court.[107]

These more recent decisions by the Court of Military Appeals reflect a willingness by the court to approve pretrial agreements involving the waiver of procedural rights. They have sounded the death knell for the *Cummings* dictum and the misbelief that either *Cummings* or *Holland* intended a per se rule against waiving motions in pretrial agreements. They mark a return to a substantive analysis of the public policies governing the plea bargaining system and set the stage for reconsideration of the extent to which public policy permits waiver of motions in pretrial agreements.

Recent Developments

Now that the Court of Military Appeals has set the stage for reconsideration of when motions may be waived by pretrial agreement, the actors have now begun to take their places. The Army Court of Military Review has addressed the issue in two recent cases and the matter has been addressed briefly in the 1984 Manual.

In *United States v. Jones*, the accused pled guilty to robbery, rape, and kidnapping pursuant to a pretrial agreement which provided that "defense counsel will not make any motions contesting the legality of any search and seizure . . ., or [any] motions challenging any legality of any out-of-court identifications."[108] The military judge conducted a searching inquiry into the provision, during which the defense counsel assured the court that the idea of waiving these motions originated with the defense.[109] On appeal, the appellant argued that the provision was invalid under *Holland*.[110]

The Army Court of Military Review, in a unanimous decision, with then-Chief Judge Suter writing the opinion, held that *Holland* was not controlling and the waiver of motions provision was not in violation of public policy. Reviewing the impact of the Court of Military Appeals' decisions since *Holland*, the court said:

> With these precepts in mind, we find the pretrial agreement in this case does not impermissibly impact upon the effectiveness or integrity of the trial or appellate process and, thus, is not contrary to public policy. We do not believe the justice system is impugned when an accused seeks concessions from a convening authority by offering the inducement to waive motions concerning issues which would be waived in any case by the acceptance of his guilty plea.[111]

The court distinguished *Holland* on the ground that the provision there did not emanate from the accused, but was included in a government-produced form.[112] This distinction misses the point of *Holland*. The fact that the Hunter provision condemned in *Holland* was included in a government-produced form does not necessarily mean that the waiver intended thereby did not emanate from the accused. The details of the negotiations in the case are not spread on the record. More to the point, however, the court in *Holland* did not consider the source of the provision determinative. Judge Cook, in fact, said that such "indiscriminate conditions" are invalid "even when initiated or concurred in by the accused."[113] The evil in the Hunter provision condemned in *Holland* which was clearly not present in the provision in *Jones* was the attempted extrajudicial infringement of judicial discretion regardless of the source of that infringement.[114]

The court in *Jones*, as with the Court of Military Appeals in *United States v. Schaffer*, was faced with a waiver provision apparently suggested in fact by the defense. Thus, the court does not address the validity of such a provision suggested by the government during negotiations initiated by the defense or required by the government in all cases. The misplaced distinction from *Holland* drawn by the *Jones* court implies that, to be valid, the waiver provision must be first suggested by the accused. In *Schaffer*, however, Chief Judge Everett implied in dicta that adequate protection against government overreaching is assured by requiring that the proposal to plead guilty for a pretrial agreement originate with the accused and that the accused in fact consent to all the terms.[115] This does not require the initial suggestion for any term, including waiver of rights or motions, to originate with the accused.[116] The *Jones* decision, nonetheless, stands for the proposition that at least when an accused, in an effort to obtain a greater concession from the convening authority, offers to waive motions in a pretrial agreement which will be waived anyway upon entry of his plea of guilty, no public policy norm is offended.

The other recent decision of the Army Court of Military Review concerning waiver of motions is *United States v. Corriere*.[117] Captain Michael J. Corriere pled guilty to numerous offenses, including drug offenses, under a pretrial agreement with no provision relating to motions. On appeal, he claimed that a sub rosa agreement existed between defense counsel and the staff judge advocate not to raise motions of discovery, admissibility of a pretrial statement, and unlawful command influence.[118] Due to inadequate evidence in the record, the court returned the record of trial

---

[107] *Id.* at 240–41 (citations omitted).

[108] 20 M.J. 853, 853 (A.C.M.R.), *petition granted*, 21 M.J. 389 (C.M.A. 1985).

[109] *Id.* at 854.

[110] *Id.*

[111] *Id.* at 855 (citations omitted).

[112] *Id.* at 854.

[113] *Holland*, 1 M.J. 58, 59, 50 C.M.R. 461, 462 (C.M.A. 1975).

[114] *Id.* at 60, 50 C.M.R. at 462–63.

[115] *Schaffer*, 12 M.J. at 427–29.

[116] *Accord* United States v. Sharper, 17 M.J. 803, 806 (A.C.M.R. 1984) (stating "[w]e do not believe that the identity of the party proposing an element of a pretrial agreement is determinative of its enforceability"); R.C.M. 705(d) and analysis. *See infra* notes 137–40 and accompanying text.

[117] 20 M.J. 905 (A.C.M.R. 1985).

[118] *Id.* at 907–08.

for a post-trial hearing on the issues surrounding the alleged sub rosa agreement.[119]

In its opinion, however, the *Corriere* court cited the *Cummings* line of cases for the proposition that an agreement "to waive *all* defense motions is against public policy and is void."[120] It then asserted that the unlawful command influence motion and the motion concerning the admissibility of the pretrial statement were of such "vital importance" as to preclude their "resolution in plea bargain."[121] By implication, the court found the waiver of a discovery motion unobjectionable. Because the court did not address these issues on the merits due to the inadequacy of the record, no explanation was proffered as to why it would violate public policy to waive these motions.[122] As a result of this opinion, different panels of the Army Court of Military Review have expressed opposing views as to whether a motion to suppress a pretrial statement is waivable by pretrial agreement.

Both *Jones* and *Corriere* were tried prior to the effective date of the 1984 Manual and neither discussed the possible impact of its provisions upon waiver of motions in pretrial agreements. R.C.M. 705(c) prohibits any term in a pretrial agreement if "the accused did not freely and voluntarily agree to it."[123] This assures that the accused know of all the conditions in the pretrial agreement and in fact consent to them, avoiding problems such as occurred in *United States v. Troglin*.[124] The rule also prohibits enforcement of any term which "deprives the accused of the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to speedy trial; the right to complete sentencing proceedings; [and] the complete and effective exercise of post-trial and appellate rights."[125] This rule largely adopts existing case law, and "is intended to ensure that certain fundamental rights of the accused cannot be bargained away while permitting the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily."[126] The drafters considered these restrictions on pretrial agreements necessary "because to give up these matters would leave no substantial means to judicially ensure that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings met acceptable standards."[127] To the extent that any waiver of motions provision might be construed to deprive the accused of any of these rights, it is now clearly prohibited.

But R.C.M. 705(c) did not prohibit waiver of motions in pretrial agreements except to the extent that the above-listed rights are waived. The discussion following R.C.M. 705(c)(1)(B) recognizes that "[a] pretrial agreement provision which prohibits the accused from making certain motions may be improper." The drafters stated that "[t]he rule is not intended to codify *Holland* to the extent that *Holland* may prevent the accused from giving up the right to make any motions before trial."[128] Thus the drafters have left the ultimate resolution of which motions may be waived by pretrial agreement to the courts.

Finally, R.C.M. 705(d) does not require that every term in the pretrial agreement originate with the accused; it is sufficient that the accused initiate the offer to plead guilty and negotiations to obtain a pretrial agreement.[129] Thereafter, either party to the negotiations may propose terms for the agreement, because, in the drafters' opinion, "[i]t is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision as long as the accused, after thorough consultation with qualified counsel, can freely choose to submit a proposed agreement and what it will contain."[130]

The Unanswered Questions

The occasion for the Court of Military Appeals to reconsider the extent to which motions may be waived in pretrial agreements in light of recent developments in military law has not yet presented itself. Given the new composition of the court, predictions about how it may ultimately resolve this issue are speculative. Nonetheless, we may expect Chief Judge Everett to have substantial influence on the development of the law in this area. From his prior decisions, it appears likely that he will not invalidate waiver-of-motions provisions per se, but will approve them "[a]s long as the trial and appellate processes are not rendered ineffective and their integrity is maintained."[131] If presented with the waiver of motions provision upheld by the Army Court of

---

[119] *Id.* at 908–09.

[120] *Id.* at 907 (emphasis added).

[121] *Id.* at 908. As to the pretrial statement motion, the court cited *Jones* as contrary precedent without comment.

[122] As to the unlawful command influence motion, the court cited United States v. Alexander, 19 M.J. 614 (A.C.M.R. 1984) (finding error in the military judge not permitting the accused to present evidence on unlawful command influence) and United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (en banc), *petition granted*, 20 M.J. 131 (C.M.A. 1985), (vacating the sentence in a guilty plea case due to unlawful command influence in discouraging favorable testimony on sentencing, raised for the first time on appeal), and concluded that an agreement to waive such a motion was "akin to those condemned by the" *Cummings* line of cases. 20 M.J. at 908. The conclusion of the court is well founded. A pretrial agreement not to raise an issue such as existed in *Treakle* would clearly affect the integrity and the effectiveness of the trial process and would be condemned by the Court of Military Appeals. Because unlawful command influence can infect the trial process at almost every stage and cuts to the heart of the integrity of the military justice system, a per se rule against waiver of such motions in pretrial agreements appears to be a necessary principle in military law, certain to be adopted by the courts.

[123] R.C.M. 705(c)(1)(A).

[124] 21 C.M.A. 183, 44 C.M.R. 237 (1972).

[125] R.C.M. 705(c)(1)(B).

[126] R.C.M. 705(c) analysis.

[127] *Id.*

[128] R.C.M. 705(c) analysis.

[129] R.C.M. 705(d)(1), (2), and analysis.

[130] R.C.M. 705(d) analysis.

[131] United States v. Mitchell, 15 M.J. 238, 240–41 (C.M.A. 1983) (Everett, C.J., concurring).

Military Review in *Jones*, for example, he would also most likely find it unobjectionable.[132]

It is less clear, however, what importance the Court of Military Appeals may attach to who proposes a specific waiver of motions term, and, if it finds that such terms may be proposed by the government, whether a requirement for the waiver of certain motions in all cases or in certain types of cases would be permissible. In resolving these issues, the court should look to the civilian practice to the extent that it is not inconsistent with military due process. The military adopted plea bargaining from the civilian practice, and the military courts have looked to that practice in the past in determining the public policies controlling plea bargaining. In addition, the foundation of public policy lies in the Constitution as interpreted by the Supreme Court, which now has the power of direct supervision of military justice.[133]

In reviewing civilian law on these issues, it is important to note that the Supreme Court has found no denial of due process in state plea bargaining systems where offers are initiated by the prosecutor and the accused routinely waives motions, including suppression motions for constitutional violations, so long as the defendant has the advice of competent counsel and acts voluntarily.[134] Thus it does not per se offend constitutional norms to require an accused to waive motions incident to a pretrial agreement.[135] Similarly, pretrial agreements are not constitutionally infirm solely because they involve the waiver of fundamental rights.[136]

The Supreme Court has also held that an accused has no constitutional right to a plea bargain.[137] Thus, either the convening authority or the accused may refuse to bargain at any time and go to trial.[138] Accordingly, pretrial agreements are not properly criticized as "contracts of adhesion,"[139] even if terms are demanded by the convening authority, for the accused at all times retains the constitutionally adequate option of a full trial on the merits with all of his or her rights assured. Accordingly, it is of no import which party proposes or in fact demands a term in a pretrial agreement, so long as the accused, upon competent advice of counsel, in fact consents to all terms.[140]

Consistent with these principles, the Court of Military Appeals should permit waiver by pretrial agreement of all motions which are waived upon entry of a guilty plea[141] and of other waivable matters not prohibited in R.C.M. 705(c), regardless of who proposes the waiver, so long as the effectiveness and integrity of the trial and appellate processes are not compromised.

Conclusion

The days of paternalism, reflected in the broad *Cummings* dictum, against pretrial agreements that go beyond mere bargaining on charges and sentence and deal with waiver of fundamental rights, are past. Although the law is unsettled in this area, defense counsel should feel free to propose and the government unrestrained to accept the waiver by pretrial agreement of motions that will be waived by a plea of guilty, and of most other waivable matters. The government ought to be able to rely on the 1984 Manual provisions and suggest waiver provisions openly. The government, however, is well advised to avoid the appearance of overreaching by fixed policies requiring waiver of certain motions in all cases, given the military courts' repeated concern with such policies. Waiver of motions provisions should be drafted with particularity to identify the motions or defenses waived, rather than in broad terms that may be interpreted to reach motions or rights that may not be waived. The government should refuse to accept any offer to waive matters prohibited in R.C.M. 705(c) or matters going to the effectiveness or integrity of the military justice system.

---

[132] *Cf.* United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982).

[133] UCMJ art. 67(h).

[134] *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 766–71 (1970).

[135] *Id.* Nor is it an exercise of unlawful command influence to do so. The decision does not affect the constitutional adequacy or fundamental fairness of the trial itself, nor does it present the risk of the appearance of evil in the civilian community (*see* United States v. Cruz, 20 M.J. 873, 880–84, 889–91 (A.C.M.R. 1985)) as the practice is common there. *See* White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 458–62 (1971). *But see* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 748–49 (1970) (suggesting that such policies are unfair to the accused).

[136] People v. Esajerre, 35 N.Y. 2d 463, 363 N.Y.S. 2d 931, 934 (N.Y. 1974). It is the waiver of such rights that is the very essence of plea bargaining. The accused gives up certain constitutional, due process rights or defenses, which cost the government time, money and resources to provide or rebut but which, in the judgment of defense counsel and the accused, present insufficient promise of success, in exchange for a better final result in the trial. The Supreme Court has never attempted to distinguish, for the purposes of plea bargaining, the importance of the right to present certain notions at trial from the substantial rights at trial of confrontation, presumption of innocence, privilege against self-incrimination, and trial of the facts before a jury, all of which are waived by a plea of guilty. Any distinction attempted in military law is not founded on sound reasoning. To preclude the waiver of such motions leads only to the implied offer to waive them by delivering a "quick, clean case" or a "45 page record," and such offers escape the light of judicial scrutiny.

[137] Weatherford v. Bursey, 429 U.S. 545, 560–61 (1977).

[138] R.C.M. 705(d) analysis.

[139] *See* United States v. Schaffer, 12 M.J. 425, 428 (C.M.A. 1982).

[140] To require the accused to propose the terms leads unavoidably to gamesmanship and innuendo until the terms acceptable to both parties are proposed.

[141] *See* R.C.M. 910(j) and analysis.

Declaratory Judgment Jurisdiction of the United States Claims Court and the Boards of Contract Appeals

*Major Dennis L. Phillips**
Contract Appeals Division, United States Army Legal Services Agency

Introduction

Within the past decade, two acts passed by Congress have had a profound effect upon the resolution of disputes that occur during the administration of government contracts. The Contract Disputes Act of 1978 (CDA)[1] created a statutory basis for the boards of contract appeals already functioning within many federal agencies. The Federal Courts Improvement Act of 1982 (FCIA)[2] established a specialized appellate forum, The United States Court of Appeals for the Federal Circuit (CAFC), to resolve issues peculiar to government contracts, customs, and patents. The FCIA also created a new trial level court, The United States Claims Court, and bestowed upon it jurisdiction to adjudicate both pre-award and post-award government contract litigation. Both the boards of contract appeals and the United States Claims Court are forums of limited jurisdiction and are not empowered to award the full panoply of relief generally available in a Federal district court. The declaratory judgment[3] is one form of remedy that has generated much controversy. At issue is the authority of the Claims Court and the boards of contract appeals to award a declaratory judgment in a contract where no monetary relief is sought.[4] Contract judge advocates need to know that in non-monetary contract disputes, the issue has been resolved at the Claims Court, but remains unsettled before agency boards. With regard to the latter forum, a final resolution of the matter by the CAFC may be anticipated and the outcome predicted. This article will initially examine the statutory basis of the United States Claims Court and judicial decisions interpreting its authority to issue declaratory judgments. An evaluation of the jurisdictional connection between the Claims Court and the boards of contract appeals will be followed by a discussion and analysis of the conflicting decisions emerging from the various agency boards concerning their power to award a declaratory judgment in a contract dispute where no monetary relief is involved.

Scope of Jurisdiction and Authority of the United States Claims Court

Congress, through the Tucker Act, gave the former United States Court of Claims (precursor to the United States Claims Court) jurisdiction over "any claim against the United States founded upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort."[5] The Court of Claims had general jurisdiction to grant monetary relief as well as limited ancillary equitable jurisdiction. The court could resort to equitable doctrines, such as accounting, reformation, and rescission, only when collateral to granting a monetary judgment. Under the Tucker Act, the Court of Claims could neither adjudicate claims founded "solely upon substantive equitable considerations"[6] nor grant nonmonetary relief such as an injunction or a declaratory judgment.[7] The Court of Claims clearly recognized the limitations on its jurisdiction prior to the CDA and FCIA when it decided *Austin v. United States*[8] in 1975. In *Austin*, the court stated:

> It is of course a cardinal principle of our jurisprudence that the only suits of which we have jurisdiction under 28 U.S.C. § 1491 (Supp. III 1973) (our general jurisdictional statute) are those in which the plaintiff seeks and can seek a money judgment. We may not give any relief unless the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; . . . [or he alleges] that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.[9]

Citing the United States Supreme Court decision in *United States v. King*,[10] the *Austin* court further concluded that it had no authority to enter a declaratory judgment or grant affirmative nonmonetary relief unless it was tied and subordinate to a monetary award. In *King*, the Court of Claims had attempted to assert that it had jurisdiction under the

---

*This article was originally submitted as a research paper in partial satisfaction of the requirements of the 34th Judge Advocate Officer Graduate Course.

[1] 41 U.S.C. §§ 601–613 (1982).

[2] Pub. L. No. 97–164, 96 Stat. 25 (codified in various sections of 28 U.S.C.).

[3] A declaratory judgment is a "remedy for the determination of a justiciable controversy where the plaintiff [or defendant] is in doubt as to his legal rights." Black's Law Dictionary 368 (5th ed. 1979). For example, if a contractor is required to develop technical data as part of a contract, a question may arise over ownership of the data because the contract is unclear. The government may want to release the data to third parties; the contractor claims that it owns the data. A monetary claim after the data is released may be an inadequate remedy for the contractor. Thus, the contractor may wish to seek a declaratory judgment to determine ownership prior to release.

[4] This article concludes that agency boards lack the authority to grant a declaratory judgment in nonmonetary disputes. For an opposing view, see Kosarin, *Nonmonetary Contract Interpretation at the Boards of Contract Appeals*, The Army Lawyer, Sept. 1985, at 11.

[5] 28 U.S.C. §§ 1491–1507 (1976) (amended 1982).

[6] AETNA Casualty and Surety Company v. United States, 655 F.2d 1047, 1060 (Ct. Cl. 1981).

[7] Berdick v. United States, 612 F.2d 533, 536 (Ct. Cl. 1979).

[8] 206 Ct. Cl. 719, *cert. denied*, 423 U.S. 911 (1975).

[9] *Id.* at 722–23.

[10] 395 U.S. 1 (1969).

Declaratory Judgment Act[11] to issue a declaratory judgment in an action seeking relief beyond money damages. In reversing the lower court's quest for expanded jurisdiction, the Supreme Court ruled that the Court of Claims's authority to grant relief depended "wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed."[12] The fact that there was no clear indication that Congress intended to exclude the Court of Claims from the scope of the Declaratory Judgment Act was not determinative. The Supreme Court was unwilling to assume that the Court of Claims had been given authority to issue declaratory judgments, and instead ruled that an express grant of jurisdiction from Congress would be required. Thus, prior to the enactment of the CDA, it is clear that the Court of Claims lacked authority to issue declaratory judgments.

Congress passed the Contract Disputes Act in 1978. A significant purpose of the Act was to generally divest federal district courts of jurisdiction over government contract disputes and to concentrate that authority in contracting officers, agency boards of contract appeals, and the United States Claims Court.[13] The enactment of the CDA did not grant any new equitable authority to the Court of Claims, however. During hearings in both the House of Representatives (House) and the Senate, much debate centered on whether the Court of Claims should have declaratory judgment authority. Earlier versions of the CDA in both houses of Congress provided for the Court of Claims to have authority to grant declaratory judgments. Provisions concerning declaratory judgment and injunctive relief were eliminated from the Act as finally approved. A House Report on the proposed CDA of 1978 stated:

> As introduced, section 10(e) of the bill H.R. 11002 would have granted the Court of Claims jurisdiction to grant injunctive relief in the exercise of its jurisdiction over claims founded upon express or implied contracts with the United States. The committee amendment eliminates this provision. This provision was strongly opposed by the Department of Justice which pointed out that this would modify the historic jurisdiction of the Court over monetary claims against the United States. Judge Davis in his comments on the bill also opposed this provision noting that with such a provision in the law, the Court would be asked to intervene in ongoing procurement disputes long before a money claim had matured.[14]

Correspondingly in the Senate, Senator Robert C. Byrd, when introducing an amendment to the Senate version of the CDA (later enacted as the CDA of 1978), asserted:

> Section 14(k) of the reported S.3178 has been eliminated from the Act. This section would have given the Court of Claims jurisdiction under the Declaratory Judgment Act. The elimination of this provision addresses concerns expressed by the Justice Department, the Department of Defense and the Armed Services Committee that allowed (sic) the Court of Claims declaratory judgment authority would undermine the disputes resolving process by permitting, in some cases, access to the Court before presentation of a claim to the contracting officer. The subject of equity relief was never addressed by the Procurement Commission and I do not believe that S.3178 is the correct forum for making this change in the jurisdiction of the Court of Claims.[15]

The fact that the CDA, as enacted, did not expressly convey to the Court of Claims any authority to issue declaratory judgments is of consequence to agency boards of contract appeals. The Act provided these boards with the authority to grant any relief that was available to a litigant in the Court of Claims.[16] The CDA did not give declaratory judgment authority to either the Court of Claims or to the agency boards through exercise of the flow-down jurisdictional provision. The Court of Claims continued to disclaim declaratory judgment jurisdiction after the CDA's enactment. For example, in *SCM Corp. v. United States*[17] it stated, "defendant seeks a declaratory judgment which is not within the jurisdiction of the court in this case."[18] That the CDA did not expand the Court of Claims jurisdiction to award a declaratory judgment appears to be evident to all but select agency boards of contract appeals. In a footnote in *McDonnell Douglas Corp.*,[19] the Armed Services Board of Contract Appeals (ASBCA) noted that the CDA added a sentence to the Tucker Act that stated: "The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978."[20] This footnote implies the board's astonishment as to why the Court of Claims has not ignored unambiguous legislative history to the contrary and derived by assumption an expansion of its equitable authority.

When the FCIA of 1982 went into effect on October 1, 1982, the newly created United States Claims Court, in addition to assuming the trial-level jurisdiction formerly exercised by the Court of Claims, received augmented power to grant declaratory judgments and give other equitable relief in contract actions prior to award. Earlier versions of both Senate and House bills would have given the Claims Court jurisdiction to grant equitable relief in all cases, not just in those involving a claim brought before the contract was awarded. This proposed unlimited expansion of authority was scaled down by Congress in response to strenuous

---

[11] 28 U.S.C. § 2201 (1982).

[12] *King*, 395 U.S. at 4.

[13] McDonnell Douglas Corporation v. United States, 754 F.2d 365, 370 (Fed. Cir. 1985).

[14] H. R. Rep. No. 1556, 95th Congress, 2d Sess. 29 (1978).

[15] 124 Cong. Rec. 36,267 (1978).

[16] 41 U.S.C. § 607(d) (1982).

[17] 595 F.2d 595 (Ct. Cl. 1979).

[18] *Id.* at 599.

[19] ASBCA No. 26747, 83-1 BCA (CCH) para. 16,377.

[20] *Id.* at 81,427 n.8.

objections raised by the Justice Department. The Justice Department, in a letter to the House Judiciary Committee, objected that:

> [T]he bill would vastly broaden the equitable power of the Article I Claims Court judges by authorizing them to enter declaratory judgments and grant injunctive relief. In our view, this vast expansion of power would drastically alter the nature of the Government's waiver of sovereign immunity and could lead to serious and untoward disruptions in the award and administration of Government contracts.[21]

The letter continued with a reference to a statement previously made by former Deputy Assistant Attorney General Irving Jaffe before the Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations in 1977:

> The Court of Claims should remain, as it was intended to be, the special tribunal where monetary claims can be resolved, divorced from the pressures generated by extraordinary proceedings to restrain or compel aspects of contract administration. Congress has, wisely, created the Court of Claims for this specialized task and no grounds exist to change it into another District Court.[22]

In recognition of these concerns, Congress limited the area within which the Claims Court could exercise equitable powers. The FCIA permitted judicial interference and issuance of a declaratory judgment by the Claims Court only at the pre-award stage of the contracting process and avoided equitable intrusion in the administration of awarded contracts. Congress' partial rejection of the administration's position in this matter was based upon recognition by legislators of the need to have a single forum empowered to grant both equitable relief and monetary damages when resolving pre-award issues. On the floor of the Senate, Senator Robert Dole, the manager of the bill, explained the justification for the expansion of the court's equitable jurisdiction:

> The fact that the Court of Claims lacks the authority to grant injunctive or declaratory relief to parties that seek its assistance has also been a major problem for litigants in Government contract cases, and has been decried by many practitioners as a glaring defect in its structure. . . . [S]ection 133 gives the new Claims Court the power to grant declaratory judgments and give equitable relief in controversies within its jurisdiction. This provision will for the first time give the court specializing in certain claims against the Federal Government the ability to grant litigants complete relief. The committee concluded that this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the Government.[23]

The Claims Court's augmented power was, nonetheless, constrained, in the final version of the statute, to the pre-award stage. As a further precautionary measure, the Senate Report indicated that "[t]he Committee expects that the court will utilize the (equitable relief) authority . . . only in circumstances where the contract, if awarded, would be the result of arbitrary or capricious action by the contracting officials, to deny qualified firms the opportunity to compete fairly for the procurement award."[24]

In *United States v. John C. Grimberg Co.*,[25] the United States Court of Appeals for the Federal Circuit had occasion to resolve the issue of whether the Claims Court could exercise its new equitable power at any stage of the contract. The court affirmed the Claims Court decision holding that the equitable power of the Claims Court could be invoked only by filing a claim with the court before a contract was awarded. The appellate court stated that "the words of the statute [FCIA] make no grant of equitable powers to the Claims Court in relation to post-award cases."[26] The appellate court subsequently noted that "The court [Claims Court], obviously could not enjoin the award of contracts already awarded. Nor would a declaratory judgment be appropriate after award."[27] For the purpose of determining the jurisdiction of the Claims Court to grant equitable relief, the court gave major weight to the legislative history of the FCIA. This is significant to agency boards of contract appeals as the legislative history of the FCIA indicates that because the Claims Court is granted exclusive jurisdiction concerning pre-award declaratory relief, comparable authority pursuant to section 607(d) of the CDA would not flow down to agency boards.[28]

Scope of Jurisdiction and Authority of Agency Boards of Contract Appeals

Boards of contract appeals are not courts, do not possess unlimited jurisdiction, and do not have the broad, diverse relief authority normally authorized federal courts.[29] Although a board's authority to award a declaratory judgment in a contract dispute where no monetary relief is involved is at issue, there is little doubt that when money damages are requested boards can interpret contract terms and, as an ancillary matter, grant relief that includes a remedy tantamount to a declaratory judgment. Prior to the enactment of the CDA, agency boards infrequently decided cases that required the interpretation of contract terms where no monetary relief was sought. Board rulings in such cases are inconsistent among agencies and, in at least one instance, contradictory within a particular board itself.

---

[21] *Court of Appeals for the Federal Circuit 1981, Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 212 (1981) (letter from Acting Assistant Attorney General Michael W. Dolan to Committee Chairman Peter W. Rodino).

[22] *Id.*

[23] 127 Cong. Rec. S14,692–94 (Dec. 8, 1981). *See also* S. Rep. No. 275, 97th Cong., 1st Sess. 22 (1981).

[24] S. Rep. No. 275, 97th Cong., 1st Sess. 23 (1981).

[25] 702 F.2d 1362 (Fed. Cir. 1983).

[26] *Id.* at 1368.

[27] *Id.* at 1372.

[28] S. Rep. No. 275, 97th Cong., 1st Sess. 23 (1981).

[29] Kosarin, *supra* note 4, at 11.

There are several instances in which, prior to the CDA, the ASBCA determined the respective rights of the parties under a contract even though no monetary relief was requested. In *Airesearch Manufacturing Company,*[30] the ASBCA held that it had the power to resolve a question whether the contractor had complied with the applicable cost accounting standards even though no monetary relief was demanded. Similarly, in *Windward Moving and Storage,*[31] the ASBCA ruled that, although the case involved a request for nonmonetary relief, it could decide whether a moving contractor was entitled to award of poundage in excess of its stated capacity. In *Windward,* the board acknowledged that although it could not grant contract reformation (the only relief requested), it could interpret the contract as written so as to guide the contracting officer in the administration of the contract. The ASBCA, however, has not always been consistent when resolving disputes involving only nonmonetary relief. In *Alliance Properties, Inc.,*[32] the ASBCA dismissed a contractor's claim pertaining to his desire to receive one-twelfth of the contract price per month. At the time of the ASBCA's ruling, all required work had been completed and the contract price had been paid in full, although not in monthly increments. Alliance, nonetheless, sought a resolution on the matter in order to preclude an occurrence in future contracts. When dismissing the contractor's appeal, the board stated, "But the Charter and Rules of this Board do not contemplate the entry of what would amount to declaratory judgments."[33]

In *Historical Services, Inc.,*[34] the Department of Transportation Contract Appeals Board (DOT CAB), in another pre-CDA case, held that "As a general rule, contract appeals boards lack jurisdiction to grant various kinds of relief of an equitable nature."[35] The DOT CAB stated unequivocally that agency boards lacked jurisdiction to correct a bid mistake, rescind a contract, reform a contract, issue an order of mandamus, or resolve allegations of fraud. When applying these limitations, the board stated:

> [I]t is clear that the relief sought by the parties lies beyond the jurisdiction of this Board. The issue in this case calls for an interpretation of the terms of the contract to ascertain the express and implied rights and obligations of the parties. While issues such as these are commonly decided by contract appeals boards, they are always presented in the context of a claim for monetary relief. The claim here, however, calls for something much different from monetary relief.[36]

The appeal was consequently dismissed as the remedies sought were held to be beyond the scope of the board's jurisdiction.

Although the CDA of 1978 provided a statutory basis for agency boards, the Act did not give the boards declaratory judgment authority in nonmonetary cases. Section 8(d) of the CDA expressly authorized agency boards to grant any relief available in the Court of Claims. As previously discussed, the Court of Claims neither possessed jurisdiction to issue declaratory judgments prior to 1978, nor did it receive such authority pursuant to the CDA. The agency boards did not inherit jurisdiction that the Court of Claims did not itself possess.

The ASBCA has not conceded that the CDA failed to bestow declaratory judgment authority upon the Court of Claims and through the flow-down provision to the agency boards. In its *McDonnell Douglas* decision, the ASBCA stated it derived its authority to award such relief from the CDA, contracts, and its charter.[37] Additionally, the ASBCA in *McDonnell Douglas* interpreted the legislative history of the CDA as supporting its view that Section 8(d) of the Act was meant to supplement the boards' jurisdiction to act in "those situations where there is inadequate authority on the part of the contracting officer to fully resolve disputes."[38] The ASBCA rejected the government's contention in *McDonnell Douglas* that it was subject to the same jurisdictional limitations as the Court of Claims. The board further stated that the CDA "was not intended to diminish or curtail the board's authority to determine the respective rights of the parties,"[39] as in a declaratory judgment, when no monetary relief was sought. The ASBCA's position was reinforced by the General Services Board of Contract Appeals (GSBCA) in *GT Warehousing Co.*[40] In *GT Warehousing Co.,* the GSBCA stated that prior to the CDA, agency boards decided disputes even though no money would change hands and that it saw no reason why it could not continue to do so under the Act.[41]

The broad jurisdictional view espoused by the ASBCA and the GSBCA after the CDA's passage was not accepted by the Engineering Board of Contract Appeals (ENG BCA). In *Guy F. Atkinson Company,*[42] the ENG BCA stated "for a board to undertake to render a contract interpretation not linked to a monetary claim would be to assume a jurisdiction which Congress has intentionally withheld from the Claims Court and from boards of contract appeals."[43] In a footnote, the board recognized that the CDA was "designed in part to eliminate disparities in

[30] ASBCA No. 20998, 76–2 B.C.A. (CCH) para. 12,150, *aff'd on reconsideration,* 77–1 B.C.A. (CCH) para. 12,546.

[31] ASBCA No. 15056, 70–2 B.C.A. (CCH) para. 8,537.

[32] ASBCA No. 10471, 65–2 B.C.A. (CCH) para. 5,210.

[33] *Id.* at 24,473.

[34] DOT CAB No. 71–8, 71–1 B.C.A. (CCH) para. 8,903.

[35] *Id.* at 41,372.

[36] *Id.* at 41,372.

[37] 83–1 B.C.A. (CCH) at 81,422. *See* Kosarin, *supra* note 4, at 15.

[38] 83–1 B.C.A. (CCH) at 81,422.

[39] *Id.*

[40] GSBCA No. 6860, 84–1 B.C.A. (CCH) para. 17,006.

[41] *Id.* at 84,701.

[42] ENG BCA No. 4785, 83–1 B.C.A. (CCH) para. 16,406.

[43] *Id.* at 81,594.

jurisdiction between the Court of Claims and the agency boards."[44] A statement by Senator Byrd contained within the legislative history referenced by the ASBCA in *McDonnell Douglas* strengthens the engineer board's view that under the CDA and prior to 1982 the boards and the Court of Claims were to exercise concurrent jurisdiction. When commenting on Section 8(d) of the Act, Senator Byrd asserted, "Agency Boards will now have the same authority as the Court of Claims would have on contract cases."[45]

As previously discussed, with the passage of the FCIA of 1982, 28 U.S.C. § 1491 was revised to give the new Claims Court exclusive jurisdiction to grant equitable and extraordinary relief on any contract claim brought before award. The legislative history of the FCIA clearly indicates that agency boards would not possess comparable authority. The Senate stated, "Since the court is granted jurisdiction in this area, boards of contract appeals would not possess comparable authority pursuant to the last sentence of section 8(d) of the Contract Disputes Act."[46] Similarly, the House stated, "This enlarged authority (declaratory and injunctive powers) is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts."[47] In *Grimberg*, the United States Court of Appeals for the Federal Circuit acknowledged this legislative history when it stated, "The Senate and House Reports are consistent in their indication that the grant in § 1491(a)(3) is exclusive only of contract boards, and that District Courts retain whatever equitable jurisdiction they had in contract cases under *Scanwell Laboratories, Inc. v. Shaffer*."[48] In addition, the dissent in *Grimberg* viewed the majority opinion as construing the word "exclusive" as meaning "that boards of contract appeals are excluded from granting declaratory and injunctive relief."[49] Congress' intent, as manifested in the FCIA, was to restrict the limited declaratory judgment jurisdiction it bestowed upon the Claims Court to the exclusion of agency boards. Any agency board ruling to the contrary ignores an unequivocal legislative history and a consistent judicial interpretation by an appellate court.

Post-CDA and FCIA Agency Boards of Contract Appeals Cases

The preceding discussion examined the statutory jurisdictional basis of the Claims Court and agency boards. An analysis of recent board decisions indicates that there remains a division of opinion among the various agency boards of contract appeals regarding their authority to issue a declaratory judgment in a nonmonetary dispute. The ASBCA is in the forefront of the controversy and espouses an unrestrained view that agency boards possess jurisdiction to grant equitable relief in such cases. The salient case in this area is *McDonnell Douglas*. As previously mentioned, the ASBCA held that it derived its equitable authority from the CDA, contracts, and board charter. In *McDonnell Douglas*, the ASBCA asserted that: it was not subject to the same jurisdictional limitations as the Court of Claims; as a quasi-judicial administrative tribunal, it did not derive its authority from the Declaratory Judgment Act; and rather than defining board authority, the CDA supplemented jurisdiction the boards already had under the pre-Act disputes clause. Although this argument initially appears persuasive, it collapses under closer scrutiny. Neither the CDA nor the FCIA conveys authority to agency boards to award a declaratory judgment in a nonmonetary dispute. Likewise, the attempt to bootstrap equitable power to the disputes clause fails. Although the clause allows a contracting party to seek "adjustment or interpretation of contract terms,"[50] "the regulation was not intended to create a right to an advisory opinion on the construction of the contract."[51] When rejecting the *McDonnell Douglas* analysis on this point, the ENG BCA in *Guy F. Atkinson* explained that, "the regulation gives either party the right to advocate the interpretation it believes to be correct, and if the other disagrees, to submit a claim and have the dispute decided by the orderly processes established therefor without interrupting the contractor's performance or the Government's administration of the contract."[52]

Lastly, although supposedly containing specific references authorizing equitable relief,[53] the pertinent provision of the ASBCA's charter authorizes it to hear, consider, and determine appeals from decisions "on disputed questions."[54] To rely upon this phrase, which is undefined in the charter, to justify the issuance of a declaratory judgment in a nonmonetary claim requires a very liberal interpretation that the federal judiciary is unlikely to draw. It is of interest to note that the United States Court of Appeals for the Federal Circuit reversed in part the ASBCA's decision in *McDonnell Douglas*. The Court ruled that the ASBCA was "in error when it ruled that it would have subject matter jurisdiction under the disputes clause if an appeal came to it from the contracting officer where the interpretation and scope of the clause were in issue on enforcement of a Comptroller General's subpoena."[55] The issue as to whether the ASBCA had authority to grant declaratory judgments, however, was not directly addressed because that question was not then before the Court. Nevertheless, the Court of Appeals for the Federal Circuit's ruling in the case should serve notice on agency boards that

---

[44] *Id.* at 81,594 n.2.

[45] *McDonnell*, 83-1 B.C.A. (CCH) at 81,420.

[46] S. Rep. No. 275, 97th Cong., 1st Sess. 23 (1981).

[47] H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 43 (1981).

[48] *Grimberg*, 702 F.2d at 1374-75 (citing *Scanwell*, 424 F.2d 859 (D.C. Cir. 1970).

[49] *Id.* at 1383.

[50] Federal Acquisition Reg. § 52.233-1 (1 Apr. 1984) [hereinafter FAR].

[51] *Atkinson*, 83-1, B.C.A. (CCH) at 81,594.

[52] *Id.* at 81,594.

[53] *See* Smith's, Inc. of Dothan, VABCA No. 2198 85-2 B.C.A. (CCH) para. 18,133 at 91,016.

[54] Defense FAR Supplement, app. A (1 Apr. 1984).

[55] *McDonnell*, 754 F.2d at 371.

attempts to broaden jurisdiction by administrative decree will be subject to close appellate scrutiny.

The ABSCA's avant-garde ruling in *McDonnell Douglas* has been buttressed by recent decisions by other agency boards. In *Ulric McMillan,*[56] the GSBCA cited *McDonnell Douglas* with approval, and affirmed its authority to award declaratory judgment type relief without the need to enter a monetary judgment. Later, in *GT Warehousing Co.,*[57] the GSBCA referred to the CDA and its addition of the phrase "or dispute with" to the Claims Court jurisdiction as an alternative source of agency board authority to issue declaratory judgments. The GSBCA stated:

> It is not yet clear whether this was a *pro tanto* legislative overruling of *United States v. King,* 395 U.S. 1 (1969), in which the Supreme Court held that the Court of Claims (predecessor to the Claims Court) could not award declaratory judgments. If it was, then Section 8(d) of the Contract Disputes Act, 41 U.S.C. § 607(d), is a second basis for our jurisdiction to grant a declaratory judgment.[58]

This putative source of authority has not been recognized by the Claims Court, its would-be chief benefactor. It is further undermined by the fact that Congress, when passing the FCIA in 1982, thought it necessary to give equitable powers to the Claims Court by enacting a new statutory provision. Had the CDA already bestowed such authority on the Claims Court, a new statutory provision would have been unnecessary.

Two additional agency boards, the Postal Service Board of Contract Appeals (PSBCA) and the Veterans Administration Board of Contract Appeals (VABCA), have also endorsed the *McDonnell Douglas* reasoning for allowing boards the power to grant nonmonetary declaratory judgment-type relief. In *Greater Eastern Holding Co.,*[59] the PSBCA resolved a claim not seeking quantified money damages by interpreting the contract terms and determining contract liability issues. The PSBCA rejected a government challenge to its jurisdictional authority by citing *McDonnell Douglas* with approval. The VABCA is the most recent convert to the *McDonnell Douglas* line of reasoning. In *Smith's, Inc. of Dothan,* the VABCA, citing *McDonnell Douglas,* held that it had the authority to grant "a declaratory judgment (or advisory opinion) regarding the effective date of the equipment warranty."[60] Finding no legal bar to its granting declaratory relief "in appropriate cases," the VABCA looked to the Declaratory Judgment Act for guidance and, finding the parties' interests too remote and speculative, declined to issue a declaratory judgment and dismissed the appeal. In *Appeal of Jones Plumbing and Heating, Inc.,*[61] the VABCA illustrated an inappropriate case for a declaratory judgment. The VABCA declined to award equitable relief where no costs have been incurred and no action would be taken as a result of a decision by the board.

Other agency boards, in post-CDA decisions, have declined to agree that they possess authority to award equitable relief in nonmonetary contract disputes. The Department of Agriculture Board of Contract Appeals (AGBCA) has spearheaded the rebuttal to *McDonnell Douglas.* Beginning with *Rough and Ready Timber Co.,*[62] the AGBCA has consistently advocated a strict constructionist view. The AGBCA has stated repeatedly that the CDA did not confer jurisdiction on boards to issue declaratory judgments.[63] Additionally, in *Cedar Lumber, Inc.,* the AGBCA raised a most convincing argument when, citing the United States Court of Appeals for the Federal Circuit decision in *Fidelity Construction Co. v. United States,*[64] it stated "that a Declaratory Judgment is an extraordinary remedy which would require a waiver of sovereign immunity when applied to a Government contract. Such waiver of sovereign immunity must be clear and specific."[65] Finding no authority to issue a declaratory judgment under the CDA, the AGBCA also expressed doubt whether an executive branch delegation through a charter provision or the contract disputes clause could authorize the equitable remedy. The ENG BCA, in *Atkinson,* concurred with the AGBCA and held that it did not have jurisdiction to grant equitable relief in a dispute not linked to a monetary claim which required the board to interpret the terms of a contract.[66] The board concluded that Congress had intentionally withheld jurisdiction to grant a declaratory judgment in post-award cases from the Claims Court and the boards of contract appeals. The Interior Board of Contract Appeals (IBCA), in its recent decision of *Appeal of Husky Oil NPR Operations, Inc.,*[67] reaffirmed its position, previously announced in *Walden General, Inc.,*[68] that it had no authority to grant a declaratory judgment and a claim requesting a declaration of rights was not appealable.

Conclusion

The scope of jurisdiction and authority of the Claims Court and agency boards has been the subject of much debate in Congress, the judiciary, and agency boards.

---

[56] GSBCA Nos. 7029–COM, 7070–COM, 83–2 B.C.A. (CCH) para. 16,595.

[57] 84–1 B.C.A. (CCH) at 84,701.

[58] *Id.* at 84,701–02.

[59] PSBCA No. 1128, 83–2, B.C.A. (CCH) para. 16,784.

[60] 85–2 B.C.A. (CCH) at 91,016.

[61] VABCA No. 1845 (31 Dec. 1985).

[62] AGBCA Nos. 81–171–3, 81–172–3, 81–173–3, 81–2, B.C.A. (CCH) para. 15,173.

[63] *See* J & J Shake, Inc., AGBCA No. 83–263–1 (21 Jan. 1986); Cedar Lumber Inc., AGBCA Nos. 85–214–1, 85–221–1, 85–3 B.C.A. (CCH) para. 18,346; Interstate Reforesters, AGBCA No. 84–177–3, 84–2 B.C.A. (CCH) para. 17,504; Brazier Forest Products, Inc., AGBCA No 84–121–1, 84–1 B.C.A. (CCH) para. 17,054.

[64] 1 FPD para. 68 (Fed. Cir. 1983).

[65] *Cedar Lumber, Inc.,* 85–3 B.C.A. (CCH) at 92,003.

[66] *Atkinson,* 83–1 B.C.A. (CCH) para. 16,406.

[67] IBCA No. 1792 (20 Nov. 1985).

[68] 82–2 B.C.A. (CCH) para. 16,070 at 79,804 n.1.

Application of the CDA and FCIA, coupled with an analysis of the *King* and *Grimberg* judicial decisions, clearly defines the existing jurisdictional boundaries of the Claims Court to issue a declaratory judgment in a nonmonetary dispute. The United States Claims Court has the jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems necessary in the pre-award stage of the procurement process. Prior to an award, pursuit of monetary relief by a claimant is not a factor in the Claims Court. After award, the Claims Court may not grant a declaratory judgment in a contract dispute not involving monetary damages.

In view of the recent varying board decisions, similar clarity regarding an agency board's authority to award a declaratory judgment is lacking. The arguments presented by the ASBCA, GSBCA, PSBCA, and VABCA in support of putative authority are not compelling. The grant of jurisdiction upon agency boards enabling them to subject the executive branch to declaratory judgments must be found in either a specific statutory or, perhaps, an express contractual provision. The doctrine of sovereign immunity operates as a bar to actions against the United States except when expressly waived by competent authority. To the extent that the government has waived its sovereign immunity to be sued in the Claims Court, the boards of contract appeals can also grant relief.[69] The intent of Congress or the executive branch to permit agency boards to issue declaratory judgments cannot be implied. As a general proposition, a waiver of sovereign immunity, or consent to be sued, or the creation of liability to declaratory judgment relief ordered by an agency board, must be strictly construed.[70] If Congress or the executive branch intended agency boards to have authority to issue declaratory judgments in nonmonetary cases, they have done so in a most ambiguous manner.

In *Fidelity Construction,* the reasoning that precluded the United States Court of Appeals for the Federal Circuit or any agency from authorizing the award of attorney fees against the United States by mere implication is applicable by analogy to agency boards unilaterally subjecting the government to declaratory judgments. Where the arguments as presented in the *McDonnell Douglas* decision are "hopelessly dependent on implication and negative inferences,"[71] they must ultimately fail. Had Congress or the executive branch intended boards of contract appeals to independently award declaratory judgments in nonmonetary disputes, they should have done so expressly to satisfy the strict construction standard. As clearly stated in *Grimberg,* "if Congress had not made the Claims Court's equitable powers 'exclusive' of contract boards, there would be a strong argument under Section 8(d) of the CDA that the boards would also have equitable powers."[72] The equitable powers were made exclusive of agency boards by Congress; and if the boards already independently possessed equitable powers from some other source, then the Court of Appeals' concern would have been academic. The strict constructionist view espoused by the AGBCA, and reinforced by the ENG BCA, IBCA, and DOT BCA, is convincing. The construction of the alternative expansive view championed by the ASBCA does not stand up against the contrary statutory scheme set forth in the CDA and FCIA. Boards of contract appeals cannot expand by fiat their authority that has been authorized by Congress or the executive branch. In my opinion, it is only a matter of time until a board ruling embracing the authority to issue a declaratory judgment in a nonmonetary dispute, akin to that reached in *McDonnell Douglas,* is reversed by the United States Court of Appeals for the Federal Circuit.

[69] Dep't of Army, Pamphlet No. 27–153, Contract Law, para. 14–6*a* (25 Sept. 1986).

[70] *See Fidelity Construction Co.*, 1 FPD para 68, at 8.

[71] *Id.* at 19.

[72] *Grimberg,* 702 F.2d at 1375–76.

Contracts Subject To Approval by Higher Authority

Major James F. Nagle
Office of the Staff Judge Advocate, U.S. Army Forces Command, Fort McPherson, Georgia

Introduction

Government contracting has become so complex that it is mind-boggling. In 1908, the Army purchased an airplane from the Wright brothers. The three-and-a-half page contract said essentially three things: the Army wanted an airplane; it must be able to fly; and if it flew more than forty-one miles per hour, the Army would pay an additional $2500.[1] In contrast, by the mid-1960s, the government contract had so changed that when a law student compiled a complete contract, including all its incorporated clauses and documents, the result was a pile of paper six feet high![2]

Clemenceau once remarked that "war is too important to be left to the generals." Some contracts become too important and complicated to be left to contracting officers if they involve certain matters or exceed a certain value. This is not disparaging to contracting officers. Rather, it indicates a need for uniformity or a realization that contracting officers

[1] Solibakke, *The First Successful Government Contract for "One (1) Heavier-Than-Air Flying Machine"*, 8 Pub. Cont. L.J. 195, 201–02 (1976). *See* Horne, *Defense Industry Profits—How Much is Enough?*, 7 Nat'l Cont. Mgmt. J. 115, 118 (1973); Powell, *The Army Procures a Flying Machine: A Backward Glance,* 12 Nat'l Cont. Mgmt. J. 75 (1978).

[2] Doke, *Contract Formation, Remedies, and Special Problems,* 2 Pub. Cont. L.J. 12,13 (1968).

often do not have the requisite legal and technical staff or experience to ensure correctness.

The present Approval of Contract clause is Federal Acquisition Regulation § 52.204–1: "This contract is subject to the written approval of the agency official designated in the Schedule and shall not be binding until so approved."[3]

The clause is a direct descendent of Armed Services Procurement Regulation (ASPR) 7–105.2—a clause so unequivocal that it is one of the comparatively few ASPR clauses that remain unchanged from its 1949 version. A similar clause was in the Federal Procurement Regulations.[4] Use of the clause is mandated when agency procedures require written approval of the contract at a level above that of the contracting officer.[5]

Such clauses are especially important as the nature of contracting changes and the complexity of the procured goods or services accelerates. Nowhere is this more apparent than in installation contracting. Many contracting officers and specialists are very experienced at small purchases and fixed price minor construction matters, such as painting and roof repairs contracts. They are now confronted with contracting out huge installation-wide service operations such as the Directorate of Engineering and Housing or Directorate of Logistics with cost reimbursable contracts.

Nature of the Clauses

What is the relationship of Approval of Contract clauses to contract formation? Are they conditions subsequent, something nice to have but dispensable, or are they conditions precedent, mandatory prerequisites without which no contract exists?

Clearly, they are conditions precedent. The decisions supporting this proposition stretch back over one hundred years. As early as 1869, the Supreme Court held, in *Filor v. United States,*[6] that when a contract required the approval of a higher authority, the Quartermaster General, no contract existed until that approval was obtained. The same result was reached in *Monroe v. United States,*[7] which contained a forerunner of ASPR 7–105.2. Ruling such approval by the Chief of Engineers to be a "condition precedent" to contract award, the Supreme Court held that, absent such approval, no contract existed.

Similarly, a long line of cases, especially in the Court of Claims, led that court to proclaim as early as 1911 that "it has been decided repeatedly that a contract providing for the approval of the superior officer is not a valid subsisting agreement until approved."[8] Similar results are obtained in the other federal courts,[9] in state courts,[10] and in the General Accounting Office (GAO).[11] Army contractors have unsuccessfully complained to the Armed Service Board of Contract Appeals (ASBCA) that such clauses are merely conditions subsequent to contract. In *Entertainment Booking Agency,*[12] the contract form's general provisions provided that contracts over $1000 had to be approved by the installation commander. Absent such approval no contract would be effected, notwithstanding the signature of the contracting officer. Four days before the contract was to be performed, the contractor was notified that the installation commander had not approved. When the contractor appealed, the ASBCA ruled that the clause imposed a condition precedent that had not been satisfied.

No Exceptions to the Rule

The clear-cut notice of the announcement is blurred when the contracting officer acts in a manner inconsistent with the clause. Such inconsistent acts occur when the contracting officer gives assurances that the contractor will receive the award, requires the contractor to furnish bond, or actually signs the contract.

In *H. R. Morgan Contracting Co.*[13] the invitation for bids conditioned the formation of a contract on the approval of higher authority. The approval was not obtained. Thus, despite assurances by the contracting officer that the award was to Morgan, a contract never existed. Similar results were achieved on parallel facts in the Court of Claims[14] and the GAO.[15] The contractor cannot claim apparent authority even where it began performance based on assurances by the contracting officer. It knowingly assumed the risk.[16]

---

[3] Federal Acquisition Regulation § 52.204–1 (1 Apr. 1984) [hereinafter FAR].

[4] Federal Procurement Regulation 1–7.204–2, *superseded by* FAR. *See also* ASPR 7–604.2, regarding the clause's use in construction contracts.

[5] FAR § 4.103; FAR § 1.301(a)(2) would include agency guidance at any organizational level.

[6] 76 U.S. (9 Wall.) 45 (1869).

[7] 184 U.S. 524 (1902).

[8] Cathell v. United States, 46 Ct. Cl. 368, 371 (1911). *Accord* Russell Corp. v. United States, 210 Ct. Cl. 596, 537 F.2d 474 (1976); Colonial Metals Co. v. United States, 204 Ct. Cl. 320, 327, 494 F.2d 1355, 1359 (1974); Cutler-Hammer, Inc. v. United States, 194 Ct. Cl. 788, 794–95, 441 F.2d 1179, 1182–83 (1971); Andrews and Co. v. United States, 154 Ct. Cl. 460, 292 F.2d 280 (1961); Globe Indemnity Co. v. United States, 102 Ct. Cl. 21 (1944); Ship Construction Co. v. United States, 91 Ct. Cl. 419 (1940); Little Falls Knitting Mill Co. v. United States, 44 Ct. Cl. 1 (1908).

[9] *E.g.*, Grammer v. Virgin Islands Corp., 235 F.2d 27 (3d Cir. 1956).

[10] Texas Co. v. Peacock, 77 Idaho 408, 293 P.2d 949 (1956).

[11] *E.g.*, 53 Comp. Gen. 167 (1973); Ms. Comp. Gen. B–175534 (20 Apr. 1972); 39 Comp. Gen. 282 (1959); 31 Comp. Gen. 477 (1952); 21 Comp. Gen. 605 (1941). In 31 Comp. Gen. 477, 477–78, the Comptroller General observed "It is well settled that where a contract contains a clause which makes its final execution dependent upon the approval of the head of the department or some supervisory official of the Government, it is not a binding obligation until such approval is had."

[12] ASBCA No. 23761, 80–1 BCA para. 14,246. *Accord* Nick G. Hanna, ASBCA No. 27367, 83–1 BCA 16,271; Joseph F. Morsoni, Jr., ASBCA No. 6928, 61–2 BCA para. 3197.

[13] ASBCA No. 12845, 68–1 BCA para. 6492.

[14] Brant v. United States, 46 Ct. Cl. 409, 415 (1911).

[15] 42 Comp. Gen. 124 (1962); Ms. Comp. Gen. B–154042 (31 Aug. 1964).

[16] Interocean Oil Co. v. United States, 270 U.S. 65 (1926); Ms. Comp. Gen. B–154042 (31 Aug. 1964).

A requirement that the identified low bidder furnish payment and performance bonds, thereby incurring added expenses, has also failed to overcome the need for higher approval.[17] Finally, even the signature of the contracting officer on the contract has not resulted in a binding contract where the requisite higher approval was not obtained.[18] Indeed, the previous Army Defense Acquisition Regulation Supplement specified that such a signing made no difference.[19]

Thus, there is no substitute for obtaining the higher approval. The contracting officer cannot waive it, nor can the government be estopped from asserting it.[20] This sometimes harsh result stems from the laws of the agency. The solicitation provision acts as an unmistakable announcement, stripping the contracting officer of the authority to contract in such circumstances. Equally clearly, it notifies the bidder "whose minds must meet" in order for a contract to result. Thus, the bidder cannot claim "secret limitations" on the contracting officer—an exception to the general rule that apparent authority does not apply against the government.[21]

Level and Formality of Approval

Such strict adherence to the rule is not a weakening of the precept expressed in *Garfielde v. United States*[22] and *United States v. Purcell Envelope Co.*[23] that formal execution of a contract is unnecessary to bind the government once a meeting of the minds has been achieved. Indeed, the ASBCA cited these cases in 1967 for the rule that a contract can be formed by the acts or intents of the parties even in the absence of a formal written contract. The board noted, however, that this rule is well recognized "but not applied, [when] the Government equally clearly had conditioned its acceptance . . . on approval of higher authority."[24] The *Garfielde/Purcell Envelope* rationale clearly holds, however, that the higher authority's approval need not be formalized.

In *Penn Ohio Steel Corp. v. United States,*[25] the approving authority was the Assistant Secretary of the Navy. That official had indeed granted oral approval, but had not yet provided *pro forma* approval by signing the contract. The court held that the oral approval was sufficient for contract formation. Similarly, in *Barclay v. United States,*[26] the higher approval authority was William Warne, the Assistant Secretary of the Interior. Mr. Warne approved the contract and accepted the bid by telegram on 31 January 1949, but did not formally sign the contract until 2 May 1949. The court held that the 31 January 1949 approval was sufficient for contract formation.

Frustrated contractors have sometimes argued that use of the clause requires the government to use its best efforts to secure the approval. Courts have not adopted that argument and have specifically ruled that if an intermediate command disapproved, there was no requirement to go to the higher approval authority.[27]

There is no limitation on who may be the requisite higher approval authority. It has been a sub-cabinet level officer[28] or the local installation commander.[29] The appointment is left to the discretion of the individual agencies. The number of such approval authorities, however, should be minimized; if there is more than one, the approvals should be obtained concurrently, if possible.[30]

Regardless of the level or formality of approval, these clauses can have a substantial impact on contractors. They can delay significantly the awarding of a contract. If a contractor's prices have increased in the interim, the government is not liable.[31] Frequently, the delay can be so long that the bid acceptance period expires.[32] Bidders then have the option of extending their bid acceptance period or not, depending on how stable their prices have been. Consequently, if higher approval is required, contracting officers should consider imposing a longer bid acceptance period than normal.[33]

Premature Performance

Premature performance will make no difference if the contract is firm fixed price. Recovery is unclear, however regarding premature performance when the higher approval is obtained later and when the contract is not firm fixed

---

[17] Ms. Comp. Gen. B–149427 (20 Aug. 1962); B.H. Greenwood, ASBCA No. 12232, 67–2 BCA para. 6650. In *Greenwood,* however, the ASBCA noted that the bonds were to be undated.

[18] Orleans Dredging Co. v. United States, 90 Ct. Cl. 360 (1940); Griffith v. United States, 77 Ct. Cl. 542 (1933); *Entertainment Booking Agency;* Ms. Comp. Gen. B–149427 (20 Aug. 1962).

[19] Army Defense Acquisition Regulation Supplement I–403.53, *superseded by* FAR.

[20] *Brant v. United States; Entertainment Booking Agency;* 42 Comp. Gen. 124 (1962).

[21] *See* Electrospace Corp., ASBCA No. 14520, 72–1 BCA para. 9455; Kurz v. Root Co., ASBCA No. 17146, 74–1 BCA para. 10,543.

[22] 93 U.S. 242, 244 (1876) (a proposal in accordance with an advertisement to carry the mail, coupled with an acceptance of the proposal, "created a contract of the same force and effect as if a formal contract had been written out and signed by the parties").

[23] 249 U.S. 313, 319 (1919) (contractor's bid to supply envelopes to the Post Office Department was accepted by entry of a formal order, even though the contract was revoked by the government before it was signed, as "formal execution . . . was not essential to the consummation of the contract").

[24] B.H. Greenwood, 67–2 BCA para. 6650 at 30,829.

[25] 173 Ct. Cl. 1064, 354 F.2d 254 (1965).

[26] 166 Ct. Cl. 421, 333 F.2d 842 (1964).

[27] Congress Construction Corp. v. United States, 161 Ct. Cl. 50 (1963).

[28] Ms. Comp. Gen. B–140330 (30 Sept. 1959) (Secretary of the Air Force).

[29] *Entertainment Booking Agency.*

[30] FPR 1–303. While this guidance was not continued in the FAR, the author submits it is well worth practicing. In Joseph F, Morsoni, Jr., ASBCA No. 6928, 61–2 BCA para. 3197, the contract required the approval of the wing commander, who approved it, and the base commander, who did not.

[31] *Orleans Dredging v. United States;* 1 Comp. Gen. 321 (1921).

[32] *See* Nick G. Hanna, ASBCA No. 27367, 83–1 BCA para. 16,271. Hanna extended its bid but modified it. Its bid was therefore rejected.

[33] *See* FAR §§ 14.201–6(j), 52.214–16; Standard Form 33, Solicitation, Offer, and Award (Apr. 1985), para. 12.

price. In one case, the Court of Claims allowed recovery.[34] A U.S. Attorney negotiated with a contractor to perform some real estate appraisal work in support of litigation. He informed the contractor that the Department of Justice (DOJ) had to approve the contract. Before the approval was obtained, but with the U.S. Attorney's knowledge, the contractor began performing the work. The higher authority was later obtained. The court allowed recovery under the theory that the U. S. Attorney had "accepted" the work, but also noted the general rule that the contractor assumed the risk if the higher approval was not obtained. The court's "acceptance" argument is suspect in light of the clear limit on the U.S. Attorney's authority and the court's acknowledgment that, regardless of an "acceptance," the contractor assumed the risk if DOJ had not approved.

The court's predicament is understandable, however. Frequently, equity demands some compensation for the contractor regardless of the theory—extraordinary contractual relief, quantum merit, or unauthorized commitment. Indeed, the ASBCA has frequently been unable to grant any relief because its jurisdiction required a contract. It could only advise the appellant that its claim for relief must lie in other forums.[35]

Conclusion

Regardless of these instances of difficulties for well-meaning contractors, the Approval of Contract clause is a legitimate and logical tool for the government to use. As the cost and complexity of contracting spirals upward, realistic management must make do with a limited number of contracting, legal, and technical personnel qualified in numerous increasingly narrow fields of esoterica. The Approval of Contract clause is a force multiplier to ensure a uniform, experienced approach. Commanders and supervisory personnel should evaluate the needs of the command and the experience of the individual contracting personnel and technical staff involved. They should then identify the contracts that demand higher level approval for whatever reason, be it complex subject matter, high dollar value, or unique type of contract (*e.g.*, time and materials contract), and obtain that approval expeditiously.

[34] Waldemar P. Thomson v. United States, 174 Ct. Cl. 780, 357 F.2d 683 (1966).

[35] *H.R. Morgan Contracting Co.; Joseph F. Morsoni, Jr.*

USALSA Report

United States Army Legal Services Agency

Table of Contents

Lex Non Scripta

Captain Stephen B. Pence
Trial Counsel Assistance Program

The law should, in appropriate circumstances, be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right. [1]

Introduction

Most offenses under military law are codified within the Manual for Courts-Martial, and the requirements of soldiers are set forth by order, regulation, or other directive. There is a body of unwritten law in the military, however, that consists of certain established customs and traditions essential to the mission of the military. This unwritten law, which "may not unfittingly be called the customary military law," [2] is referred to in the Manual for Courts-Martial as a "custom of the service." [3] A custom of the service may rise to the level of a "duty" under Article 92 of the Uniform Code of Military Justice. [4] Failure to conform to accepted customs of the service may also be considered "unbecoming" for an officer and form the basis for a violation of Article 133, or be conduct prejudicial to good order and discipline or "service discrediting" conduct under Article 134.

Very few criminal cases have depended solely on the existence of military custom in determining whether a soldier has committed an offense under military law. This is because most actionable obligations placed on soldiers are found in specific directives, and because of the difficulty imposed on the government in proving that a particular act of misconduct represents a deviation from military custom. Within the past year, the Court of Military Appeals has addressed the subject of "customs of the service" in *United States v. Johanns,* [5] *United States v. Heyward,* [6] and *United States v. Thompson.* [7] In these cases, the court acknowledged the existence of an unwritten standard of conduct for commissioned and noncommissioned officers, and discussed its application in criminal proceedings. The purpose of this article is to review the basis for requiring a higher standard of conduct from soldiers, examine the court's view of this requirement, as represented by its recent decisions, and provide prosecutors with guidance on the realistic use of a custom of the service violation.

Standards of Conduct

Military law by necessity is different from its civilian counterpart. [8] As a specialized community, it is governed by a separate discipline than that of the civilian community. [9] The concepts of duty and discipline are more than admirable qualities in the armed forces; they are attributes which are essential to the military and may be properly demanded of all service members. [10] One can imagine the vulnerability of our national defense if a soldier could stop soldiering as easily as a civilian can leave a job. Because of this distinction, the UCMJ regulates a far broader range of conduct of military personnel than a typical state criminal code regulates conduct of civilians. [11] Higher standards of conduct may therefore be enforced by the military in furtherance of its mission.

In accordance with these higher standards, the military has maintained the commitment one must have to duty. Duty is obviously an essential part in the role of soldiering. Congress has determined that the failure of a soldier to meet his or her duty may warrant criminal prosecution. [12] Duty is easily recognized when it is presented in the form of an order or regulation. Both Congress and the Supreme Court have recognized, however, that not all duties can be reduced to writing for courts-martial purposes, "for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them." [13] Thus, customs of the service legitimately form the basis for imposing a duty upon soldiers.

No case has examined the unique nature of military service more than *Parker v. Levy.* In that case, the Supreme Court upheld Captain Levy's conviction for conduct unbecoming an officer and a gentleman under Article 133 and for making statements that were prejudicial to the good order and discipline of the armed forces in violation of Article 134. The charges against Captain Levy stemmed from his urging black enlisted soldiers not to go to Vietnam if ordered to do so, and if sent to Vietnam to refuse to fight. There was no specific regulation or provision prohibiting Captain Levy, or any other Army officer, from urging enlisted personnel not to go to Vietnam. Captain Levy

[1] Parker v. Levy, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring).

[2] *Id.* at 744 (citation omitted).

[3] Manual for Courts-Martial, United States, 1984, Part IV, paras. 16c(3)(a) and 60c(2)(b) [hereinafter UCMJ].

[4] Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1982) [hereinafter UCMJ].

[5] 20 M.J. 155 (C.M.A. 1985).

[6] 20 M.J. 35 (C.M.A. 1986).

[7] 22 M.J. 40 (C.M.A. 1986).

[8] *Levy,* 417 U.S. at 743.

[9] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

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

[11] *Levy,* 417 U.S. at 750.

[12] UCMJ art. 92(3).

[13] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35–36 (1827), *cited in Levy,* 417 U.S. at 745.

complained that the Articles under which he was convicted were unconstitutionally vague. The Court of Appeals agreed with Levy that the imprecise language of the Articles could provide insufficient warning to future offenders even though Levy's action fell squarely within the prohibitions of Articles 133 and 134, and he was clearly on notice that his conduct violated the articles.[14] The Supreme Court reversed the Court of Appeals, upheld Levy's conviction, and ruled that the Articles are not unconstitutionally vague. "For reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.[15]

The Supreme Court also acknowledged that its decisions during the last century have "recognized that the long-standing customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Articles 133 and 134."[16] *Parker v. Levy* not only recognized the legitimate concern the military has in the conduct of its members, but also realized that the standard of conduct may be measured by a custom within the service. The Court further found that Levy had been given ample notice that his conduct was prohibited, despite the fact that his conduct was not specifically proscribed, and he could have no reasonable doubt that his statements were in violation of Articles 133 and 134. Justice Blackmun, in his concurring opinion, succinctly stated the situation: "In actuality what is at issue here are concepts of right and wrong and whether civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a broader variety of relationships than one finds in civilian life."[17] The Supreme Court decision leaves no doubt that, due to the special relationship between the government and members of the armed forces, higher standards of conduct may be required of service members.

A custom in law "must consist of a uniform, known practice of long standing, which is also certain and reasonable, and is not in conflict with existing statutes or constitutional provision."[18] The Manual states that "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or *custom of the service.*"[19] Before an individual can be convicted for dereliction of duty, it must be shown that he or she knew or should have known of the existing duty.[20] The logical inference is that before a soldier may be convicted under Article 92, the government must prove that any custom of the service imposing a duty was known or should have been known by the accused.

As *Parker v. Levy* shows, a breach of a custom of the service may also form the basis of a violation of Articles 133 and 134. According to the Manual, a "[c]ustom arises out of a long established practices which by common usage have attained the force of law in the military or other community affected by them."[21] The point at which a particular action becomes or ceases to be a custom of the service and thus imposes or relieves a soldier of a legal obligation is hard to determine, however. Nevertheless, these issues were addressed by the Court of Military Appeals in *Johanns, Heyward,* and *Thompson.*

Johanns: Conduct Unbecoming an Officer

In *United States v. Johanns,* the Court of Military Appeals put the "unwritten law" to the test. In that case, an officer was convicted of violating Article 133 by having sexual intercourse with four enlisted women. It was undisputed that the interaction was consensual, nondeviate, and sometimes instigated by the women involved. The government's position was that Captain Johanns' conduct, although not particularly proscribed by any regulation, was "wrongful, dishonorable and disgraceful" and "contrary to the customs and traditions of the armed forces of the United States."[22] Captain Johanns countered, *inter alia,* that Article 133 was void for vagueness.[23]

The Air Force Court of Military Review conceded that officers are held to a high standard of conduct and that their conduct should be exemplary.[24] That court further acknowledged that "customs of the service can clarify the general article [Article 133] and help define the standard expected."[25] The Air Force court found, however, that no custom of the service existed in the Air Force that prohibited the type of conduct engaged in by Captain Johanns for criminal prosecution purposes. Dissenting opinions posited that, despite a lack of "custom of the service" that would prohibit Captain Johanns conduct, his actions were nevertheless unquestionably "unbecoming an officer" and "prejudicial to good order and discipline."[26]

The Court of Military Appeals upheld the decision of the court of military review and, in view of the Air Force court's determination that no custom existed, assumed that Johanns had not received adequate notice that his conduct was prohibited.[27] The Court of Military Appeals conceded

---

[14] 478 F.2d 772 (3d Cir. 1973).

[15] *Levy,* 417 U.S. at 756.

[16] *Id.* at 746-47.

[17] *Id.* at 763.

[18] W. Winthrop, Military Law 43 (1886).

[19] MCM, 1984, Part IV, para. 16c(3)(a) (emphasis added).

[20] MCM, 1984, Part IV, para. 16c(3)(b).

[21] MCM, 1984, Part IV, para. 60c(2)(b).

[22] 20 M.J. at 156-57.

[23] *Id.* at 158.

[24] 17 M.J. 862, 868 (A.F.C.M.R. 1983).

[25] *Id.*

[26] *Id.* at 870, 872, 887.

[27] 20 M.J. at 160.

that officers are held to a higher standard of conduct. Furthermore, the court found that if a custom did in fact exist, a violation thereof would tend to have a direct effect on good order and discipline because it would be perceived that the officer was "flouting military authority."[28] More importantly, according to the court, the existence of a custom would provide notice to officers so that, as in the case of *Parker v. Levy*, "they would have no reasonable doubt as to the legal requirement to which they are subject."[29] The concurring opinion by Judge Cox, constrained by the factual conclusions of the court of military review, expressed astonishment at that court's conclusion that there was no custom in the Air Force that forbids associations that " 'demean the officer,' 'detract from the respect and regard for authority inherent in military relationship between officers and enlisted,' 'prejudic[e] . . . good order and discipline in the armed forces,' 'dishonor[ ] or disgrac[e]' the officer 'personally,' 'seriously compromise[ ] his standing as a commissioned officer,' and are 'morally unbefitting and unworthy.' "[30] Judge Cox believed that the evidence established beyond a reasonable doubt that Captain Johanns' conduct was unbecoming an officer. The finding by the lower court that no custom existed prohibiting Johanns' acts, however, forced a finding that he lacked notice that his conduct was criminal.[31]

The Court of Military Appeals recognized that customs differ among the services. Even so, the court made clear that once it is established that a custom exists, it may form the basis for prosecution under Article 133 and 134. Moreover, the court found that existence of the custom provides the requisite notice that a violation of the custom may result in prosecution.

Heyward and Thompson: An NCO's Duty

In *United States v. Heyward*, a technical sergeant failed to report that he had observed other Air Force members using marijuana. The noncommissioned officer (NCO) had not only seen other members smoking marijuana, but had on a few occasions smoked marijuana with them. Heyward was found guilty of being derelict in his duties under Article 92 for not reporting the use of drugs by other service members. He was also guilty of using marijuana in violation of Article 134. Heyward's duty to report the use of drugs by other service members was imposed by an Air Force regulation.[32] Heyward admitted at trial that he had a duty to report this misconduct, but contended that the duty violated his right against self-incrimination.[33] The Court of Military Appeals agreed with Heyward with regard to his duty to report the use of other Air Force members on those occasions when he was also a user. The court upheld the basic reporting requirement as valid and permissible, however. In so doing, the court acknowledged that Heyward, unlike his civilian counterparts who were not subject to criminal prosecution for not reporting criminal behavior, had a special duty imposed by a regulation to report the criminal conduct he had observed. The court reiterated that "[a] military member who knowingly fails to perform a duty, whether the duty be imposed by administrative regulation, a custom of the service, or lawful order, may be prosecuted under Article 92(3) for dereliction of duty."[34] Explaining the legitimacy of the reporting duty, the court stated:

> Drug abuse by members of the military has long been regarded as a serious threat, not only to the preparedness of the drug abusers themselves but "to the performance of the mission entrusted by the Constitution and Congress to the Armed Services." In attempting to maintain high standards of health, morale, and fitness for duty, it is entirely reasonable for the Air Force to impose upon its members a special duty to report drug abuse.[35]

Accordingly, the court recognized that to perform its vital mission, the military must insist upon respect for duty and discipline. This is so even if the duty imposed on the service member may focus attention upon his own conduct and eventually lead to criminal charges being brought against him.[36]

Chief Judge Everett's concurring opinion expressed concern about a duty imposed upon a service member, absent a regulation, to which he may not have had sufficient notice. The concurring opinion realized that a "substantial portion of our citizenry are unwilling to 'get involved' by preventing or reporting crimes."[37] The opinion further noted that those who report misdeeds may be labeled as a "snitch" and be unpopular. This general reluctance to get involved may result in a service member being unaware of his duty to get involved and thus deprive him of proper notice of his duty. "[I]t must be proved in light of the societal background concerning such inaction, that appellant knew—or should have known—that he was subject to this duty."[38] According to Chief Judge Everett, Heyward was aware of his duty in his case only because of the written Air Force directive.

In *United States v. Thompson*, the Court of Military Appeals confronted the situation that was hypothetically considered in *Heyward's* concurring opinion. In *Thompson*, the court reviewed the sufficiency of the evidence of an Air Force technical sergeant's conviction for dereliction of duty for failing to *prevent* drug abuse by a subordinate. Thompson was also convicted of using marijuana with the

---

[28] *Id.* at 159–60.

[29] *Id.* at 160.

[30] *Id.* at 165.

[31] *Id.*

[32] 22 M.J. at 36.

[33] *Id.*

[34] *Id.*

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

[36] *Id.* at 37.

[37] *Id.* at 38.

[38] *Id.* (citation omitted).

subordinate. Because of the rationale expressed in *Heyward*, which was decided the same day, the court found it inconsistent to convict Thompson of dereliction of duty for failing to prevent a crime to which he was a principal. The Court, however, took the opportunity to express doubt about the government's establishment of a "clear-cut duty" in *Thompson*.[39]

In *Thompson*, no Air Force regulation or directive was introduced to establish a duty on the part of the NCO to prevent drug abuse among subordinates. Rather, the government sought to establish this duty by submitting evidence of the Air Force's efforts to eliminate drugs. The government also presented the testimony of Thompson's commander, who testified that the duty to prevent crime is "inherent in the rank of noncommissioned officer."[40] Citing prior decisions by the Supreme Court and decisions of its own, the Court of Military Appeals acknowledged that "noncommissioned officers, by virtue of their rank and authority, have certain leadership responsibilities required of them by law and custom."[41] The Court stated:

> We agree with the basic premise that noncommissioned officers have the responsibility to maintain high personal standards of conduct and to counsel and correct their subordinates on deficiencies. Indeed, any noncommissioned officer worth his salt would not hesitate to take affirmative action to stop the use of drugs, to break up fights, to halt a thief, or to take reasonable measures to 'prevent' crime in any shape or form.[42]

After realizing the higher standards required of noncommissioned officers, the court continued:

> Nevertheless, in the absence of an identifiable regulation, directive, or custom of the service which would provide notice to noncommissioned officers of the legal requirements to which they are subject, we are reluctant to approve criminal sanctions under Article 92(3) for failure to perform a general unspecified duty to "prevent" crime.[43]

The court concluded by advising the Air Force to implement specific directives if it desired to subject NCOs to criminal liability for failure to prevent drug abuse.

Conclusion

Although unwritten law is still recognized by the Manual as imposing a higher standard of customary conduct upon all service members, the recent decisions by the Court of Military Appeals appear to have diminished its importance.

The concern the Court of Military Appeals expressed in *Heyward* and *Thompson* in using a custom of the service to prove duty is that a service member may not be on notice that the custom exists. But this could also be true of a written directive. It is well recognized that a service member is nonetheless charged with obeying the written regulation despite his or her ignorance of it.[44] Furthermore, the court in *Johanns* stated that the existence of a custom provides notice to potential offenders "so that they would have no reasonable doubt as to the legal requirements to which they are subject."[45] Had the court in *Heyward* and *Thompson* first looked to the existence of a custom, the guidance rendered in those decisions may have been different. Instead, the court conditioned the existence of a custom on the demonstration of notice of the custom. The court in *Thompson*, although lauding the high standards of noncommissioned officers, questioned whether there was "an identifiable . . . custom of the service which would provide notice."[46] One response might be a custom that, in the court's own words, "any commissioned officer worth his salt would not hesitate to" do.[47] If preventing drug abuse among subordinates is an act that any NCO would not hesitate to do, why does the court hesitate in finding it is a custom of the service? And if it is a custom that any NCO would not hesitate to do, where is the lack of notice?

The circumstances in *Heyward* and *Thompson* are distinguishable. The government in *Heyward* was attempting to establish a duty to "report" the drug abuse, while in *Thompson* the alleged duty was to "prevent" drug abuse. The court in *Thompson* expressed concern over how far an individual would have to go in order to "prevent" a crime.[48] This may indeed be the key to the court's decision in *Thompson*. To extend this reasoning, however, to a duty to "report," as the concurring opinion in *Heyward* intimates, is unwarranted. Reporting drug abuse requires a specific and unequivocal action on the part of the noncommissioned officer. Despite the fact that what and when the NCO must report may be the subject of debate,[49] it should not justify a finding that a noncommissioned officer never has a duty, absent a written directive, to report drug abuse. Indeed, it seems inconsistent to entrust an NCO with the power to apprehend a drug abuser,[50] but deny that an NCO has any duty to report the abuse. Furthermore, the concern expressed in the concurring opinion of *Heyward*, that an individual reporting an offense may be labeled a "tattletale," is perhaps valid for the civilian society but is inconsistent with the "overriding demands of discipline and duty" within the military that was recognized in *Parker v. Levy*. Comparing a noncommissioned officer's obligation to report drug abuse with children in Nazi Germany reporting

---

[39] 22 M.J. at 41.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* MCM, 1984, Rule for Courts-Martial 916(l)(1) [hereinafter R.C.M.]; *see* United States v. Davis, 16 M.J. 225 (C.M.A. 1983).

[45] 20 M.J. at 160.

[46] 22 M.J. at 41.

[47] *Id.*

[48] *Id.*

[49] *Heyward*, 22 M.J. at 39.

[50] R.C.M. 302(b)(2).

disloyal actions by their family, as was done in the concurring opinion in *Heyward,*[51] likewise is of questionable value. It is indeed difficult to imagine any noncommissioned officer "worth his salt" observing a subordinate abusing drugs and defending his failure to report the abuse on the basis that he was afraid others would call him a "tattletale." Consider the situation where a staff sergeant, squad leader, in an effort to be "one of the guys," is sitting in a barracks room with four of his subordinates who are smoking marijuana. The duty officer smells marijuana coming from the room, opens the door, and discovers the crime. All of the soldiers in the room are ordered to submit urine samples the next day. The squad leader's sample tests negative. Absent a written directive prohibiting his conduct, has the noncommissioned officer committed an offense punishable by court-martial? This is the type of issue with which the Court of Military Appeals will inevitably have to deal. Finding a moral obligation on the part of the staff sergeant without attaching any legal significance will do little to further the concept of "duty" or discipline in the military.

There seems little question whether the military services can demand a higher standard of conduct from officers and NCOs. The Manual for Courts-Martial and case law recognizes that the unique mission of the military places a duty upon it leaders to maintain a standard of conduct above what is required of a civilian. It is equally recognized that not every duty or legal obligation can be reduced to writing. These two tenets were aptly demonstrated in *Parker v. Levy,* where an officer's mutinous language, although not prohibited by a specific directive, was nevertheless clearly in violation of the customary standard of conduct that is expected of an officer. The Manual for Courts-Martial specifically provides that a "custom of the service" may be used to prove "duty" under Article 92(3) or service discrediting conduct of the General Article of Article 134. Customs also play a significant role in determining if conduct is "unbecoming an officer" under Article 133, as was pointed out in *United States v. Johanns.* Although "custom of the service" continues to be recognized by the Manual and case law as a feasible method of proving a required standard of conduct, its legal application is problematic.

While the Court of Military Appeals acknowledges the higher standards of conduct for all officers, it will be reluctant to hold them to this higher standard without a written directive or order. It is evident that the government should rely on a "custom of the service" alone as a last resort in attempting to establish a duty. If prosecutors must rely on a custom alone, they should be prepared to show that not only did the custom exist, but also that the accused was on notice of the custom. This could be done by showing the relationship between the custom and the mission of the military, introducing training manuals pertaining to the leadership responsibility of the officer involved, and presenting testimony of other officers in a position to know the customs of the position held by the accused. In light of *Thompson,* where this technique was tried, it is unclear whether any amount of evidence will suffice to impose a duty based on custom of the service alone. Furthermore, if a custom is established, counsel should be prepared to combat an attack by the accused that the custom has been unenforced and no longer exists, or does not affect good order and discipline in the military. To prevent the particular problems faced in *Heyward* and *Thompson,* trial counsel might advise commanders that they should remind their noncommissioned officers of the military's determination to stop drug abuse and their responsibilities to that end. At a minimum, this should include their duty to report drug abuse that they observe among their subordinates.

[51] 22 M.J. at 38 (Everett, C.J., concurring).

The Advocate for Military Defense Counsel

Ineffective Assistance During the Post-Trial Stage[1]

Captain Stephanie C. Spahn
Defense Appellate Division

Introduction

After trial, but before appellate review has begun, there exists a period of time during which the trial defense counsel still represents the convicted accused. How long after trial does this obligation exist? What type of representation is expected? When is a trial defense counsel's representation in post-trial matters considered ineffective and what can a defense counsel do to effectively represent the client after the court has adjourned? The purpose of this article is to identify problem areas in post-trial proceedings and to suggest ways to avoid them.

In *United States v. Palenius,*[2] the Court of Military Appeals generally defined the parameters of the trial defense counsel's post-trial duties. These duties are divided into four separate categories. First, the defense counsel has a duty to inform the client about the military appellate process,

[1] Last in a series of articles on ineffective assistance. *See* 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; Curry, *Ineffective Assistance of Counsel During Trial,* The Army Lawyer, Aug. 1986, at 52; Franzen & Oei; *Effective Assistance of Counsel During Sentencing,* The Army Lawyer, Oct. 1986, at

[2] 2 M.J. 86 (C.M.A. 1977).

including the options the client can exercise to attempt to influence the intermediate review conducted by the convening authority.[3] Defense counsel is responsible for taking action on the client's behalf during these intermediate reviews.[4] Second, defense counsel should identify possible appellate issues and discuss them with the client.[5] Once an appellate defense counsel has been appointed, trial defense counsel also should apprise him or her of the issues.[6] Third, defense counsel should advise and assist the client "as the exigencies of the case require"; for example, a client may need to request deferment of confinement because of a family emergency.[7] Finally, defense counsel should maintain the attorney-client relationship until substitute defense counsel or appellate defense counsel have been properly appointed and have begun performance of their duties.[8]

The policy behind the court's ruling in *Palenius* is to ensure that an accused receives continuous, uninterrupted legal representation after trial.[9] This continuity is necessary because in military practice, unlike civilian practice, the attorney who represents the accused on appeal is often different from the attorney who represented him at trial.[10] The Court of Military Appeals wanted to eliminate the fragmented representation of the accused that resulted from defense counsel ceasing to act before appellate counsel had begun to do so.[11]

For the purposes of this article, post-trial duties will be divided into the following four categories: appellate rights advice; post-trial submissions; assistance to appellate defense counsel; and substitution of counsel.

Appellate Rights Advisement

Defense counsel has a duty to explain appellate rights to the client. This advice must include not only an explanation of the powers of the appellate courts, but also an explanation of appellate defense counsel's role in causing those powers to be exerted and the consequences of proceeding without such assistance.[12] Incorrect or incomplete advice may result in a finding by the appellate courts that the attorney's performance was ineffective. For example, in *Palenius,* defense counsel told the client that his case would receive a quicker and better review by the Army Court of Military Review if the client did not have an appellate defense counsel represent him.[13] Further, the record was devoid of any post-trial submissions by defense counsel on the client's behalf.[14] The Court of Military Appeals held that defense counsel's erroneous advice and failure to provide even the minimum post-trial representation necessary to protect the client's interests constituted ineffective assistance of counsel.[15]

Defense counsel must also take reasonable measures to ensure that the client's desires regarding appellate representation and possible appellate issues are brought to the attention of the appellate courts.[16] To that end, defense counsel should have the client read and sign the standard "Appellate Rights Form" (also known as a "Request for Appellate Representation"). Defense counsel should include on this form any issues the client wants raised on appeal and the legal errors made at trial. Defense counsel should then serve the original on the court reporter, retain a copy, and provide a copy to the client. Moreover, if this form is not attached to the copy of the record of trial served on the defense counsel for review, counsel should inquire as to its whereabouts.[17] If possible, defense counsel may want to have the client execute another form. Although the Army Court of Military Review and the Court of Military Appeals are unlikely to find defense counsel's representation was ineffective if his or her only error was a failure to retain the appellate rights form, claims of ineffective assistance can be precluded by diligence in the early stages of post-trial representation.

Trial defense counsel *may* want to advise the client about post-trial and appellate rights *prior* to trial. Whether a client intends to plead guilty or not guilty, it may ease his or her mind to know that the trial court is not the court of last resort. This pretrial preparation will also ensure that the client understands the appellate rights advisement given by the military judge at the end of his trial.[18] Although the military judge is now required to advise the client of his or her appellate rights,[19] defense counsel still has the primary duty to explain post-trial and appellate rights to the client.[20]

Post-Trial Submissions

Rule for Courts-Martial 1105 permits an accused to submit written matters to the convening authority which might

---

[3] *Id.* at 93.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 91.
[13] *Id.* at 89.
[14] *Id.*
[15] *Id.* at 91.
[16] United States v. Knight, 16 M.J. 691, 692 (A.C.M.R. 1983) (citing United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982) and *Palenius*).
[17] *Id.*
[18] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1010 [hereinafter MCM, 1984 and R.C.M. respectively].
[19] *Id.*
[20] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 13–4*a* (1 July 1984) [hereinafter AR 27–10].

affect the convening authority's decision whether to disapprove any findings of the sentence. R.C.M. 1106(f) allows counsel for the accused to submit written corrections or rebuttal to any matter in the staff judge advocate's post-trial recommendation which defense counsel believes is "erroneous, inadequate, or misleading" and to comment on any other matter.[21] Usually, it is the defense counsel, rather than the accused, who submits matters to the convening authority under R.C.M. 1105. Failure to submit either a petition for clemency or a *Goode* response is not ineffective assistance of counsel per se. If the military judge has recommended clemency or if the staff judge advocate's recommendation to the convening authority contains erroneous information or is incomplete, however, defense counsel's failure to act may constitute ineffective assistance of counsel.[22]

The Court of Military Appeals, citing *Palenius,* has held that the "loyalty of defense counsel to his client—before, during, and after trial—is a cornerstone of military justice."[23] The court has held defense counsel responsible for preparation of the *Goode* response and of a petition for clemency when, in the defense counsel's professional judgment, such a petition may lead to a more favorable sentence for the accused.[24] In *United States v. Titsworth,* defense counsel was specifically advised by the military judge that he would entertain a petition for clemency for suspension of the bad-conduct discharge if it was supported by reports concerning appellant's efforts to rehabilitate himself.[25] Defense counsel did not submit a petition for clemency.[26] The Court of Military Appeals held that, if the petition was not submitted simply because of defense counsel's inaction, the accused received inadequate representation.[27] If, however, the decision not to submit a petition for clemency was the conscious choice of both the accused and the defense counsel, the court stated it would find no valid basis for complaint by the accused.[28] Because defense counsel's affidavit implied that the accused had concurred in the decision not to submit a clemency petition and the accused could not be reached for rebuttal, the court did not find that the accused had received inadequate representation.[29]

In a subsequent case, *United States v. Davis,*[30] the Army Court of Military Review considered whether the trial defense counsel's failure to notify the convening authority of the trial judge's strong recommendation to suspend the punitive discharge deprived the appellant of effective assistance of counsel.[31] The Army court opined that R.C.M. 1105 shifted the burden of bringing favorable information to the convening authority's attention from the staff judge advocate to the trial defense counsel.[32] Applying the standard set forth in *Strickland v. Washington,*[33] and *United States v. Jefferson,*[34] the *Davis* court concluded that appellant had received ineffective assistance of counsel at a critical point in the proceedings because there "was a reasonable probability that the convening authority would have suspended the adjudged discharge had he known of the trial judge's 'strong' recommendation."[35] The *Davis* decision indicates that the Army court will find that counsel was ineffective when there is a "reasonable probability" that the convening authority would have granted clemency had he or she known about a favorable recommendation.[36]

Additionally, the Navy-Marine Court of Military Review has held that defense counsel's double failure to submit a petition for clemency and to rebut an erroneous statement in the staff judge advocate's post-trial review, in light of the appellant's desire to return to active duty, a strong recommendation for clemency, and a good confinement record, constituted ineffective assistance.[37]

The military appellate courts have not confined themselves to finding ineffective assistance of counsel when defense counsel fail to submit clemency petitions. Failure to rebut erroneous, inadequate, or incomplete information in post-trial recommendations can be equally ineffective. In *United States v. Schreck,* defense counsel's response to the staff judge advocate's post-trial review consisted of a statement that he concurred with the staff judge advocate's opinions and recommendation to approve the adjudged sentence, despite the fact that the military judge had strongly recommended substantial clemency and despite defense counsel's written acknowledgment to the appellant that he

---

[21] Matters submitted under the provisions of R.C.M. 1105 will be referred to as petitions for clemency. Matters submitted pursuant to R.C.M. 1106 will be called *Goode* responses because the requirement for service of the staff judge advocate's post-trial review on trial defense counsel with provision for his response was first established in United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

[22] *See* United States v. Davis, 20 M.J. 1015 (A.C.M.R. 1985).

[23] United States v. Schreck, 10 M.J. 226, 228 (C.M.A. 1981).

[24] United States v. Titsworth, 13 M.J. 147, 148 (C.M.A. 1982).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 149.

[30] 20 M.J. 1015 (A.C.M.R. 1985).

[31] The military judge had strongly recommended that the bad-conduct discharge be suspended. The staff judge advocate did not advise the convening authority of this recommendation. Trial defense counsel submitted no matters for the convening authority's consideration under R.C.M. 1105 or 1106. The convening authority took action without considering the military judge's recommendation for suspension of the discharge. *Id.* at 1016.

[32] *Id.* at 1019.

[33] 466 U.S. 668 (1984).

[34] 13 M.J. 1 (C.M.A. 1982).

[35] *Davis,* 20 M.J. at 1019.

[36] *Id.*

[37] United States v. Zapata, 12 M.J. 689 (N.M.C.M.R. 1982).

would prepare an appropriate reply to the post-trial review.[38] The Court of Military Appeals held that, even if defense counsel's action was inadvertent, it ran contrary to the norm of loyalty required after trial and therefore required prompt corrective action.[39] The court did not decide the issue of ineffective assistance because the appellant had escaped from lawful confinement during the pendency of his appeal.[40] The Air Force Court of Military Review found ineffective assistance, however, when a defense counsel failed to rebut a misleading statement in the post-trial review.[41] The Air Force court held that defense counsel have a responsibility to correct anything that is misleading, incomplete, or erroneous in the post-trial review.[42]

To avoid being cited for ineffective assistance, defense counsel should carefully review each case to determine whether a petition for clemency or a response to the staff judge advocate's post-trial recommendation is necessitated by the facts of the case. If the military judge has strongly recommended clemency, defense counsel should submit a petition for clemency unless the client specifically instructs counsel not to submit one. In that event, defense counsel should ask the client to put those instructions in writing so the defense counsel has documentary proof of the client's wishes to show appellate authorities, if necessary. Moreover, defense counsel should carefully scrutinize the post-trial recommendation to see whether it complies with the mandates of R.C.M. 1106. If it is incomplete or contains erroneous information, defense should point out the discrepancies in a *Goode* response.

Although the primary purpose of post-trial submissions is to influence the convening authority to take action favorable to the client, post-trial submissions can be tremendously helpful to those responsible for appellate review of the case because they may provide a more complete picture of the client than is contained in the record of trial. In order to meet the relatively short suspense date for a post-trial submission, defense counsel may want to send out questionnaires prior to trial to the client's family, former employers, and the like. Moreover, defense counsel should consider drafting a form letter requesting clemency recommendations that could be sent to court members immediately after trial. Counsel should encourage the client prior to trial to unearth all of the favorable documentary evidence he or she has accumulated; documents not used at trial can supplement the petition for clemency. The clemency recommendations and favorable documentary evidence can then be placed in a folder and presented to the convening authority as a package. The benefits of such pretrial preparation are twofold. First, the convening authority has a clearer picture of the accused and may be more likely to grant clemency. Second, appellate counsel will have more information on which to base a request for sentence reduction from the appellate courts.

If a defense counsel does not have anything good to say about the accused, however, it is better to submit nothing at all. In *United States v. Pratt*,[43] a defense counsel apparently expected his client to raise an allegation of ineffective assistance of counsel, so he sent a detailed affidavit to the convening authority setting forth many of the difficulties he had had with his client.[44] The Navy Court of Military Review determined that defense counsel's disclosure of privileged information operated to deny the appellant effective post-trial representation.[45] Because the record established beyond a reasonable doubt the appellant's guilt and his desire to be discharged, however, the court found the appellant was not prejudiced by his counsel's disclosures.[46]

Duty to Assist Appellate Defense Counsel

Trial defense counsel must provide reasonable assistance to appellate counsel and may be obligated to assist appellate defense counsel by obtaining information needed for appellate review.[47] Defense counsel may *not* take any action after trial to harm the client.[48] Even when a client alleges ineffective assistance of counsel, a defense counsel is not free to volunteer information that does not concern the issue of ineffective assistance.[49] If the client or appellate counsel desires access to the defense counsel's file in order to determine what steps were taken in the client's behalf, defense counsel is obligated to provide reasonable access to the file and a reasonable opportunity to reproduce documents contained therein.[50] The Court of Military Appeals in *United States v. Dupas* imposed only two limitations on the client's access to the defense counsel's file:

> (a) If for some reason, cost to the attorney is involved in reproducing documents or providing access, the client must provide for reimbursement of these costs; and, (b), if information has been provided to a lawyer on the promise that it will be kept in confidence—even with respect to his client—the confidentiality of such information must be maintained.[51]

To avoid a conflict with appellate defense counsel, trial defense counsel should be sure to document his or her advice to the client, the client's desires, and the extent of

---

[38] *Schreck*, 10 M.J. at 227–28.

[39] *Id.* at 229.

[40] *Id.*

[41] United States v. Black, 16 M.J. 507 (A.F.C.M.R. 1983).

[42] *Id.* at 511.

[43] 9 M.J. 548 (N.C.M.R. 1980).

[44] *Id.* at 550.

[45] *Id.*

[46] *Id.* at 551.

[47] AR 27–10, app. C, para C–2*d*.

[48] United States v. Dupas, 14 M.J. 28, 30 (C.M.A. 1982).

[49] *Id.* at 30.

[50] *Id.*

[51] *Id.* at 31.

counsel's pretrial preparation of the case. Allegations of ineffective assistance can be quickly squelched if a record of adequate representation is apparent from defense counsel's file.

If trial defense counsel desires to be relieved of post-trial responsibilities, he or she must apply to the court which has jurisdiction of the case for relief.[52] The *Palenius* court held that defense counsel should continue to perform all post-trial duties until a substitute counsel or appellate counsel have been appointed and have begun performing their duties, at which point defense counsel can apply for relief.[53] The Navy Court of Military Review, sitting en banc in *United States v. Sterling*,[54] provided guidelines on how to apply for relief because the diversity of approaches in applications for relief signalled a need for uniformity. The Navy court expected the application for relief to be "the product of a conscious, rational consideration by both trial and appellate defense counsel, supporting a conclusion that further representation by the original defense counsel is no longer necessary to adequately protect the interests of an accused."[55] Defense counsel's application must include the following assurances: appellate defense counsel has been appointed or has been requested by the accused; all post-trial duties have been performed, including examination of the staff judge advocate's review; and all post-trial duties will continue to be performed until defense counsel has received actual notification of relief.[56] Other pertinent factors may include: counsel's impending release from active duty; geographical separation of counsel and accused; necessity for appointment of substitute counsel; and mental or physical conditions that would make effective representation difficult.[57] The Navy court cautioned trial and appellate defense counsel to ensure that their client's interests are not jeopardized by release of the trial defense counsel.[58]

Substitution of Counsel

In *Palenius*, the Court of Military Appeals set forth guidelines for defense counsel who want to be relieved from the case after a substitute counsel has been properly designated.[59] Prior to *Palenius*, problems often arose when substitute counsel were appointed to represent accuseds in post-trial proceedings. In many cases, substitute counsel had no prior connection with the case and failed to communicate with the appellant before responding to the staff judge advocate's post-trial review.[60] In *United States v. Iverson*, the Court of Military Appeals held that "absent a truly unusual circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level."[61] The court found that the accused must agree to the substituted counsel before an attorney-client relationship can be formed because an attorney cannot act as an agent without the knowledge and consent of the principal.[62] Therefore, it is incumbent on both the original and the substituted defense counsel to ascertain that the substitution has been properly made and agreed to by the client. Until a substituted counsel has been properly appointed and accepted, the duty to represent a client's post-trial interests remains with the original counsel. Defense counsel should scrupulously comply with the procedural requirements of *Palenius* in order to avoid allegations of ineffective assistance.

Conclusion

Trial defense counsel should be active representatives for clients even after trial. Failure to perform important post-trial duties can result in allegations of ineffective assistance of counsel. More importantly, failure to represent the client zealously at every level may substantially prejudice the client's opportunity for favorable resolution of his or her case.

---

[52] *Palenius*, 2 M.J. at 93.

[53] *Id.*

[54] 5 M.J. 601 (N.C.M.R. 1978) (en banc).

[55] *Id.* at 602.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Palenius*, 2 M.J. at 93.

[60] United States v. Iverson, 5 M.J. 440 (C.M.A. 1978); United States v. Brown, 5 M.J. 454 (C.M.A. 1978); United States v. Miller, 2 M.J. 767 (A.C.M.R. 1976); United States v. Economu, 2 M.J. 531 (A.C.M.R. 1976).

[61] 5 M.J. at 442–43.

[62] *Id.* at 443. The Army Court of Military Review agrees with this proposition. *See* United States v. Simmons, SPCM 21372 (A.C.M.R. 25 Sept. 1985); *United States v. Miller; United States v. Economu.*

The Right to Counsel: What Does It Mean to the Military Suspect?

Captain Donna L. Wilkins
Defense Appellate Division

Introduction

The right to counsel afforded suspects under the fifth and sixth amendments to the Constitution of the United States are distinct, but may overlap in their application. The fifth amendment right to counsel developed to interject an attorney between law enforcement personnel and the suspect, thereby protecting the individual from self-incrimination in the inherently coercive atmosphere of a custodial interrogation.[1] The sixth amendment right to counsel provides that all individuals facing criminal proceedings have the assistance of an attorney.[2]

These constitutional amendments and the black letter rules interpreting their application are not always helpful in determining when the right to counsel attaches under each of the amendments. The purpose of this article is to help the trial defense counsel recognize when either the fifth or sixth amendment right to counsel attaches for the military suspect and assist the trial defense counsel in determining the duty owed to that individual.

Fifth Amendment Right to Counsel

The United States Supreme Court, in *Miranda v. Arizona*,[3] set out the requirement that counsel warnings be given by law enforcement officers to a suspect during a custodial interrogation. The Court concluded that, because of the inherently compelling and coercive nature of custodial interrogations, there was a need to ensure that the suspect truly had the option to either remain silent or to make a voluntary statement. Thus, based on this reasoning, the court established the fifth amendment right to counsel. *Miranda* requires that:

> [A] suspect must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.[4]

This rights advisement is required before any incriminating statements made during custodial interrogations may be admitted at trial.[5] If an individual renders an incriminating statement without having been previously advised of these rights or after invoking the right to remain silent or to consult with an attorney, the statement is considered involuntary and a violation of the fifth amendment.

Article 31 of the Uniform Code of Military Justice[6] provides that a person may not be interrogated or requested to render any statement without first being informed of the nature of the offense for which he is suspected, that he has a right to remain silent, and that any statement made may be used against him as evidence at a trial by court-martial. The Article 31 warnings do not require right to counsel warnings. The Article 31 warnings must be given by any person subject to the Code[7] who is acting in an official disciplinary or law enforcement capacity[8] and who is soliciting an incriminating response or statement from a suspect.[9] There is no requirement that the suspect be in custody before he or she is entitled to be advised of his or her Article 31 rights.

Although the Article 31 rights do not require the advisement of the right to counsel, the fifth amendment right to counsel was made applicable to the military in *United States v. Tempia*.[10] Counsel rights and warnings required by *Miranda* were subsequently codified in Mil. R. Evid. 305(d)(1)(A). This rule requires that an individual be advised of his or her right to consult with counsel and to have counsel present prior to an interrogation, where the suspect is in custody, could reasonably believe himself or herself to be in custody, or is deprived of his or her freedom of action in any significant way. Thus, whenever a suspect is interrogated in a non-custodial atmosphere, the investigator must advise the individual of his or her Article 31 rights. If the suspect is in custody or is significantly deprived of his or her freedom of movement, the investigator must advise the suspect of his or her Article 31 rights and the right to counsel.

In *United States v. Scott*,[11] the Court of Military Appeals addressed the meaning of "custody." The court held that whenever a suspect is directed to report to a particular individual or place and the order, which the suspect is not free to decline, is clearly given for law enforcement purposes, the suspect is in custody.[12] Another important factor in determining the existence of "custody" would be whether the

---

[1] U.S. Const. amend. V. *See* Miranda v. Arizona, 384 U.S. 436 (1966). For a further discussion of the right to counsel, see Finnegan, *Invoking the Right to Counsel: The* Edwards *Rule and the Military Courts*, The Army Lawyer, Aug. 1985, at 1; Criminal Law Division, the Judge Advocate General's School, U.S. Army, Criminal Law—Evidence, chapters 26 & 27 (June 1986) (to be published as Dep't of Army, Pam. No. 27-22).

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

[3] 384 U.S. 436 (1966).

[4] *Id.* at 479. The opportunity to exercise these rights must be afforded the suspect throughout the interrogation process.

[5] *Id.* at 444, 478–79.

[6] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

[7] Mil. R. Evid. 305(c).

[8] Mil. R. Evid. 305(c) analysis.

[9] Mil. R. Evid. 305(b)(1).

[10] 16 C.M.A. 629, 37 C.M.R. 249 (1967).

[11] 22 M.J. 297, 302 (C.M.A. 1986).

[12] *Id.*

individual could objectively perceive that the order to report had a law enforcement purpose.[13] If, however, a suspect is ordered to report to a superior who is not a law-enforcement official and is not apparently exercising law-enforcement functions and the order has a valid military purpose apart from any law-enforcement purpose, the suspect is not in custody.[14] In light of the interpretation of "custody" in *Scott*, the right to counsel would appear to attach whenever an individual is directed to report to a particular place or individual for questions by anyone who, under the circumstances, is acting in a law-enforcement capacity and it appears to the individual that the order to report and the questioning have a law-enforcement purpose.

After *Miranda*, a question remained about what happens once the suspect has been given the warnings and has invoked the right to counsel.[15] In *Edwards v. Arizona*,[16] the Supreme Court addressed the question. The Court was apparently concerned that, once the suspect had invoked his right to counsel, the police might attempt to obtain a subsequent waiver of that right and thus establish the admissibility of any statement obtained from the suspect, by simply showing that the suspect had responded to further police-initiated custodial interrogation.[17] *Edwards* set out the following per se rule: once an accused or suspect in custody invokes the right to counsel, no further interrogation is permitted until counsel has been made available or unless the accused himself initiates further communication or conversation.[18]

Likewise, Military Rule of Evidence 305(f) provides that "[i]f a person chooses to exercise the privilege against self-incrimination or the right to counsel under [Mil. R. Evid. 305], questioning must cease immediately." This rule does not answer the question of whether or when questioning may be resumed following the exercise of a suspect's rights, because the drafters felt that the courts had not fully resolved the matter at that time.[19] Since the drafting of this rule, however, the Court of Military Appeals has decided that the *Edwards* per se rule does apply to military interrogations.[20]

Even after *Edwards* became part of military law, the military courts have continued to wrestle with the meaning of "counsel made available."[21] In *United States v. Whitehouse*,[22] the Army Court of Military Review declined to interpret *Edwards* as a prohibition against further interrogation until the suspect has actually talked to a lawyer. The court felt that the military suspect could properly waive his right to counsel after having invoked that right if the suspect was afforded the opportunity to seek counsel, and then exercised his prerogative as to whether he wished to speak with the police.[23] In *Whitehouse*, the accused had thirteen days in which he was free to seek out and consult with counsel. He was not confined during that time, but he never consulted with an attorney. The court concluded that "counsel made available" meant "a reasonable opportunity" to consult with counsel.[24]

Military Rule of Evidence 305(d)(2) provides that "[w]hen a person entitled to counsel under [Mil. R. Evid. 305(d)(1)] requests counsel, a judge advocate . . . shall be provided by the United States . . . before the interrogation may proceed." The United States, whether through the Trial Defense Service or the staff judge advocate, must ensure that a suspect is promptly provided with legal consultation or representation whenever required by law or regulation.[25] In addition, military police are directed, pursuant to their own regulation,[26] that once a "suspect indicates that he wishes to consult a lawyer, he must not be questioned until a lawyer is obtained."[27] The military police investigator is instructed not to influence the suspect to alter his or her desire to consult a lawyer and that the suspect "will be provided the location and telephone number of the nearest

---

[13] *Id.*

[14] *Id.* It should be noted that, while the Court used the terminology "custody," the issue involved "seizure" under the fourth amendment. "Seizure" under the fourth amendment and "custody" under *Miranda* are not necessarily the same. Berkemer v. McCarty, 468 U.S. 420 (1984) (Highway patrol stopped car that was weaving and without giving *Miranda* warnings, asked driver if he had used intoxicants; held to be a fourth amendment seizure, but not "custody" for *Miranda* purposes.).

[15] The Supreme Court addressed the issue of when an interrogation may be resumed after the suspect has asserted the right to remain silent in Michigan v. Mosley, 423 U.S. 96 (1975). The Court determined that the admissibility of statements obtained after a person in custody asserted his right to remain silent depended on whether the police "scrupulously honored" the suspect's right to be questioned. *Id.* at 104.

[16] 451 U.S. 477 (1981).

[17] *Id.* at 484–85.

[18] *Id.*

[19] Mil. R. Evid. 305(f) analysis.

[20] United States v. Harris, 19 M.J. 331, 338 (C.M.A. 1985).

[21] The Supreme Court has not addressed the meaning of "counsel made available."

[22] 14 MJ 643 (A.C.M.R. 1982).

[23] *Id.* at 645.

[24] *Id.* In United States v. Applewhite, 20 M.J. 617 (A.C.M.R.), *petition granted*, 21 M.J. 275 (C.M.A. 1985), the government fit into the loophole of "counsel made available" when the accused had an opportunity to see counsel, but failed to do so, for five days between the invocation of the right to counsel and the polygraph examination after which he gave written confessions regarding the offenses. In United States v. Goodson, SPCM 16459, slip op. at 5 (A.C.M.R. 17 Sept. 1986), which was on remand from the Court of Military Appeals, the Army Court of Military Review held that time was a factor to be weighed under the totality of the circumstances. In addition to time, that court weighed whether the appellant was continually at liberty during the time he supposedly had to seek counsel. In that case, Goodson was at liberty from noon on Saturday until 1630 the following Monday. The court held that counsel had not been "made available" to Goodson under the circumstances of that case.

[25] Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 6-8g (1 July 1984) (C3, 1 Oct. 1986) [hereinafter AR 27-10].

[26] Dep't of Army, Reg. No. 190-30, Military Police—Military Police Investigations, appendix C, para. C-3 (1 June 1978). In United States v. Goodson, slip op. at 5, the Army Court of Military Review noted this particular regulation and found that it had not been followed in appellant's case. The court held that appellant should not be penalized for the government's failure to abide by its own regulation.

[27] *Id.*

staff judge advocate."[28] These rules and regulations require more than simply providing a suspect with a "reasonable opportunity" to consult with an attorney before military investigators are allowed to re-interrogate him. They prohibit further interrogation of the suspect until he or she actually talked with a lawyer.

Generally, the fifth amendment right to counsel attaches during a custodial interrogation at the time the investigator has completed advising the suspect of his or her Article 31 rights and his or her right to counsel under *Miranda* and Mil. R. Evid. 305(d). The fifth amendment right to counsel may attach earlier, however. A suspect can invoke his or her fifth amendment right to counsel during the rights advisement[29] or even before the rights advisement is administered if the suspect is in custody and awaiting interrogation by the military investigator.[30] Defense counsel should pay particular attention to the first time a suspect requested a lawyer. It may be that the suspect was entitled to counsel and his or her fifth amendment right to counsel was improperly denied.

Sixth Amendment Right to Counsel

The right to counsel afforded to soldiers under the sixth amendment is distinct from the right to counsel under the fifth amendment. Under the sixth amendment, an accused has the right to have the assistance of counsel for his or her "defence" in all criminal prosecutions. "The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'"[31]

The sixth amendment right to counsel attaches "at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[32] Initiation of charges in the military criminal system does not parallel the civilian system. Thus, in the military, the sixth amendment right to counsel has been interpreted to attach upon preferral of charges[33] or when a suspect is subjected to pretrial restraint.[34] A suspect's sixth amendment right to counsel may attach much earlier, however, if the suspect is without counsel during a period in which a substantial threat existed as to the suspect's ability to receive a fair trial. The present test for determining when the sixth amendment right to counsel attaches is whether adversary judicial proceedings have been instituted against the suspect.[35]

An "adversary judicial proceeding" may actually begin prior to the initiation of a formal judicial proceeding if an accused's right to a fair trial is hampered because of the absence of an attorney to represent his or her interest. An investigation ceases to be a general investigation of an unsolved crime when the suspect becomes the accused and the purpose of an interrogation is to get him or her to confess his or her guilt despite his or her constitutional right not to do so.[36] Whatever happens at this type of interrogation may affect the whole trial. To hold that the sixth amendment right to counsel is dependent upon formal charges when the suspect, for all practical purposes, has been charged with the offense would allow the government to ignore a suspect's sixth amendment right to counsel and not provide the suspect with a counsel until it is ready to do so.[37] The rule invoking the sixth amendment right to counsel for preindictment interrogations was intended "to guarantee full effectuation of the privilege against self-incrimination."[38]

A suspect's right to counsel which attaches at a pretrial interrogation may be premised upon both the fifth amendment and the sixth amendment. Although these constitutional bases of the right to counsel may at times overlap, they are "distinct and not necessarily coextensive."[39] The fifth amendment entitles the suspect to the presence of counsel during a custodial interrogation to protect his or her constitutional privilege against compulsory self-incrimination.[40] The sixth amendment provides for counsel at all critical stages of the prosecution "where counsel's absence might derogate from the accused's right to a fair trial."[41]

Notice to Counsel

The military courts have attempted to further protect the suspect's right to counsel by requiring that investigators give notice to the suspect's attorney of any proposed interrogations. This notice requirement was first set out in *United States v. McOmber.*[42] "[O]nce an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement

---

[28] *Id.*

[29] Smith v. Illinois, 469 U.S. 91 (1984).

[30] United States v. Goodson, 22 M.J. 22 (C.M.A. 1986), *on remand,* SPCM 16459 (A.C.M.R. 17 Sept. 1986).

[31] United States v. Wade, 388 U.S. 218, 225 (1967).

[32] Kirby v. Illinois, 406 U.S. 682, 688, 689 (1972) (plurality opinion), *cited with approval in* Estelle v. Smith, 451 U.S. 454, 469, 470 (1981).

[33] United States v. Wattenbarger, 21 M.J. 41, 43 (C.M.A. 1985).

[34] Mil. R. Evid. 305(d)(1)(B) provides that a suspect is entitled to consult with counsel and to have that counsel present at an interrogation conducted "subsequent to preferral of charges or the imposition of pretrial restraint under R.C.M. 304 [when] the interrogation concerns the offenses or matters that were the subject of the preferral of charges or were the cause of the imposition of pretrial restraint."

[35] *Wattenbarger,* 21 M.J. at 44.

[36] Bram v. United States, 168 U.S. 532, 562 (1897).

[37] *See* Escobedo v. Illinois, 378 U.S. 478, 485–86 (1964).

[38] *Kirby,* 406 U.S. at 689 (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)).

[39] People v. Bladel, 421 Mich. 39, 365 N.W.2d 56 (1984), *aff'd,* 106 S. Ct. 1404 (1986).

[40] *Edwards v. Arizona; Miranda v. Arizona.*

[41] United States v. Wade, 388 U.S. at 226–27.

[42] 1 M.J. 380 (C.M.A. 1976).

obtained involuntary under Article 31(d) of the Uniform Code."[43]

The Military Rules of Evidence have codified and expanded the *McOmber* notice requirement:

> When a person subject to the code who is required to give warnings under [Mil. R. Evid. 305(c)] intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.[44]

Notice to counsel of a subsequent interview is required only when the offenses under investigation are related to those offenses for which counsel represents the suspect. If the offenses in question are distinct and unrelated to those offenses for which the suspect is represented by counsel, no notice is required.[45] This exception to the notice requirement is at odds with the purpose of the fifth amendment right to counsel. A suspect who invokes his or her right to counsel is in effect saying, "I do not feel competent to deal with the police except through a lawyer."[46] If a suspect feels incompetent to deal with the police on one offense, why should he or she be expected to feel competent to deal with the police on another unrelated offense, especially one that is more serious? The preferred rule should ensure that whenever a suspect is being represented by a lawyer for any criminal offense, he or she should not be interrogated about another offense without first informing that lawyer, whether the offense is related or not.

Under *McOmber* and Mil. R. Evid. 305(e), investigators are required to give notice only to the attorney who has "an existing attorney-client relationship,"[47] and not to a defense counsel who may inevitably represent the suspect. Nor is the investigator required to ask the suspect whether an attorney-client relationship exists.[48] Although the *McOmber* rule was intended to safeguard the suspect's exercise of the right to counsel, the courts have left gaps through which a crafty investigator can crawl. For instance, if the government does not actually "provide" the suspect with counsel upon the invocation of his or her right to counsel, the suspect might not seek counsel or the attorney he or she does see may provide only the "basic suspect advice" without forming an attorney-client relationship. In the absence of an attorney-client relationship, there is no notice requirement and there is no one standing in the way of the investigator who desires to re-interrogate the subject. The suspect's exercise of the right to counsel would be better protected if the government ensured that counsel was provided once the suspect invoked his or her right to counsel. Then there would be no question of whether the suspect is represented by counsel and the suspect would have an attorney to act as an intermediary with the police.

Duty of the Defense Counsel

Once a suspect invokes his or her right to counsel, he or she may wander into or be directed to the Trial Defense Service office. Generally, there is no overt effort by the government to actually put the suspect in touch with a lawyer. If a suspect goes to the Trial Defense Service office at this early stage, the defense counsel's actions during this initial meeting will decide how much meaning the "right to counsel" has for the suspect.

At this early juncture, some defense counsel take the "let's wait and see" attitude; that is, wait and see if the government is going to prefer charges. The defense counsel who takes this attitude believes that there is no requirement to form an attorney-client relationship with a suspect until charges have been preferred and will not take any overt action to represent the suspect at this time. The suspect is provided the "basic suspect advice," sometimes en masse, and sent on his or her way. The "basic suspect advice" consists of informing the suspect that he or she has a right to remain silent and that anything he or she says to a government official may be used against him or her at a trial by court-martial. The suspect is advised that he or she has a right to consult with an attorney before being interrogated and to have such attorney present at the interrogation. The suspect is told if someone tries to question him or her about the offenses of which he or she is suspected, the suspect should invoke his or her rights and not speak about the offenses. The suspect is generally not asked about the offenses for which he or she is suspected for fear that an attorney-client relationship may be established. The suspect is explicitly told by the defense counsel that he or she is not the suspect's attorney.

The "basic suspect advice" may be good advice, but from the suspect's point of view, the exercise of the right to counsel becomes no more than a re-run of the Article 31 and *Miranda* rights given by the investigator. The suspect could, and often does, receive the same information from viewing a film or talking with the unit legal clerk. The suspect who invoked the right to counsel because he or she needed help in dealing with the law enforcement investigators has not received that help in this situation. The suspect is not represented by an attorney for the purposes of requiring *McOmber* notice. Even if asked by the investigator, the suspect would indicate that he or she does not have an attorney.

In some instances, providing only the "basic suspect advice" to a suspect may be appropriate. The attorney should not form an attorney-client relationship in those cases where representation of the suspect may present a conflict of interest for the attorney. In addition, U.S. Army Trial Defense Service (TDS) policy discourages defense counsel from forming attorney-client relationships with suspects who are considered transient or who will be tried at another

---

[43] *Id.* at 383.

[44] Mil. R. Evid. 305(e).

[45] *Id. See* United States v. Spencer, 19 M.J. 184 (C.M.A. 1984); United States v. Lowry, 2 M.J. 55 (C.M.A. 1976).

[46] This rationale has its roots in Michigan v. Mosley, 423 U.S. 96, 109 (1975) (White, J., concurring).

[47] United States v. Littlejohn, 7 M.J. 200, 203 (C.M.A. 1979). *See* Moran v. Burbine, 106 S. Ct. 1135 (1986).

[48] United States v. Harris, 7 M.J. 154 (C.M.A. 1979).

location.[49] In these cases, however, the defense counsel should not leave the suspect with the feeling that he or she will have to fend for himself or herself when dealing with the "government." The defense counsel should advise the suspect that the counsel cannot enter into an attorney-client relationship, but that arrangements are being made to obtain an attorney.[50] The suspect should be advised not to talk to anyone regarding the offenses until he or she has had an opportunity to consult with counsel. The defense counsel should arrange for the suspect to have telephonic contact with counsel as soon as practical and should make every effort to assure that the invocation of the right to counsel was not in vain.

Other defense counsel take the position that an attorney-client relationship should be formed early in the investigative process. It may be in the client's best interest to render a statement early, but if the defense counsel refuses to talk to the client about the offenses of which he or she is suspected, the defense counsel cannot intelligently advise the suspect. If the defense counsel might not be the attorney representing the suspect at trial, he or she should inform the suspect of this fact at the initial interview. This precaution may facilitate obtaining a release from the client in the event that the first attorney is unable to represent the client at subsequent proceedings.[51] Just because an attorney forms an attorney-client relationship with a suspect at the initial interview does not necessarily mean that attorney will be required to represent the suspect at trial. Although the establishment of an attorney-client relationship with an accused is an important factor in determining whether to grant a request for individual military counsel, it is not the only factor.[52] The concern for loss at trial of the attorney who initially established an attorney-client relationship with the suspect should not be the motivating factor. This is particularly true when the effect of requiring representation at trial by the first attorney is to discourage active representation at the early stage.

The right to counsel can only have meaning for the suspect if the suspect has an attorney to represent him or her at the stage where he or she has invoked the right to counsel. The defense counsel should make it clear to the suspect that he or she has an attorney and that if anyone attempts to question him or her, the suspect should inform them that he or she is represented by counsel and that they should contact such counsel before proceeding with the interrogation. The defense counsel should give the suspect the counsel's referral card. This would reinforce to the suspect that he or she is represented by counsel and discourage investigators from proceeding in absence of notice to counsel. The defense counsel may also consider personally notifying law enforcement personnel and the suspect's chain of command that he or she is representing the suspect and that, prior to any subsequent interrogations of the suspect, he or she should be notified and given an opportunity to be present at such interrogations.

An advantage to forming an attorney-client relationship early is that the defense counsel may be able to prevent the suspect from ever going to trial or at the very least have more control over the case as it reaches trial. The defense counsel is likely to know the government's case even before the trial counsel. By taking the first crack at witnesses and the available evidence, the defense counsel will know the strengths and weaknesses of the government's case early on. The defense counsel may be able to obtain a commitment from the suspect's chain of command for a less severe disposition of the suspect's case. Although the defense counsel may perceive this initial activity as onerous in view of the fact that charges may not have been preferred against the suspect, the benefit to the suspect in the long run may far outweigh any burden the defense counsel perceives.

Defense counsel who take the position of initially providing the suspect with the "basic suspect advice" may find that they have provided the suspect with advice and have formed an attorney-client relationship with the suspect regardless of their intentions not to do so. By not taking a more active role in representing the suspect in the initial stages of the case, the defense counsel may find himself or herself in breach of the duty of loyalty owed the suspect.[53] Defense counsel sometimes try to avoid forming an attorney-client relationship with the suspect because of considerations of time and government economy. When an attorney is representing competing interests, a conflict of interest exists,[54] and the defense counsel is ineffective. In addition, the suspect who has invoked the right to counsel at a custodial interrogation has a right to a defense counsel to represent him or her under law and regulation;[55] therefore, defense counsel have a duty to the suspect to form an attorney-client relationship. Under the fifth and sixth amendment, the suspect is entitled to an attorney who is "peculiarly and entirely the [suspect's] own representative; who owes him total fidelity; to whom full disclosure may be safely made in a privileged atmosphere, and from whom [the suspect] can learn with confidence a proper course of action."[56] The counsel's primary consideration should always be the welfare of the suspect.

If the defense counsel, who commences representation of a suspect or has dealt with the suspect in such a way as not to form an attorney-client relationship, will not be able to

---

[49] *See* U.S. Army Trial Defense Service Standing Operating Procedures, para. 3-2(b)(2) (1 Jul. 1983) [hereinafter SOP]. This policy appears to be contrary to the mission of USATDS, however, which is to provide defense counsel services for Army personnel whenever required by law or regulation, SOP para. 1-3. U.S. Army Trial Defense Training Memorandum 86-2, para. 14 (1 Jul. 1986) reinforced the idea that a more protective stance may be needed for transient personnel in that the soldier should be made aware that he or she has a continuing right to an attorney throughout the investigative process and that an "attorney of record" should be established for contact during further investigative efforts. The memorandum pointed out the need for periodically monitoring these types of situations to determine whether an attorney-client relationship should be established.

[50] SOP, para. 3-3(a)5.

[51] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 505(d)(2)(B) provides specific limitations on the excusal of a counsel from a case once an attorney-client relationship has been formed. Counsel can be excused at the request of the accused.

[52] United States v. Gnibus, 21 M.J. 1, 9 (C.M.A. 1985).

[53] Model Code of Professional Responsibility EC 7-1 (1980). The lawyer has a duty to represent the client zealously within the bounds of the law.

[54] United States v. Kidwell, 20 M.J. 1020 (A.C.M.R. 1985).

[55] *See* Mil. R. Evid. 305(d); AR 27-10, para. 6-8g.

[56] *Tempia*, 16 C.M.A. at 639, 37 C.M.R. at 259.

subsequently represent the suspect at trial, the defense counsel should ensure that counsel is appointed and available to represent the suspect at future interrogations or pretrial proceedings.[57] Counsel should also ensure that an attorney of record is established for contact during future investigative processes.

Defense counsel are sometimes overworked and may have very little time outside of preparing the cases of their existing clients. Their job may be made easier, however, by spending time outside of their offices educating the troops about the TDS and cultivating relationships with those individuals who may make a difference in the lives of their future clients. Defense counsel can help the potential suspect by educating soldiers, commanders, and law enforcement personnel about the mission of the installation trial defense office and by acquainting them with the lawyers who support that mission. There are a number of soldiers who do not know about TDS or that lawyers are available who are designated to perform defense counsel services. When a soldier is dealing with a law enforcement investigator for the first time in his or her life, the knowledge that free lawyers are available will allow him or her to effectively exercise his or her rights. The soldiers and the commanders can be educated through news articles and participation by trial defense counsel at unit training classes. Training noncommissioned officers are always looking for someone in the military justice division of the staff judge advocate's office to teach classes to the troops. Defense counsel should volunteer to participate in some of these classes.

The defense counsel should visit commanders and law enforcement personnel routinely[58] and establish a good working relationship with these individuals. Defense counsel must remember that these are the individuals who will be making the decisions that will affect a client's future. Defense counsel should listen to and try to understand the concerns of commanders and law enforcement personnel, but at the same time make their own views and positions known. The defense counsel, once having won the respect of commanders and law enforcement personnel, may be pleasantly surprised when those same individuals support the recommendations of the defense counsel regarding a client or send an individual, who may be in "trouble" and in need of help, directly to the TDS office. Trial defense counsel, like their civilian counterparts, need to take an active role in the military community. Defense counsel may find that maintaining and cultivating good relations with commanders and law enforcement personnel may pay dividends for future clients and help the defense counsel better protect the rights of those clients.

Defense counsel should provide defense services throughout the duty day and on weekends, holidays, and other non-duty periods.[59] TDS offices are not expected to be manned twenty-four hours a day, but the TDS counsel should establish a procedure to provide necessary defense service during those non-duty hours when a suspect is most likely to be brought in by the military police for questioning. The TDS office can establish its own on-call roster to be distributed to the staff duty officer and law enforcement personnel as part of the on-call roster for the judge advocates from the office of the staff judge advocate. In the event that a soldier requests counsel, or is otherwise in need of a defense counsel, there will be a number available where a defense counsel can be contacted.

Another alternative is to maintain an answering machine at the TDS office to provide instructions for the soldier seeking counsel during non-duty hours. At the minimum, defense counsel should make their existence known to law enforcement officers and let them know how to reach a TDS counsel during non-duty hours. Do not let the excuse that the "on-call JAG" is only for the military police be the excuse given to your clients[60] when they request to consult with a defense counsel after hours.

Duty of the Government

Military Rule of Evidence 305(d)(2) requires the United States to provide counsel to a suspect who has invoked his or her right to counsel at a custodial interrogation before the interrogation may proceed. Under this rule, counsel are generally provided by TDS. The mission of the TDS is "to provide specified defense counsel services for Army personnel, whenever required by law or regulation."[61] In the event that TDS counsel are unavailable, the government is required to designate non-trial defense service counsel to perform defense counsel responsibilities.[62] Counsel under this rule are usually provided from the office of the staff judge advocate. When a suspect invokes the right to counsel during a custodial interrogation, the government has a obligation to detail or appoint a counsel to represent the suspect, either by way of TDS counsel or counsel from the office of the staff judge advocate. To hold the government to a lesser duty would allow the government to take advantage of a situation where the suspect has been denied counsel because of TDS's inability to provide counsel or refusal to form an attorney-client relationship with an individual.

Conclusion

Military Rule of Evidence 305 and the case law interpreting the fifth and sixth amendments do not necessarily set out clear standards for determining when the right to counsel attaches. This issue continues to be addressed by the courts. Defense counsel should be alert to those instances where a suspect's right to counsel attaches prior to the rights advisement administered during a custodial interrogation. This will allow defense counsel to take an overt role

---

[57] *Cf.* Anders v. California, 386 U.S. 738, 744 (1967) ("the constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of an active advocate in behalf of his client").

[58] SOP, para. 3–15(b). All USATDS counsel are expected to visit commanders and staff elements routinely, attend officer calls and other social functions when invited, volunteer their services, and otherwise take an active role in the military community.

[59] SOP, para. 3–10(a) and (c).

[60] *See Goodson*, slip op. at 2. The military investigator told the appellant that the on-call JAG was for the military police use only, thus leaving appellant with the impression that no JAGs were available for him to consult.

[61] AR 27–10, para. 6–2.

[62] AR 27–10, para. 6–8*g*.

in the development of the client's case from its initiation. By effectively representing the client at this early stage in the criminal proceedings, the defense counsel can give worth to the "right to counsel." The military suspect will truly have a "champion" between him or her and the government.

DAD Notes

Controversy in Challenge for Cause

The Army Court of Military Review recently decided a controversial case involving both the denial of the defense's challenge of the military judge for cause and the subsequent denial of a request to proceed to trial by military judge alone. In *United States v. Sherrod,*[1] appellant challenged the military judge for cause after the judge disclosed on the record that he lived next door to the victims of one of the on-post burglaries of which the accused was charged and the daughter of these same neighbors was the female victim of the assault and battery charge.[2] The military judge denied the challenge for cause and the subsequent request for trial by judge alone.[3] The accused was tried by a panel composed of officers and convicted of several offenses including burglary and assault and battery.

The court found that the military judge erred as a matter of law by refusing to recuse himself upon challenge. The court based its holding on Rule for Courts-Martial 902(a)[4] which requires recusal to avoid the appearance of partiality. The court held that the trial judge abused his discretion in deciding not to recuse himself, and cautioned other judges that their discretion is not unlimited.[5] Ultimately though, the court found no prejudice resulting from the military judge's error and affirmed the findings of guilty.

In finding that the military judge's subsequent refusal to grant appellant's request for trial by judge alone was not error, the court again applied the abuse of discretion standard. The court said that the military judge's action in removing himself as the fact finding and sentencing authority "promoted the interest of justice in avoiding even the appearance of bias, prejudice, or evil."[6] The appellant was not totally without relief, however, as the court found his sentence inappropriately severe, and reduced the confinement portion from twenty-nine to twenty years.[7]

In *United States v. Allport,*[8] the court, relying on *Sherrod,* assumed without finding that the military judge erred when he refused to recuse himself, but again found no prejudice.[9] In *Allport,* the day before the trial, the military judge made some apparently joking comments to the trial defense counsel regarding the refusal of the appellant's family to lend him money to reimburse the victim of the charged larceny offense. While the court found error and chastised the military judge for making the comments, [and the trial defense counsel for having "some difficulty in accepting criticism from the bench"],[10] it found no legal prejudice.

Trial defense counsel should be concerned about the *Sherrod* decision because of its practical effects on trial tactics. The Army Court of Military Review found that although the military judge should have recused himself, no prejudice resulted because the panel members, not the military judge, determined the appellant's guilt and sentence. The trial defense counsel in *Sherrod* had opted to request trial by judge alone when the military judge initially refused to recuse himself. That request is not surprising given the sensational nature of the crimes.[11] It is also no surprise that the military judge denied the request because of his stated relationship with some of the victims. In so doing, however, the military judge also shut the door on one of appellant's options—choosing who would decide his case.

Military judges may be expected to deny requests for trial by judge alone in this and similar situations. What is disturbing about the denial in the *Sherrod* case is the problem the parties had in obtaining a fair and impartial panel. That fact was demonstrated by the numerous successful challenges for cause against potential members in the case. Unfortunately, because of the nature of the crimes, especially the assaults on young dependents in their military quarters, it is highly unlikely that the appellant could have found an unemotional, detached panel on any military installation. Obviously, the appellant preferred to be sentenced by an experienced, trained legal mind, one less

[1] 22 M.J. 917 (A.C.M.R. 1986). For a further discussion of challenges of the military judge and trial by judge alone, see Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law—Trial Procedure, chapter 3 (May 1986) (to be published as Dep't of Army, Pam No. 27–173).

[2] The female assault victim was also a close friend of the judge's own thirteen year-old daughter, the child had spent the night at the judge's quarters previously, and the judge had chauffeured groups of children, including the victim, to various places, among which were ski trips lasting one or two days. *Sherrod,* 22 M.J. at 919.

[3] *Id.*

[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 902(a) [hereinafter R.C.M.]. The standard is based on the appearance of partiality and applies when *reasonably* questioned.

[5] *Sherrod,* 22 M.J. at 921.

[6] *Id.*

[7] *Id.* at 923.

[8] SPCM 22061 (A.C.M.R. 11 Sept. 1986)

[9] *Id.*, slip op. at 1, 3.

[10] *Id.* slip op. at 2–3.

[11] Private Sherrod was also convicted, inter alia, of committing an indecent act on a male child under the age of sixteen. *Sherrod,* 22 M.J. at 918.

likely to react emotionally to the sensational nature of the crimes.

In *Sherrod*, the fact that the military judge in reality had *no* discretion to grant the request for judge alone might have deprived the appellant of a fair trial. The panel that sentenced him imposed the maximum sentence. The Army Court of Military Review, without much explanation, found the maximum sentence too harsh and reduced the confinement adjudged by approximately one-third. The anomalous result is that the court gave sentence relief where it refused to find prejudice. It remains to be seen how *Sherrod* will fare on further appeal. Captain Lida A. Stout.

Rehabilitative Potential Evidence Limited

Rule for Courts-Martial (R.C.M.) 1001(b) permits the prosecution to present "evidence, in the form of opinion, concerning the accused's . . . potential for rehabilitation." In *United States v. Horner*,[12] the accused's battery commander testified that the accused "should [not] be allowed to stay in the Army."[13] The defense counsel, on cross-examination, established that the witness based his opinion "solely on the fact that drugs had been distributed. Specifically, the commander felt that no one who distributed drugs should be retained in the service, '[r]egardless of the characteristics of the individual involved.' "[14] The military judge denied the defense motion to strike the witness' testimony.

In deciding whether this testimony was admissible, the court looked at the analysis to the R.C.M. 1001(b).[15] The analysis indicated that the trial counsel may present evidence of the service members rehabilitative potential, and that similar information from the accused's employer or neighbors is often included in civilian pre-sentencing reports. The court accepted these comments, but left it open for future cases to decide whether the comments of the drafters were accurate.[16] It would be wise for trial defense counsel to object to this type of testimony as not being commonly included in pre-sentencing reports.

The Court of Military Appeals ruled, however, that the testimony was inappropriate because it was "based not upon any assessment of appellant's character and potential, but upon the commander's view of the severity of the offense."[17] The court stated that

> [t]he witness' function in this area is to impart his/her special insight into the *accused's* personal circumstances. It would be ironic and absurd if R.C.M. 1001(b)(5) were construed to allow the parties to call witnesses simply for the purpose of telling the court-martial what offenses, in the witness' estimation, require punitive discharge or lengthy confinement, etc.[18]

The court found harmless error in a trial by military judge alone and indicated that "the commander's comments should have been stricken."[19]

When a government witness renders an opinion on sentence appropriateness, defense counsel should vigorously cross-examine to determine whether the opinion is based only upon the severity of the offense rather than on the accused's personal circumstances. Defense counsel should be especially vigilant in drug and barracks larceny cases. The conventional "wisdom" among noncommissioned officers and commanders is that these offenses automatically warrant harsh treatment. Conveying that attitude on the witness stand is clearly condemned in *Horner*. Captain Peter M. Cardillo.

Preserving Objections to Laboratory Evidence

In most cases, defense counsel must rely on government or military laboratories to process relevant evidence. What rights does the accused have in the preservation of this evidence?

In *United States v. Kern*,[20] the Court of Military Appeals stated that Article 46[21] "seems to go beyond" the constitutional minimum when it states that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." In so holding, the court adopted the test for preservation of evidence applied by the United States Supreme Court in *California v. Trombetta*.[22] In *Trombetta*, the Supreme Court held that a constitutional duty to preserve evidence arises when: the evidence possesses an exculpatory value that is apparent before the evidence is destroyed; and the evidence is of such a nature that the defense would be unable to obtain comparable evidence by other reasonably available means.[23] The burden of proof is on the defense to establish these facts.[24]

In *United States v. Garries*,[25] the Court of Military Appeals applied the above test in a murder case involving blood stain evidence examined by an FBI laboratory. The

---

[12] 22 M.J. 294 (C.M.A. 1986). For a discussion of what evidence is admissible during sentencing, see Gaydos & Capofari, *A Methodology for Analyzing Aggravation Evidence*, The Army Lawyer, July 1986, at 6.

[13] *Id.* at 295.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 296.

[17] *Id.*

[18] *Id.* (emphasis in original).

[19] *Id.*

[20] 22 M.J. 49 (C.M.A. 1986).

[21] Uniform Code of Military Justice art. 46, 10 U.S.C. § 846 (1982).

[22] 467 U.S. 479 (1984).

[23] *Id.* at 489.

[24] Proof must be by a preponderance of the evidence. R.C.M. 905(c)1.

[25] 22 M.J. 288 (C.M.A. 1986).

court ruled that the laboratory report was admissible because the defense did not meet its burden under *Kern* and no hint existed of bad faith by the government.[26] The court did note, however, that the result might have been different if the testing had been done by the military or at its request, because *the failure to provide notice* to the defense of the testing and destruction of the evidence would be difficult to excuse.[27]

When evidence is destroyed in testing, defense counsel is left with nothing but a piece of paper. When this happens, trial defense counsel should consider three arguments in support of a motion to suppress the laboratory report. First, if warranted by the evidence, argue that the government acted in bad faith. Second, argue that the evidence destroyed was "apparently exculpable" before its destruction and that no comparable evidence is reasonably available. Third, argue that the government's failure to notify the defense of the pending testing and destruction warrants suppression as the defense was denied an opportunity to safeguard the interests of the accused. Captain James McGroary.

Utilizing Jencks!

Although the decision of the Supreme Court in *Jencks v. United States*[28] has created an important cross-examination tool for both defense and government counsel due to its codification in civilian[29] and military law,[30] a Jencks Act request can be easily forgotten by counsel in the course of litigation. An excerpt from a recent case illustrates this point.[31] The accused attempted to defend two drug distribution charges under the theory of entrapment. In support of this theory, trial defense counsel tried to elicit testimony on cross-examination from the primary government witness, a Criminal Investigation Division (CID) agent, to show that the accused had been badgered into committing the crimes. While questioning the witness about the numerous telephone calls that he made to the accused, the following discussion took place concerning notes the agent had taken:

Q: Did you take notes while you were talking to Mr. [D] on the telephone?

A: You know—I really don't know whether I wrote it down or not—case file, that is.

Q: Did you or did you not write something additional to this typed report?

A: No. Any other thing that I may have put down would have been in my—the confidential informant's [CI] or the registered source's file, and it would basically read along the same lines as what you see in the report now.

Q: Where is that?

A: What do you mean?

Q: Where is that—where you wrote down?

A: That's what I just said, sir, it would be in the registered source's file.

Q: I mean where is it now.

A: CID office.

Q: Can you produce that for us, sir?

. . . .

A: Well, I would have to get with my—the people at CID.

Q: We'll take that up later. Now, I want to be sure I understood you though; what you're saying is that you have some notes you haven't given to us?

A: As I said, the notes—if I wrote down anything else about it, it would be in the CI's file.

Defense counsel did an outstanding job in eliciting facts in support of a Jencks Act request.[32] No such request was made in this case, however, as the defense failed to "take that up later." Because such a motion can only be made after a witness has testified on direct examination[33] and is intended to assist the defense counsel on cross-examination,[34] the request for the production of such notes must be timely and will be, as in this case, waived if not made.[35]

Had the defense counsel moved for the production of the agent's notes, the military judge would have been obligated to order the relevant files produced.[36] The military judge would then have been required to review the materials to determine whether the notes related to the testimony of the witness and whether the defense was already in possession of substantially all of the contents of the files.[37] A determination of the impeachment value of the materials by the military judge would exceed the scope of review permitted by *Jencks*, however, as only the defense is adequately equipped to determine the effective use of the materials for

---

[26] *Id.* at 292.

[27] *Id.* at 293 n.6. The defense should at least have the opportunity to be present when testing is likely to result in destruction of the evidence.

[28] 353 U.S. 657 (1957)

[29] 18 U.S.C. § 3500 (1982) [hereinafter Jencks Act.]

[30] R.C.M. 914.

[31] United States v. Davis, CM 448339 (9th Inf. Div. (Light) & Ft. Ord 18 Sept. 1985).

[32] The Jencks Act requires a court, upon motion of the defendant, to order the prosecution to produce any statement of a witness in the possession of the United States which relates to the subject matter which the witness has testified. *See* 18 U.S.C. § 3500(b) (1982). *See also* R.C.M. 914(a) (rule applies equally to defense witnesses other than the accused).

[33] United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980) (although the Jencks Act bars disclosure of a government witness' reports or statements until the witness has testified on direct examination, when the witness' direct examination is concluded, disclosure of the witness' report or statement is mandatory if defendant moves for disclosure).

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

[35] *See* United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975).

[36] 18 U.S.C. § 3500(b) (1982); R.C.M. 914(e). A mistrial may also be ordered in the interests of justice.

[37] *Id.*

purposes of discrediting the government's witness and furthering the accused's defense.[38] If the military judge determined that any of the materials contained in the files were irrelevant to the testimony, the military judge could excise the irrelevant portions and order production of the remainder.[39]

Had the government refused to produce the CID case file, the military judge would have ordered the members to disregard the testimony of the witness.[40] Because the CID agent was the government's primary witness, it would have been impossible for the government to obtain a conviction without his testimony. In the absence of a motion to produce under the Jencks Act, however, we will be forever guessing whether there was something in those files that would have made a case for entrapment. Captain David C. Hoffman.

Government Fails to Stem Influx of Parsley At Fort Eustis

In *United States v. Hutchins*,[41] the Army Court of Military Review denied the government's appeal of a trial judge's ruling that a court-martial lacked subject-matter jurisdiction over an off-post larceny by false pretense. In this case, the government agent purchased parsley sprinkled with nail polish remover thinking that it was phencyclidine (PCP). Relying on *United States v. Burris*,[42] the Army court concluded that it could not disturb the military judge's findings of fact because they were not clearly erroneous or unsupported by the evidence.[43]

This case demonstrates the importance of trial defense counsel requesting the military judge to make specific findings of fact, and of marshalling the evidence to show lack of subject-matter jurisdiction. Although the trial counsel argued that the case was a drug offense and that *United States v. Trottier*[44] provided a basis for jurisdiction, the military judge specifically found that the case did not involve drugs, but was actually a larceny offense.[45] In discussing the impact of the offense on the military, the judge found that Fort Eustis had not been affected by an "undue influx of parsley."[46]

Though the Army Court of Military Review stated that this case "does not constitute authority for the proposition that there can be no military jurisdiction over off-post larceny-by-false-pretense cases,"[47] trial defense counsel can certainly rely on *Hutchins* as a model for the kind of factors that show lack of subject-matter jurisdiction. *Hutchins*, along with *United States v. Williams*,[48] (lack of court-martial jurisdiction to try off-post larceny by false pretense case involving the sale of fake drugs to an undercover government agent) and *United States v. Barideaux*,[49] (insufficient military interests to warrant court-martial jurisdiction over off-post distribution of marijuana) provide counsel with sufficient authority to challenge subject-matter jurisdiction in larceny by false pretense cases. Captain Pamela G. Montgomery.

---

[38] *See* Rosenburg v. United States, 360 U.S. 367 (1959); Hoffman & Lucaitis, *The Jencks Act "Good-Faith" Exception: A Need for Limitation and Adherence*, The Army Lawyer, Sept. 1986, at 30.

[39] *Jencks*, 353 U.S. at 668–69.

[40] 18 U.S.C. § 3500(c) (1982); R.C.M. 914.

[41] Misc. Dkt. 1986/5 (A.C.M.R. 12 Aug. 1986).

[42] 21 M.J. 140 (C.M.A. 1985).

[43] *Hutchins*, slip op. at 4.

[44] 9 M.J. 337 (C.M.A. 1980).

[45] *Hutchins*, slip op. at 3.

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

[47] *Id.*, slip op. at 4 n.7.

[48] 4 M.J. 336 (C.M.A. 1978).

[49] 22 M.J. 60 (C.M.A. 1986).

Military Rule of Evidence 803(24)(B) and the Available Witness

Lieutenant Colonel Ferdinand D. Clervi
Military Judge, Fifth Judicial Circuit, Mannheim, FRG

The Issue: 803(24)(B)

Mil. R. Evid. 803(24),[1] which is identical to Mil. R. Evid. 804(b)(5), sets forth the so-called Residual Hearsay Rule. This article questions whether Mil. R. Evid. 803(24)(B) requires the unavailability of the witness to be established prior to admitting a prior out-of-court statement. Do not be misled. Although Mil. R. Evid. 803 states that the availability of the declarant is immaterial, in my opinion, this broad guideline does not apply to the unique circumstances of Mil. R. Evid. 803(24). The proponent of the out-of-court statement must establish, on the record, that the witness is either not available to testify or that the out-of-court statement of the witness is more probative than the testimony of the witness. The issue may be narrow; nevertheless, its effects could be far-reaching. Judges, prosecutors, and defense counsel are more frequently encountering this question because of the increasing visibility and trial of child and spouse abuse cases.

But the question is by no means limited to that area alone. In order for evidence to be admitted pursuant to Rule 803(24), five conditions must be met.[2] Our concern is the fourth condition, *i.e.*, the statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts.[3] If the witness is available to testify, does the in-court testimony then become more probative on the point for which it is offered than any out-of-court hearsay statement? And should the hearsay statement be inadmissible? In my opinion, the simple answer is yes.

The issue arises from a reading of the Army Court of Military Review case, *United States v. Quick*,[4] where the trial judge admitted prior oral statements of a five-year-old girl to her babysitter. The girl was present and could have been called. The prosecutor introduced the accused's confession, but did not call the girl. The prosecutor explained to the judge that, based on her interview of J (the girl) and her observation of J as a witness at the pretrial hearing, she had concluded that J was responsive to leading questions only, answered those nonverbally, and required prompting from her mother before answering. In the prosecutor's view, J's earlier statements to the babysitter would be more probative than her live testimony. The babysitter was permitted to testify. The court failed to discuss the requirement of 803(24)(B),[5] concluding that "under the circumstances presented, the government was not required to show unavailability."[6] Although not expressly stating, the court found that the defense counsel waived J's appearance because the defense counsel "declined an offer to have J brought into court and subjected to his cross-examination."[7]

The problem with this approach stems from the requirement that the court, not the prosecutor, must determine whether the conditions of Mil. R. Evid. 803(24) have been met.[8] "Preliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the military judge."[9] With respect to 803(24), "preliminary questions" of admissibility include whether the proffered statement satisfies the requirements of 803(24).[10] The court in *Quick* acknowledged that the decision to admit evidence under

---

[1] Mil. R. Evid. 803(24) provides:
A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is not excluded by the hearsay rule] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

[2] United States v. Mathis, 559 F.2d 294, 298 (5th Cir.), *cert. denied*, 429 U.S. 117 (1977):
(1) The proponent of the evidence must give the adverse party the notice specified within the rule; (2) The statement must have circumstantial guarantees of trustworthiness equivalent to the 23 specified exceptions listed in Rule 803; (3) The statement must be offered as evidence of a material fact; (4) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (5) The general purposes of the Federal Rules and the interests of justice must best be served by admission of the statement into evidence.

[3] Mil. R. Evid. 803(24)(B).

[4] 22 M.J. 722 (A.C.M.R. 1986): *See also* United States v. Rousseau, 21 M.J. 960 (A.C.M.R. 1986).

[5] Instead, the court concentrated its efforts on the second condition, *i.e.*, that the statement must have circumstantial guarantees of trustworthiness.

[6] *Quick*, 22 M.J. at 725 (citing United States v. Inadi, 106 S. Ct. 1121(1986), where recorded statements of unindicted co-conspirators were admitted under Fed. R. Evid. 801(d)(2)(E) without demonstrating the unindicted co-conspirator's unavailability).

[7] *Id.*

[8] Mil. R. Evid. 803(24). *See also* Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law—Evidence, chapter 17 (June 1986) (to be published as Dep't of Army, Pam. No. 27-22).

[9] Mil. R. Evid. 104(a). When ruling on preliminary questions, the military judge is not bound by the rules of evidence except those with respect to privileges.

[10] Holmes, *The Residual Hearsay Exceptions: A Primer for Military Use*, 94 Mil. L. Rev. 15, 37 (1981). For further discussion on residual hearsay, see Kelly & Davis, *Litigating the Residual Exceptions to the Hearsay Rule*, 6 The Advocate 4 (1984), and Note, *Effective Use of the Residual Hearsay Exception*, Trial Counsel Forum, Sept. 1984, at 2.

Mil. R. Evid. 803(24) rests within the sound discretion of the trial judge.[11]

The burden is on the trial counsel to address and satisfy each element of Rule 803(24). This is an affirmative obligation; it cannot be satisfied by a general plea for admission.[12] When the prosecutor gives reasons why the witness should not be required to testify and therefore her prior statements should be admitted, that constitutes merely a general plea for admission and does not satisfy the requirements of 803(24)(B). The prosecutor should proceed to establish, through admissible evidence, that the witness is in fact unavailable; for example, by presenting evidence that it would be futile to call the witness because she is non-responsive to questioning. This can be established by a stipulation of fact, calling the witness so the judge can observe her responses and demeanor, or calling other disinterested witnesses who can testify about the condition of the witness. Then the judge can determine whether the prior out of court statements are more probative than the witness herself.

The Available Witness

The more difficult situation arises when there is no issue of availability. It may be that the victim is just not a very good witness and consequently the prosecutor, for example, wants to use the prior out-of-court oral or written statement in lieu of live testimony. Presumably the prosecutor has determined that the prior statement is inadmissible under Mil. R. Evid. 803(1)–(23) and Mil. R. Evid 804.[13] Does Mil. R. Evid. 803(24)(B) prohibit the admissibility of the prior statement because the witness/victim is not unavailable?[14] Two cases support the proposition that Mil. R. Evid 803(24)(B) prohibits the admissibility of prior statements when the witness is available. In *United States v. Mathis*, the witness testified "If I was made to tell you, I would tell the truth."[15] The court discussed the requirement of Fed. R. Evid. 803(24)(B): "The live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than the bare statements transcribed by the ATF agents."[16]

The court further commented:

> Unlike the case in which the witness takes the stand, the use of the statements foreclosed any exploration of weaknesses in the witness' perception, memory, and narration of the matters asserted within the statements. While it has been contended that availability is an immaterial factor in the application of Rule 803(24), this argument is wide of the mark. Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements into evidence under the last subsection of Rule 803 because of the requirement that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved. Rule 803(24), thus, has a built-in requirement of necessity. Here there was no necessity to use the statements when the witness was within the courthouse. The trial court erred in overlooking this condition of admissibility under Rule 803(24).[17]

The well-intentioned reasoning of the trial judge in *Mathis* in admitting the prior statements is important:

> I think the record clearly shows what happened here and I think the record justifies me letting the Government use this statement and I'm doing it; as I stated she says it's true. *I'm convinced the girl is frightened and that for some reason or other which I'm not going to try to dig out of her, she's not going to testify. I'm convinced the second marriage was purely for the purpose of allowing her to take, claim the privilege of a wife. She has told me that if I force her to she'll testify, but I don't want to do that.* I don't think I should under the circumstances. We're going to use this alternative. . . .[18]

The judge just did not want to put "the girl" through the rigors of direct testimony and cross examination. I believe it is fair to say that most judges do not want to put young abused children and abused spouses through the same ordeal. But as the court in *Mathis* went on to say:

> In both civil and criminal cases, our common law heritage has always favored the presentation of live testimony over the presentation of hearsay testimony by the out-of-court declarant. See McCormick, Evidence 2d § 244. The jury's observation of the demeanor of the witness and the effectiveness of cross-examination in the discovery of the truth are the traditional reasons for the preference even though the out-of-court statement had been given under oath. The assumption which underlies the hearsay rule is that the reliability of statements made in the courtroom may be better made to appear than a second hand recitation of those uttered out of court.
>
> Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere. Yet tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules. The trial court's ruling would lead down the latter impermissible path. The ruling was not in harmony with the general purposes of the Federal Rules.[19]

---

[11] 22 M.J. at 723 (citing United States v. Whalen, 15 M.J. 872 (A.C.M.R. 1983)).

[12] S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 654 (2d ed. 1986).

[13] Rule 804 requires unavailability.

[14] Within the meaning of Mil. R. Evid. 804(a).

[15] 559 F.2d at 296.

[16] *Id.* at 298 (citations omitted).

[17] *Id.* at 299. *See also* S. Rep. No. 1277, 93d Cong., 2d Sess. 19, *reprinted in* 2974 U.S. Code Cong. & Ad. News 7065 [hereinafter S. Rep.].

[18] *Id.* (emphasis supplied).

[19] *Id.* (citations omitted).

In *United States v. Arnold,*[20] the victim of indecent liberties was the thirteen-year-old daughter of the accused. Her original statement was an excited utterance[21] made to her school counselor followed by statements to the school nurse and the Criminal Investigation Division (CID). The latter statement was admitted under Mil. R. Evid. 803(24). The victim did not testify[22] although she was available.[23] While noting that the general heading of Rule 803 states that the unavailability of the declarant is not a prerequisite for admissibility, the court pointed out that only two exceptions, excited utterances and medical diagnosis, permit the use of a declarant's personal out-of-court statement.[24] In citing Mil. R. Evid. 803(24)(B) as indicating some necessity concerning availability, the court stated "to accept the . . . argument that a sworn, contemporaneous statement to the police is automatically more probative and trustworthy than in-court testimony would be a rejection of the American system of criminal justice as embodied in the fourth, fifth and sixth amendments."[25] In essence, the court concluded that under the factual setting in the case, the only appropriate provision under which this CID statement would be admissible was Mil. R. Evid. 804(b)(5), which requires a governmental showing of unavailability of the witness.[26] Although *Arnold* does not cite *Mathis,* these two cases provide persuasive authority that unavailability of the witness is required under 803(24)(B).

Further support exists for this proposition when the witness is not called to testify.[27] Courts have admitted statements under Mil. R. Evid. 803(24) where the witness did testify.[28] On the other hand, some courts have not required the unavailability of the witness.[29] In my opinion, the weight of authority is that, in those cases where the witness is ready, willing, and able to testify, those prior statements are not admissible before the witness has testified. If that testimony is not more probative on the point than the prior statements, however, the latter may then be introduced into evidence,[30] assuming all other requirements of Mil. R. Evid. 803(24) are met.

The court must also be concerned with whether there is other evidence, in addition to the witness, which is more probative on the point for which it is offered than any out-of-court statement. For example, physical injury to the victim, the defendant's confession, other eyewitnesses, and other hearsay exceptions should all be considered. If there is more probative evidence, the out-of-court statement is inadmissible. The evidence, however, must be examined in relation to all other evidence in the case. Mil. R. Evid. 803(24) may be "utilized to admit hearsay which is direct evidence on the point in question, even though expert testimony and circumstantial evidence tending to prove the same point is already available."[31] "Moreover, hearsay evidence which merely offers greater detail or is more specific than evidence already available may be 'more probative' on the point for which it is offered than any other evidence which the proponent can provide through reasonable efforts."[32] "If there is conflicting evidence on a certain material point, hearsay may also be admissible . . . if it is the only evidence that can resolve that conflict."[33]

---

[20] 18 M.J. 559 (A.C.M.R. 1984).

[21] *Id.* at 561.

[22] *Id.* at 560.

[23] *Id.* at 561.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *In re* Fine Paper Antitrust Litigation, 751 F.2d 562, 586 (3d Cir. 1984) (the court placed no reliance on Rule 803(24) saying "since the authors of the correspondence could have been called as witnesses, the statements cannot be found to be more probative on the point for which [they are] offered than any other evidence which the proponent can procure through reasonable efforts," citing Fed. R. Evid. 803(24)(B)); Arrow-Hart, Inc. v. Covert Hills, Inc., 71 F.R.D. 346 (E.D. Ky. 1976) (The first judge died and the new judge ruled a new trial was required. He refused to use Fed. R. Evid. 803(24) to admit the testimony of the first trial, stating the Rule was not intended to cover such a situation where the declarant was available but the parties just did not wish to repeat the testimony from the previous trial, and the successor judge could not determine the credibility of the witnesses by reading a transcript); United States v. Cordero, 22 M.J. 216 (C.M.A. 1986) (statements were not admitted under either Mil. R. Evid. 803(24) or 804(b)(5)); United States v. Lemere, 22 M.J. 61 (C.M.A. 1986) (statement was not admitted by trial judge under Mil. R. Evid. 803(24) because witness was available and did testify).

[28] United States v. Mandel, 591 F.2d 1347, 1385 (4th Cir. 1979); United States v. Barnes, 586 F.2d 1052, 1055 (5th Cir. 1978) (witness in court exculpated herself and defendant recanted earlier statements that inculpated defendant); United States v. Powell, 22 M.J. 141 (C.M.A. 1986); United States v. Yeauger, 20 M.J. 797 (N.M.C.M.R. 1985) (an unsworn statement was admitted); *United States v. Whalen.*

[29] United States v. Loalza-Vasquez, 735 F.2d 153, 158 (5th Cir. 1984) (teletype messages were admitted because live testimony would not have been more probative on the issue or more susceptible to attack by the defendants); Dallas County v. Commercial Union Insurance Co., 286 F.2d 388 (5th Cir. 1961) (The court admitted a 58-year-old newspaper article. The question involved whether a courthouse tower had collapsed of its own weight or because it had been struck by lightning, which was crucial for purposes of insurance coverage. To prove the lightning theory, evidence of charred timbers in the wreckage was introduced. To counter this, the defense introduced a 1901 newspaper article describing a fire in the tower while the courthouse was still under construction. Although the court upheld the admission of the article, one has to wonder why the charred timbers were not examined by an expert to determine the age of the charring. If such evidence were available, it would seem to be more probative on the point. In any event, the court stated "to our minds, the article published in the Selma Morning-Times on the day of the fire is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later."); United States v. American Cyanamid Co., 427 F. Supp. 859, 865–66 (S.D.N.Y. 1977) (The court stated it would be unnecessarily expensive and time consuming to call witnesses, from various remote places, to come to testify as to what they thought in 1972. It found that the most accurate reflection of their thoughts in 1972 were their contemporaneous letters.); United States v. Rousseau, 21 M.J. 960, 963 (A.C.M.R. 1986) (The court, in dictum, rejected *Mathis* and *Arnold,* stating that requiring unavailability of a witness under Mil. R. Evid. 803(24) ran afoul of the clear language of the rule that unavailability was immaterial and, in fact, makes Rules 803 and 804 redundant; however, the court admitted the statement into evidence because it found the witness unavailable); 4 J. Weinstein & M. Berger, Weinstein's Evidence para. 803(24)[01] at 803–369 (1985) [hereinafter Weinstein's Evidence].

[30] *Mandel; Barnes;* United States v. Powell, 22 M.J. 141, 145 (C.M.A. 1986); *Whalen,* 15 M.J. at 878.

[31] Holmes, *supra* note 10, at 66 (citing Huff v. White Motor Corp., 609 F.2d 286, 295 (7th Cir. 1979)).

[32] *Id.* (citing United States v. Bailey, 581 F.2d 341, 347–48 & n.11 (3d Cir. 1978)).

[33] *Id.* (citing United States v. Iaconetti, 406 F. Supp. 554, 559 (E.D. N.Y.), *aff'd,* 540 F.2d 574 (2d Cir. 1976)).

Court of Military Appeals Update

Although the Court of Military Appeals has not ruled directly on the meaning of Mil. R. Evid. 803(24)(B), it is getting close.

In *United States v. Lemere*,[34] the trial judge ruled that the prior out-of-court statement of the mother of a three and one-half year old child witness was not admissible under Mil. R. Evid. 803(24) because the in-court testimony was more probative than the out-of-court statement.[35] Judge Everett commented on the trial judge's holding:

> This position gains support from the theory that to some extent the hearsay exceptions are based on necessity; and there is less necessity to receive an extrajudicial statement if the declarant is available to testify in court.
>
> On the other hand, there are situations when a declarant's earlier statement may be more reliable than his current testimony. Indeed, this is the premise for admitting "recorded recollection" as an exception to the hearsay rule under Mil. R. Evid. 803(5). Moreover, if the draftsmen of Mil. R. Evid. 803(24) had believed that this rule would not apply in situations where the declarant was available to testify, it would have been hard to justify promulgating the rule because its very terms make the rule apply even if the declarant is available to testify.[36]

In *United States v. Powell*,[37] the trial judge admitted the prior out-of-court statement of the testifying witness under Mil. R. Evid. 803(24). In his concurring opinion, Chief Judge Everett supported the exercise of the military judge's discretion in allowing admission of an inconsistent statement as substantive evidence, even though the pretrial statement was made to the police, saying Mil. R. Evid. 803(24) had been satisfied. He commented, however, that the rationale for admissibility was much weaker where the declarant has not testified.[38]

In *United States v. Cordero*,[39] the trial judge admitted the prior out-of-court statement of the accused's wife under both Mil. R. Evid. 804(b)(5), declaring the wife unavailable, and Mil. R. Evid 803(24), even if the wife was not unavailable. The Court of Military Appeals disagreed. In commenting on Mil. R. Evid. 803(24), Chief Judge Everett stated:

> Considering the spirit of these provisions [Mil. R. Evid. 801(d)(1) (prior statement) and 804(b)(1) (former testimony)], it is hard to conceive that the drafters of the Military Rules of Evidence contemplated that an extrajudicial statement [apparently utterly unreliable] like Claudia's could be admitted under Mil. R. Evid. 803(24) if the witness were available to testify. Moreover, if Mil. R. Evid. 803(24) was intended to go so far, it seems irreconcilable with the Supreme Court's view of an accused's right of confrontation under the sixth amendment.[40]

Whether the court will interpret Mil. R. Evid. 803(24)(B) as requiring witness unavailability remains to be seen.

No Child/Spouse Witness Exception

Mil. R. Evid. 803(24) was not intended

> to establish a broad license for trial judges. . . . [It was] not meant to authorize major judicial revisions of the hearsay rule. . . . Such major revisions are best accomplished by legislative action. . . . [T]he trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.[41]

Mil. R. Evid. 803(24) "should be interpreted to authorize the admission of hearsay evidence of high probative value in individual situations, but not to create new class exceptions."[42]

Trial judges should not, therefore, create an exception for abused children and spouses that permits their out-of-court statements to be introduced in lieu of their in-court testimony. Each situation must be resolved on a case-by-case basis and determined within the conditions of Mil. R. Evid. 803(24). In time, when continued judicial experience indicates that a particular type of statement is reliable, an amendment to the rules could be proposed to authorize the recognition of a new class exception.[43] Such an exception for children or spouses would seem unlikely. In *United States v. Lemere*, the testimony of a three-and-one-half year old witness apparently resulted in, among other punishments, twelve years confinement without admission of any prior statement. I personally presided over a case in which the clear and lucid testimony of a four year old girl resulted in, among other punishments, twenty years confinement imposed by a jury. These types of cases reveal that "even"

---

[34] 22 M.J. 61 (C.M.A. 1986).

[35] *Id.* at 68. The military judge did admit the statement, however, as an excited utterance under Mil. R. Evid. 803(2). This ruling was reversed on appeal. *Id.* at 65–66.

[36] *Id.* at 68.

[37] 22 M.J. 141 (C.M.A. 1986).

[38] *Id.* at 145 (Everett, C.J., concurring).

[39] 22 M.J. 216 (C.M.A. 1986).

[40] *Id.* at 220 (citing Ohio v. Roberts, 448 U.S. 56 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968)). Judge Cox, concurring, withheld his views on the ramifications of Mil. R. Evid. 803(24) pending the decision in New Mexico v. Earnest, 106 S. Ct. 2734 (1986) (per curiam), which presented the question: "Does the Sixth Amendment require the exclusion at trial of an un-cross-examined hearsay statement without regard to its indicia of reliability?" Judge Cox noted that apparently Mil. R. Evid. 803 (24)(B) was not satisfied. 22 M.J. at 224.

[41] S. Rep., *supra* note 17, at 7066.

[42] 4 Weinstein's Evidence, para. 803(24)[01], at 803–382–83.

[43] *Id.* at 803–383.

children can testify and require no exception. Immaturity alone is not enough.[44]

Conclusion

Mil. R. Evid. 803(24), and especially Rule 803(24)(B), should not be taken lightly. As we have seen, there are situations where unavailability may or may not be required prior to admission of out-of-court statements. Each case must be viewed on its own merits. There exists no bright line rule of admissibility. The successful proponent of the admission of the out-of-court statement in lieu of or in addition to in-court testimony will have studied the facts of the case, applied those facts to the five conditions of Mil. R. Evid. 803(24), and presented them clearly and concisely to the military judge. As with most situations, preparation is the key to admissibility.

[44] The cynics among us may also argue that creation of a class exception for children/spouses would only encourage false statements knowing their testimony would not be required in court. For a further discussion of child witnesses, see Woods, *Children Can Be Witnesses Too: A Discussion of the Preparation and Utilization of Child-Witnesses in Courts-Martial*, The Army Lawyer, Mar. 1983, at 2.

Trial Defense Service Note

Defending the Apparently Indefensible Urinalysis Client in Nonjudicial Proceedings

Captain Ronald W. Scott
Frankfurt Field Office, U.S. Army Trial Defense Service

Introduction

A military defense attorney will, in the course of a tour of duty, counsel many clients who are facing Article 15[1] proceedings or administrative elimination for drug abuse. The vast majority of these clients admit their culpability to their commander or attorney, or both, generally making the advisement and disposition of such cases relatively simple and straightforward. On rare occasions, however, a client will deny having committed the offense, and will persist in a declaration of innocence, even though made fully aware of the privileged nature of the attorney-client relationship and confronted with a facially-perfect packet of evidence. In such instances, the attorney normally proceeds to delineate the various options available to the client, including contrasting the maximum penalties at each potential level of disposition. This is done to educate the client and elicit what experience has usually demonstrated to be the truth; *i.e.*, the client comes to his or her senses and admits culpability, so that an appropriate strategy can be mapped.

Where such a client continues to proclaim innocence, the attorney may be left in a quandary both as to whether the client is in fact innocent and as to what to do next. The purpose of this note is to suggest several avenues of attack that should routinely be considered in an attempt to vindicate what is presumed to be and may actually be an innocent client. These include diagnostic polygraphy and serological testing for blood group and/or Lewis type to rule out the client as the source of the urine specimen.

It may seem at first that the tactics suggested are too time-consuming, expensive and/or risky to be employed at lower levels of disposition—particularly at the Article 15 level. In light of heavy case loads and all of the various allied duties facing a military defense counsel, it may appear that the triage process mandates that extraordinary measures be reserved for court-martial cases. The consequences of Article 15, however, are often as devastating to a career in today's military as are those of boards and courts-martial, albeit less immediately so.[2] And the incidence of drug abuse clients persisting in a claim of innocence at the Article 15 and administrative board levels is so rare that resort to one or more of the measures to be suggested is not particularly onerous.[3]

As a preliminary point, it has been my experience that urinalysis Article 15 clients persisting in a claim of innocence universally display a strong desire to turn down Article 15-level proceedings and elevate the case to a court-martial in order to vindicate themselves. In a case that presents a flawless chain of custody and no palpable errors at either the local or laboratory level, such a move is usually reckless and will likely produce disastrous results. An explanation that resolving the case at the Article 15 level does not necessitate a plea of guilty and a review of the lifelong consequences of a federal felony drug conviction will, more often than not, dissuade a client from such a course of action.

One other preliminary problem facing the attorney is the decision whether to request a litigation or court packet from the drug testing laboratory that reported the positive

[1] Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1982).

[2] For instance, soldiers in 46 of the 383 enlisted military occupational specialties (MOS) (including, among others, Avionic Mechanic (35K), Legal Specialist (71D), Finance Specialist (73C), Pharmacy Specialist (91Q) and Military Policeman (95B)) are subject to Department of the Army-mandated MOS reclassification actions if identified as drug users. *See* Dep't of Army, Reg. No. 611-201, Personnel Selection and Classification—Enlisted Career Management Fields and Military Occupational Specialties, chap. 2 (25 Oct. 1983).

[3] The author counseled 168 drug abuse clients facing nonjudicial proceedings between 7 February and 31 August 1986. Of that number, only three clients persisted in a claim of innocence throughout the period of the attorney-client relationship.

result. With elaborate quality assurance checks and three-tier testing of positive specimens, including radioimmunoassay, gas chromatography, and mass spectrometry/gas chromatography testing, the likelihood of a reported false positive from the laboratory is usually too remote to make such a request productive. Once generated, the packet may tend to harm the client's case tremendously. Because of the sheer volume and the packet's organized, scientific presentation of data, graphs, external and internal chains of custody, and other pieces of evidence,[4] a lay factfinder may be inclined to afford undue weight to such impressive evidence in determining the client's guilt or innocence.[5]

The same quality control and multi-tier testing considerations make a request for a retest of a specimen generally nonproductive. Absent some reasonable indication that the testing laboratory has mistakenly reported a specimen positive, the attorney should assume that the specimen purported to be the client's specimen is truly positive. Additionally, counsel should consider the fact that commanders are likely to view retest and litigation packet requests, without any articulable justification, as mere delaying tactics. This will make them less inclined to grant other requests vital to the client's interests, such as extended retention of the positive urine sample or delays in nonjudicial proceedings pending results of a polygraph or serology examination.

The tactics suggested herein for defending drug abuse clients claiming to be innocent at the nonjudicial level of disposition may or may not be applicable to court-martial cases. For instance, regarding requests for litigation packets, there are other considerations that make routine requests for such packets more advantageous at the court-martial level, even absent any specific reason to suspect laboratory error. At court-martial, there is much less concern for angering a commander by causing delay in the proceedings, and greater concern for discovering an obscure error that might create reasonable doubt in a factfinder's mind at trial. Other similar dichotomies are found throughout this note. The utility, however, of diagnostic polygraphy and exculpatory serology testing is equally viable for court-martial cases, and should be considered by counsel as ammunition in the defense arsenal at that level of action as well.

Diagnostic Polygraphy

The polygraph examination is the more expedient of the two recommended courses of action for exculpating an innocent client. Yet, resort to polygraph has been infrequent in recent years in such cases, although the numbers are increasing.[6] The Criminal Investigation Command (CID) has labeled such examinations "exculpatory polygraph examinations in connection with positive urinalysis results;" however, they are more properly labeled as diagnostic polygraphs. When an attorney requests a polygraph for a client, the attorney may not be convinced of the client's proclaimed innocence,[7] and therefore uses the polygraph results as much to assess the client's credibility as to try to use a favorable result to exculpate the client.

Regardless of an attorney's personal beliefs regarding the scientific validity of polygraphy, he or she is professionally and ethically bound to present diagnostic polygraphy as an option to the potentially innocent client. Despite the ongoing debate as to its validity,[8] polygraphy has been proven

---

[4] As an example, the court packet prepared by the U.S. Army Forensic Toxicology Drug Testing Laboratory (USAFTDTL), Wiesbaden, includes: a court packet report/authentication page; the court packet request; the USAFTDTL electronic message; the submitted chain of custody; the USAFTDTL master batch log; radio-immunoassay log data; gas chromatography/mass spectrometry data; retest data, if applicable; and an affidavit from the laboratory's director detailing the procedures used at the facility.

[5] See generally E. Imwinkelried, The Methods for Attacking Scientific Evidence 1-31 (1982); A. Moenssens, R. Moses, & F. Inbau, Scientific Evidence in Criminal Cases 26 (1973).

[6] U.S. Army Criminal Investigation Command (USACIDC) polygraphers conducted 1303 urinalysis polygraphs between 1 January 1985 and 8 September 1986. Official statistics of the USACRC, Baltimore, MD 21222.

[7] If the attorney knows that the client is guilty, or it is obvious from all the evidence, including the client's revelations during the interview, that he or she is guilty, the attorney cannot resort to diagnostic polygraphy to try to exculpate the client. See Model Code of Professional Responsibility DR 7-102(A)(6) (1980), which reads: "In his representation of a client, a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."

[8] It is not the purpose of this brief note to thoroughly review the literature assessing the validity of polygraphy. (Validity is the extent to which polygraphy can accurately detect deception and truthfulness in an examinee.) It is every counsel's duty, however, to know what the literature says about polygraph validity before offering it to a client as an option. For an exhaustive review of the literature on polygraphy, see *Scientific Validity of Polygraph Testing*, Polygraph Sept. 1983, at 196 [hereinafter *Scientific Validity*], and *The Accuracy and Utility of Polygraph Testing*, Polygraph Mar. 1984, at 1 [hereinafter *Accuracy and Utility*]. For a more critical viewpoint, see Kleinmuntz, *Trial by Polygraph*, Trial, Sept. 1985 at 1.

The best synopsis of the polygraph's validity comes from Congress' Office of Technology Assessment (OTA), which found that meaningful evidence of polygraph validity has only been shown when the control question technique is used in the area of specific-incident criminal investigations where a prior investigation has been completed and a prime suspect or suspects identified. In such cases, the polygraph detects deception at a rate better than chance, but with significant error rates. OTA summarized the average range of polygraph validity results from 10 field and 12 analog (simulation) studies as follows:

—Correct guilty detections, 68–86%

—Correct innocent detections, 49–76%

—False positives (innocent persons labeled deceptive), 19–28%

—False negatives (guilty persons labeled innocent), 10–13%

Scientific Validity, supra, at 300.

In the only major reported study evaluating military polygraphers (with the participation of a Department of Defense (DOD) joint services Judge Advocate General's Corps officer panel), the validity of military polygraphers was estimated at 90% for correct guilty detections and 94% for correct not guilty determinations, based on a comparison between the polygraphers' conclusions and unanimous guilt-innocence decisions by the four-member JAGC panel, which had access to complete investigation files, except for any reference to the polygraphs. *See A Validation Study of Polygraph Examiner Judgments*, J. Applied Psychology 399–403 (1969), (cited in *Accuracy and Utility supra*, at 61–62, 67. These results led to the conclusion by DOD that

> Since that time, the accuracy may have increased somewhat due to the higher selection standards, more thorough training (both the initial polygraph training and periodic seminars on advanced topics), and the establishment of quality control offices which review each polygraph case. For all of these reasons, it is likely that the quality and accuracy of federal polygraph examiners is higher than the polygraph profession generally.

Id. at 62.

particularly efficacious in exculpating military members accused of drug offenses.[9]

A client needs to have enough general information about the polygraph and specific information about its validity to make an informed choice about whether to take the test. How much information does counsel need to impart to obtain the juridical analog of medical "informed consent"? Should counsel attempt to explain to clients what the instrument does, including the various measures of physiological response, and the theory behind the control question technique? The control question technique is nearly universally utilized by Army polygraphers. Should the client be told that the scientific basis for polygraph testing is unknown, or that, to the scientists' best knowledge, the polygraph instrument measures physiological reactions representing a fear of detection rather than deception per se?

Polygraphers urge that the defense counsel should explain nothing about polygraphy to prospective examinees. The primary reason given for withholding information is that the danger of an inconclusive result with a truthful client is increased if the client has preconceived and probably incorrect conceptions about the test, as related by a lawyer. This concern is a valid one, and is a documented phenomenon in the scientific literature.[10]

Other reasons against attempting to educate clients on polygraph theory and practice include: ignorance by attorneys as to the objective state-of-the-art regarding polygraphy; and the inherent danger that in-depth advice on the nature of the test and/or the control question technique will enable a guilty client to fool the examiner and "beat" the machine. In the zealous defense of a client's rights, an attorney may, under such circumstances, find himself or herself assisting the client in perpetrating a fraud, in violation of the Code of Professional Responsibility.[11]

The literature supports the conclusion that defense counsel should not, when advising clients, go beyond a brief statement as to the objective reported validity of polygraphy and the legal implications of the use of the polygraph for or against the client. To maximize the validity of an examination, the client should have few or no preconceived ideas about the test. All explanations and the physiological and psychological setting of the client should be left to the polygrapher. The pretest interview theoretically sets truthful examinees at ease, while increasing the anxiety in deceptive ones.

A polygraph, then, offers the best chance of being a valid test of truth or deception when the examinee develops a sense of trust in the examiner. Counsel's job is to ensure that local polygraph examiners are worthy of that trust. No one should send a client for a diagnostic urinalysis polygraph unless the attorney has met the examiner and is satisfied with the examiner's credentials and objectivity. Development of a rapport between defense counsel and the examiner will facilitate cooperation in such areas as defense counsel assistance in development of relevant questions[12] and limitations on background or control questions.[13]

The procedures for attorneys to request diagnostic urinalysis polygraphs for clients are governed by AR 195–6 and a Office of The Judge Advocate General Criminal Law opinion.[14] As part of the preliminary preparation for the examination, the client meets with the polygraph examiner, and after the reading/waiver of Article 31 rights, is interviewed by the examiner only regarding the use or possession of illegal drugs within thirty days of the urinalysis.[15] The client must be prepared to fully discuss the charge under inquiry, but should be cautioned by defense counsel not to volunteer unrelated and potentially incriminating information. The client makes a sworn statement denying the offense and a CID case is generated. The client also signs a polygraph consent form,[16] after which the examiner requests the examination in message form from the USACIDC approving authority.[17]

Approval is routinely granted and takes, on average, three days. The examination typically follows within ten

---

[9] Of the 1303 urinalysis polygraphs conducted by USACIDC examiners between 1 January 1985 and 8 September 1986, 20 examinees were reported as "no deception indicated" (NDI), 2 were inconclusive, and 45 were reported as "no opinion."

In April 1986, Secretary of the Navy John Lehman reinstated midshipman Jeffrey Bellistri, who had a positive cocaine urinalysis result, based on an NDI polygraph report. (Bellistri was reported as inconclusive on two prior polygraphs.) Stars and Stripes, April 13, 1986, at 6, col. 1.

[10] *See Scientific Validity, supra* note 8, at 204.

[11] *See* Model Code of Professional Responsibility, DR 7–102(A)(7) (1980), which reads: "In his representation of a client, a lawyer shall not counsel *or assist* his client in conduct that the lawyer knows to be illegal or fraudulent" (emphasis added).

[12] Polygraph examiners are open to agreement to limit questions concerning use or possession of illegal drugs to a period of 10 days prior to urinalysis. They also will exclude questions concerning constructive possession, if defense counsel objects to such questions. USACRC Memo, subject: Protocol for Conducting Exculpatory Polygraph Examinations in Conjunction with Positive Urinalysis Test, 30 Apr. 1985 [hereinafter USACRC Memo].

[13] Responses to control/background questions will neither be evaluated nor reported by USACRC. Dep't of Army, Reg. No. 195–6, Criminal Investigation—Department of the Army Polygraph Activities, para. 2–8*a* (1 Sept. 1980) [hereinafter AR 195–6], implementing Department of Defense Directive 5210.48, DOD Polygraph Program (24 Dec. 1984).

[14] DAJA–CL 1974/12018, subject: Polygraph Support for Defense Counsel, 10 Dec. 1974.

[15] AR 195–6, para. 2–1*a*(2); USACRC Memo.

[16] Dep't of Army, Form 2801, Polygraph Examination Statement of Consent (1 Jul. 1985). Note that the adhesion clause, subparagraph f ("anything I say or do during the polygraph examination may be used against me in any administrative, military or judicial proceedings.") is inapplicable to administrative elimination board proceedings. *See infra* note 23.

[17] AR 195–6, para. 1–5. Approval authority has been delegated by Commanding General, USACIDC, to: Deputy Commander, USACIDC; Director, USACRC; Chief, Polygraph Office, USACRC; Commander, 2d Region, USACIDC; Commander, 7th Region, USACIDC; and Commanders, 1st, 3d, and 6th Regions, USACIDC (emergencies only). USACIDC is anxious to increase the numbers of urinalysis polygraphs done, according to Robert A. Brisentine, Jr., Director, USACRC. USACRC Memo.

days,[18] so delays in proceedings must be prearranged with commanders and/or board recorders. The period of requested delay also includes a ten to fourteen day post-examination period, during which quality control review and approval of the examiner's test and conclusions is accomplished at the US Army Crime Records Center (USACRC),[19] before any results are releasable. After review, a synopsis of the examination, its relevant questions, and any conclusions are released to both government and defense counsel.[20]

Depending on commander's patience levels, counsel will have to devise creative methods to exact delays in Article 15 proceedings pending results of polygraphs. A suggested strategy is to obtain client's written consent in advance of the polygraph examination to release the interim results of the examination to the commander via the trial counsel to cut the period of delay from 30 to 14 days. The advantage to the client is that recalcitrant commanders will be more inclined to grant a delay in a hearing under such circumstances, thus giving the client the chance to generate otherwise unavailable exonerating evidence. The primary disadvantage to the client is that the commander will probably proceed with the hearing based on an interim unfavorable report. Commanders should be informed by defense counsel of the interim nature of the report and the potential for set aside action[21] should USACRC invalidate the polygrapher's conclusions.

While the results of a polygraph are freely admissible at an Article 15 hearing,[22] a respondent at an elimination board has the absolute right to have unfavorable polygraph results excluded simply by failing to agree with the board recorder as to the offer and admission of the evidence before the board.[23] This rule can work to the detriment of the client, however, in the event of a favorable polygraph result, in that the board recorder can likewise decline to agree to its offer and admission before the board.[24] Good rapport between the defense counsel and the trial counsel/recorder can dampen the chances of such an injustice resulting, as can a memorandum of understanding concerning admissibility of polygraph evidence in board proceedings.

Exculpatory Serology Testing

The second method by which a defense counsel can attempt to exculpate a drug abuse client is by serological testing. This procedure offers the promise, unlike polygraphy, of absolutely and unequivocally exculpating a client. Yet, unfortunately, its overall utility, on balance, is less than that of the polygraph. This irony becomes more understandable with more detail about the procedure and what it offers to whom.

Exculpatory serology testing, in the current state-of-the-art form, is used by the U.S. Army Criminal Investigation Laboratories[25] (USACIL) only to rule out an individual as the source of a positive urine specimen, based on a difference in ABO-system blood groups[26] and/or Lewis types[27] between the urine sample and a blood sample submitted by the individual. Current technology does not enable USACIL to inculpate a subject by reporting that, based on blood group characteristics, the urine and blood samples are consistent with having emanated from the same

---

[18] *See* DAJA-CL 1974/12018, *supra* note 14. Counsel should, whenever practicable, exercise their right under para. 2-2g(2), AR 195-6 to observe a client's polygraph. They should not, however, disrupt the examination for any reason except to permanently halt the test. Other disruptions will tend to alter the examinee's psychological set and lessen the chances for a valid test. Before testing takes place, the attorney should inform both the client and the examiner that a post-polygraph interview is prohibited. Polygraph examiners will respect defense counsel's order regarding limitations on such interviews. Depending on the level of rapport between the examiner and defense counsel, the attorney may need to have the understanding reduced to writing. A letter from the attorney ordering a blanket prohibition for post-polygraph interviews for that attorney's clients is one option to save time and spare disaster if the attorney might otherwise fail to obtain the agreement in a given case.

[19] AR 195-6, para. 2-5*b*.

[20] AR 195-6, para. 2-8*c*(2)(c).

[21] *See* Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 3-28 (1 July 1984).

[22] Id., at para. 3-18*j*, which reads in pertinent part: "The imposing commander . . . may consider any matter . . . he or she reasonably believes to be relevant to the offense."

[23] Dep't of Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers, para. 3-7*c*(2) (31 Oct. 1977) (Cl. 15 Jun. 1981) [hereinafter AR 15-6]. *See also* Dep't of Army, Reg. No. 635-200, Personnel Separations, Enlisted Personnel paras. 2-10c and 2-11 (5 Jul 1984). A draft revision of AR 15-6 would modify paragraph 3-7*c*(2) to permit the appointing/separation authority to consider polygraph evidence, even though the separation board would remain precluded from doing so. Memo, Office of The Judge Advocate General, DAJA-AL, 86/157, subject: Draft Changes to AR 15-6, Procedures for Investigating Officers and Boards of Officers, 17 Apr. 1986.

[24] AR 15-6, para. 3-7*c*(2).

[25] There are three USACIL facilities worldwide. USACIL, Continental United States (CONUS), Fort Gillem, Georgia, and USACIL, Europe, in Frankfurt, Federal Republic of Germany, conduct exculpatory serological testing. USACIL, Pacific, at Camp Zama, Japan, does not conduct such testing.

[26] The four ABO blood groups are:
Group O, which 45% of the American population has;
Group A, which 42% of the American population has;
Group B, which 10% of the American population has;
Group AB, which 3% of the American population has.
E. Kabat, Blood Group Substances: Their Chemistry and Immunochemistry 2 (1956); C. McCormick's Handbook on the Law of Evidence 517 (2d ed. 1972).

[27] *See* Kabat, *supra note* 26, at 13. The following table details the three major Lewis types, percentages of the population having each type, and the secretor classification for each type:

Lewis Type	*Caucasian*	*Negro*	*Secretor Status*
Le(a+b−)	20.1	19.6	non-secretor
Le(a−b+)	70.2	51.9	secretor
Le(a−b−)	9.7	28.5	either

L. Mothan, 39 Vox Sanguinis 327-30 (1980).

source.[28] Resort to serology, therefore, cannot hurt a client's case. It is not universally helpful either, however.

How is ABO-blood group or Lewis type group identified in urine? Water soluble, high molecular weight "blood group substances" are found in all human organs, as well as in body secretions, such as saliva and urine. Two groups of people are distinguishable—one that secretes large quantities of blood group substances (labeled "secretors") and the other that secretes only small quantities of the substances ("nonsecretors").[29] About eighty percent of the population are secretors,[30] from whose urine ABO-blood groups can be determined and compared to known blood samples. Only rarely can the ABO-blood group of a nonsecretor be identified. Lewis factor typing can be done for both secretor and nonsecretor urine samples. Where the compared urine and blood samples display different ABO-blood groupings or Lewis types, the client is ruled out as the source of the urine specimen.[31]

An attorney contemplating serology testing for a client must ensure that the client's commander submits a written or message request to the USAFTDTL for the sample to be retained, within ninety days of the date that the laboratory certifying official signed the DA Form 5180–R.[32] The defense counsel then arranges an appointment with a CID or Military Police Investigator (MPI) case agent, where the client renders a sworn statement denying the offense. A case file is opened and the case agent arranges for the client's blood sample to be drawn under chain of custody at the medical facility. (A saliva specimen is usually taken, too.) The blood sample is then submitted by the case agent to the supporting USACIL, under the procedures outlined in Army Regulation 195–5.[33]

Although intervention and cooperation of the supporting staff judge advocate office is not required to initiate serology testing, it is advisable to request such assistance. Without it, commanders at Article 15 proceedings and administrative board presidents are unlikely to grant the necessary 45 to 60 day delays to await test results.[34] A defense counsel should be prepared to seek relief on behalf of the client from adverse action by the imposing commander when he or she refused to wait for test results, and the test results ultimately exculpate the client.[35]

Defense attorneys must be particularly aware of the need to meticulously screen clients before initiating serology testing. In addition to the physical discomfort to the client who must render the blood sample, the testing procedure is among the most expensive and time-consuming of all procedures done at USACIL.[36]

If the Tests Do Not Exculpate the Client Then What?

Before the nonjudicial action takes place, counsel must schedule a follow-up appointment with a client after serology or polygraph test results are reported. The strategy to be employed will depend on the test result. Regarding polygraphs, "no opinion" and "inconclusive" results neither hurt nor help the client's case. A "deception indicated" (DI) conclusion requires counsel to take steps either to preclude its admission at board proceedings,[37] or to submit a statement or solicit live expert testimony for a board or imposing commander at Article 15 proceedings, explaining why the adverse result does not necessarily mean that the client is guilty. The same statistics[38] that make polygraphy a viable option for a client can also be used to show the significant probability of error.[39] Every client facing an Article 15 or board where the factfinder will consider adverse polygraph results needs such evidence in his or her favor.

As for serology test results, an inconclusive report is likewise neutral to the client. A report that fails to rule out the client as the source of the urine specimen is also neutral to the client. This fact must be pointed out to the factfinder by defense counsel, so that such a conclusion is not considered as incriminating evidence. An affidavit from the USACIL serologist can be obtained that will explain that the only proper interpretation of such a report is that the client cannot be exculpated by this procedure.

If the result of either test is in the client's favor, then the proceeding is normally ended. Problems can still occur with polygraph evidence, however. At board proceedings, the recorder can still block both the offer and admission of the

---

[28] Research is underway at USACIL, CONUS, to add two more serum markers to the identification matrix, *i.e.*, group specific component (GS) and transferrin (TF). Interview with Ms. Marilyn Chase, Forensic Chemist, USACIL, CONUS (3 Sept. 1986) [hereinafter Chase Interview].

[29] F. Schiff & M. Akine, 78 *Munch. Med. Wschr.* 657 (1931), *cited in* G. Hartmann, Group Antigens in Human Organs in Selected Contributions to the Literature of Blood Groups and Immunology 1–8, 64–84 (U.S. Army Medical Research Laboratory, Ft. Knox, KY, 1970).

[30] McCormick, *supra* note 26.

[31] Between 1 January 1984 and 31 August 1986, 22 exculpatory serology tests were conducted at USACIL, CONUS. Of that number, there were two exculpations. Additionally, there were eight inconclusive results, due to insufficient quantity of urine sample for analysis or due to the age of the urine samples. (Urine samples can be tested for up to one year, even when stored at room temperature.) Chase Interview, *supra* note 28.

[32] Dep't of Army, Form 5180–R, Urinalysis Custody and Report Record (Apr. 1984). The period of initial long-term storage of urine samples at USAFTDTL facilities was recently extended from 60 to 90 days. The message requesting retention of a specimen must now originate from the commander, not defense counsel, and the additional period of storage is now 270 days, absent a follow-up extension request. *See* HQDA Letter 40–86, subject: Renewed Policies for the Biochemical Drug Testing Program, 11 Aug. 1986.

[33] Dep't of Army, Reg. No. 195–5, Criminal Investigation—Evidence Procedures, para. 2–7c. (15 Oct. 1981).

[34] The reporting delay is a result of the heavy caseload carried by the forensic serology department at USACIL. Interview with Mr. Thomas Kotowski, Serologist, USACIL, Europe (14 Aug. 1986) [hereinafter Kotowski Interview].

[35] *See* United States v. Balcom, 20 M.J. 558 (A.C.M.R. 1985).

[36] The process of concentrating and extracting blood group substances from urine, called the absorption-inhibition technique, is expensive and time-consuming. The process utilizes elaborate machinery, involves comparison of the sample to 10 control samples, and takes four to five work days to complete. Kotowski Interview, *supra* note 34.

[37] *See* AR 15–6; *supra* note 23 and accompanying text.

[38] *See supra* note 8 and accompanying text.

[39] *Id.* (OTA statistics).

favorable result.[40] At either board or Article 15 proceedings, the factfinder may need additional persuasion as to the validity of the result. Accordingly, counsel may need expert polygraph testimony, either live or in statement form. Strategy and tactics to be employed will have to be determined on a case-by-case basis.

In the face of a DI polygraph finding or an inconclusive result from either test, counsel can still devise a formidable case based on other evidence. In addition to the aforementioned attack on the adverse polygraph result based on the wide "window of error," counsel can build a case based on credible good-character evidence. The statistical error rate for urinalysis can be proffered as evidence to create doubt as to the validity of the positive test result.[41] Passive inhalation, if applicable, may be a defense available to the client.[42] And a strong alibi may exonerate a client in the case of a cocaine-positive urinalysis, where a positive result usually indicates that the individual used the drug within forty-eight hours of the urinalysis.[43] Countless other potential defenses are already known and routinely used by military defense counsel.

Conclusion

Exculpatory serology testing and diagnostic polygraphy are two methods by which an otherwise indefensible drug abuse client may be exonerated. Resort to these methods by military defense counsel has been infrequent in the recent past. Counsel representing urinalysis clients at judicial, nonjudicial, or administrative proceedings should seriously consider these options and employ them in appropriate cases.

[40] *See* AR 15–6; *supra* note 23 and accompanying text.

[41] *See, e.g.*, Stars and Stripes, *supra* note 9, where a Navy spokesman stated that "recent quality-assurance tests disclosed only 11 errors in 1,8 million samples tested." The Deputy Director of USAFTDTL, Wiesbaden, opined that this statement probably refers to the statistical estimate of false positives for the Navy, and is probably representative of the statistical rate of error for the Army as well. Interview with Major Michael Smith, MSC (2 Sept. 1986). Official statistics estimating Department of Army urinalysis errors are unavailable. For a review of basic probability theory, see R. Johnson, Elementary Statistics 128–243 (2d ed. 1976).

[42] Since 12 August 1985, USAFTDTL facilities are reporting as marijuana-positive specimens with 15 ng/ml THC. *See* Asst. Sec'y of Defense for Health Affairs Memo to Service Secretaries, subject: Drug Urinalysis Testing Levels, 12 Aug. 1986. Several recent passive inhalation studies in the literature report levels approximately half the new confirmatory test level. *See, e.g.*, Morland, *Cannabinoids in Blood and Urine After Passive Inhalation of Cannabis Smoke*, 30 J. Forensic Sci. 997 (1985); Perez-Reyes, DiGuiseppi & Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 Clinical Pharmacology & Therapeutics 36 (1983).

[43] Interview with Major Michael Smith, MSC (6 May 1986).

Clerk of Court Note

Courts-Martial Statistics

Two data processing requests, run for different requestors at separate times, have enabled us to compare some court-martial statistics for the *calendar* years 1982 through 1985. Those comparisons are set forth in the tables that follow:

GCM Trial Types	*1982*	*1983*	*1984*	*1985*
Percent tried by judge alone	63.8	68.4	67.8	71.2
Percent tried by officer courts	17.4	14.7	15.7	12.8
Percent tried with enlisted members	18.8	16.9	16.5	16.0

GCM Trial Results	*1982*	*1983*	*1984*	*1985*
Overall conviction rate	92.4	91.6	91.4	93.4
Percent sentenced to discharge	88.3	91.6	90.2	89.7
Percent of discharges:				
DDs or dismissals	46.3	48.2	46.2	42.7
BCDs	53.7	51.8	53.8	57.3
Percent sentenced to confinement	92.2	92.6	91.5	90.4
Percent of sentences:				
Less than 1 year	24.1	22.6	24.7	25.0
1 year to 5 years	65.3	65.1	64.1	64.5
More than 5 years	10.6	12.3	11.2	10.5
Percent sentenced to forfeiture or fine	92.3	92.5	90.8	91.1

BCD SPCM Trial Types	*1982*	*1983*	*1984*	*1985*
Percent tried by judge alone	66.6	76.1	75.4	74.7
Percent tried by officer courts	18.2	11.2	11.5	10.9
Percent tried with enlisted members	15.2	12.7	13.2	14.5

BCD SPCM Trial Results	*1982*	*1983*	*1984*	*1985*
Overall conviction rate	92.8	92.8	90.9	90.8
Percent sentenced to BCD	68.9	73.6	69.5	70.5
Percent sentenced to confinement	86.2	85.5	81.1	82.0
Percent sentenced to forfeiture or fine	83.7	86.1	84.3	83.0

Other SPCM Trial Types	*1982*	*1983*	*1984*	*1985*
Percent tried by judge alone	67.5	67.8	63.6	63.3
Percent tried by officer courts	15.6	12.6	14.8	12.1
Percent tried with enlisted members	16.8	19.6	21.6	24.5

Other SPCM Trial Results	*1982*	*1983*	*1984*	*1985*
Overall conviction rate	87.2	81.8	79.7	73.6
Percent sentenced to confinement	59.8	50.7	45.1	49.1
Percent sentenced to forfeiture or fine	76.0	77.6	77.1	76.1

These percentages were calculated from data obtained from the Military Judge File in the Court-Martial and Disciplinary Information Management System (CDIMS), the data base file into which data from the military judge case reports was entered from April 1981 through June 1986. In the course of carrying out these and other data processing requests, we have come to the conclusion—for a variety of technical reasons—that these figures may be relied upon more as an indicator of trends than as final figures for the years in question.

The CDIMS military judge file, among others, is being replaced by the new Army Court-Martial Management Information System (ACMIS), which is a combination military justice data base and appellate case tracking system based on DOCKETRAC, a system developed and marketed by INSLAW. Effective with trials ending after 30 June 1986, all information from the revised and renamed court-martial case report has been entered into ACMIS. For more information about ACMIS, see Perrin & Brunson, *A New Generation: Automation of Courts-Martial Information,* The Army Lawyer, July 1986, at 69.

Regulatory Law Office Note

Gas Utility Service

Engineers, lawyers, and procurement officers at military installations may have an opportunity to achieve a major reduction in the current level of costs for gas utility service. Judge advocates may wish to alert facilities engineers to the changes in gas rate regulation that have accompanied other changes in the market place.

To grasp the nature of change, a quick review of the regulatory scheme is in order. In 1938, Congress provided for the regulation of the wholesale price of gas service by the predecessor of the Federal Energy Regulatory Commission (FERC) in the Natural Gas Act, 15 U.S.C. § 717. "Wholesale" has been interpreted as a "sale for resale." The retail rate of gas utility service to customers is regulated by a state public utility commission in most states. Military installations usually contract for gas utility service at a price tied to a "regulated rate" as provided in the Defense Federal Acquisition Regulation (DFAR) subpart 8.3, Supplement No. 5 (1 Apr. 1984). That "regulated rate" is often a retail industrial tariff rate of the local distribution company (LDC) regulated by the state regulatory commission. This form of procurement provides a good match between services supplied and those required by the installation. Tieing the contract price and service procured to the tariff of the regulated utility also tends to reduce the problems of contract administration.

The gas utility industry has tended to segment along regulatory lines. Interstate "pipelines" regulated by FERC provide wholesale gas service to LDCs. In doing so, the pipelines act both as a "merchant" selling gas as a commodity, and a "common carrier" in transporting the commodity to the LDC's point of delivery. The LDC has traditionally acted in a similar fashion in relation to its retail customers. Until recent years, FERC had interpreted its role of regulating the wholesale price of gas service to include regulating the producers "well-head" price pursuant to court approved regulatory fiat. *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954).

A low well-head price of gas did not encourage petroleum exploration for new domestic supplies. While gas and oil are competing fuels, the decline in domestic exploration made the Nation more dependent on foreign supplies. This, in part, set up the great increase in oil prices in the 1970s. Utilities raced to contract for gas reserves. Dwindling domestic gas reserves resulted in perceived shortages. Congress authorized gradual decontrol of well-head gas prices in the Natural Gas Policy act of 1978, 15 U.S.C. § 3301. FERC was permitted to decontrol the well-head price of *some new* gas. It led to much domestic exploration for oil and gas. Crude oil prices peaked in the spring of 1981, and have declined in a series of steps since then. As a competing fuel, gas has felt this price competition. The rise in gas utility service "commodity" costs encouraged energy conservation, fuel-switching, and other actions that have reduced the sales volumes for both pipelines and LDCs. Loss of load, falling demand, and large new gas reserves contribute to the current glut of gas on the market. Many new gas wells are shut-in, with no buyer for the commodity.

In the era of fully regulated well-head pricing of the commodity, the parties negotiated for terms other than price in gas supply contracts. "Take-or-pay" provisions, long term purchases, and, where permitted, indexing sales prices to adjust for inflation were common contract terms. Today, the pipelines and LDCs find that they have contracted for gas at what is now a very high price for gas under unfavorable contract terms. Utilities find those contracts a great burden. This contract gas is the largest commodity cost used in calculating gas rates for customers who require a utility to act as both "merchant" and common carrier.

In 1985, FERC allowed the deregulation, in great measure, of a large portion of the commodity. FERC has also acted to allow pipelines to act both in their traditional role as a utility with "merchant" and "common carrier" functions combined and solely as a "common carrier." See *Regulation of Natural Gas Pipelines After Partial Well-head Decontrol,* Order No. 436, FERC Docket No. RM 85–1 (Oct. 9, 1985) and subsequent orders.

The problem of retaining load on distribution systems to avoid "take-or-pay" penalties, and meeting competition with high commodity gas costs, is serious for pipelines and LDCs. In some instances, it has been possible to get producers to renegotiate contracts to lower the current price of gas. Declining sales "volumes" have resulted in those costs which are unrelated to the commodity cost of gas, but are costs of operating the LDC, being spread over fewer units of sales. Often, retail gas rates are volumetric rates. To retain load and spread costs over a larger number of units of sales, it will be necessary to increase sales. This can be difficult in the face of fuel oil competition.

The unbundling of the "merchant" and common carrier functions of the utility, whether it is a pipeline or a LDC, is one approach. Where a pipeline acts as a common carrier of a customer's commodity (gas), it earns a margin that does contribute to meeting the overall costs of service of the utility. That margin goes toward the capital costs and operating expenses of the pipeline. With the present field price of "new" gas at lower levels than before, customers may wish to buy their own gas, and merely have it transported by the pipeline and the LDC. This provides the customer with commodity cost savings. It provides load retention, and some earnings to both the LDC and the

pipeline carriers. While not all problems are solved, the utilities do not lose the customer to competing fuel oil, and do earn some margin. This approach has been in effect for customers on FERC regulated rates for some time. The concept of unbundling the functions of a gas utility, such as a LDC, are newer to state regulators. Some state commissions have held investigations of this subject in the last year, and some have such proceedings in process. Still other states have permitted utilities to enter into "experiments" in such rate making. Like all new ideas, the initial reactions include some skepticism and inertia. The consumer is benefiting from lower gas rates in some cases already, however. For instance, Fitzsimons Army Medical Center has elected to procure gas using an approach that is more competitive and unbundles the traditional package of gas utility service.

The Regulatory Law Office (JALS–RL) is currently participating in a proceeding before the Maryland Public Service Commission which is investigating the intrastate affects of changes in the interstate sale and transportation of natural gas. Pursuant to a contract funded by the Office of the Chief of Engineers, direct testimony and exhibits of an expert witness was presented in that case by the Regulatory Law Office. The proceeding is Maryland PSC Docket No. 7962. This office will participate similarly in other proceedings in other states on behalf of Army bases therein. Judge advocates should properly notify this office of any such pending proceeding known to them or of which they become aware.

In the past, FERC has not encouraged direct sales by interstate pipelines to military installations purchasing the "full" utility service. *Alexander v. F.E.R.C.*, 609 F.2d 543 (D.C. Cir. 1979). FERC appears to construe common carriage as an area in which the pipelines may deliver the customer's gas directly, "by-passing" the LDC. State regulators and the LDCs may question this arguable infringement into the "franchised territory" of the LDC. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951); *but see Richfield Oil Corp. v. California Public Utilities Commission*, 354 P.2d 4, *cert denied sub nom. Southern Counties Gas Co. v. California Public Utilities Commission*, 364 U.S. 900 (1960). This issue is of greater importance for industrial users than the federal facilities who may have less concern about the state authorized "franchise" of one supplier versus another. "By-pass" may not be a practical option if the federal facility receives service from the LDC at a point remote from pipeline competition. The by-pass option should not be omitted from any competitive procurement action that solicits natural gas service. The LDC may transport gas to meet fuel oil competition, however, if the installation has dual-fuel capability.

To the extent that gas service contracts continue to be tied to regulated rates, especially state regulated rates, installations have an interest in the LDC providing "open access" for transportation of customer-owned gas at fair rates. Military installations would want year round "open access" transportation, not merely the transportation of volumes of gas in off-peak seasons (summer). Some industries focus their usage on off-peak periods. Usage by military installations tends to track the usage pattern of the LDC, and is often weather sensitive.

Establishing a "fair" rate for transportation service by a LDC is a separate issue, and may be affected by the dual fuel capability of the customers, or "by-pass" considerations. A "full margin" transportation rate would give the end-customer the benefit of the differential between the gas the LDC or pipeline had under long term contract and the current lower field price. Such a full margin rate would give the LDC and interstate pipeline their full mark-up related to recovery of costs of service unrelated to commodity cost. A "full margin" rate may be excessive, however, even though authorized by a state regulatory commission. To meet fuel oil competition, the transportation rate may have to be below the "full-margin" level. This is not as attractive to the LDC as it might be to the customer. Loss of a customer to fuel oil competition would leave the fixed costs of operating the LDC and the interstate pipeline to be divided among the fewer remaining customers and require rate increases to recover those costs. The LDC, the interstate pipeline, and the state regulatory commission all have an interest in preventing that problem from growing. Any "contribution" a sale makes that recovers all variable costs of the LDC and some portion, however small, of fixed costs is better than losing the customer to fuel-oil competition. The LDC, the interstate pipeline, and the producer all have an interest in load retention. If the producer reduces the field price of the commodity, it is fair to anticipate that the LDC and the interstate pipeline will find something less than a "full margin" rate to be fair.

Not every military installation will find it prudent to alter procurement methods along the lines discussed herein, but that should be a well considered decision. The DOD policy with respect to competitive procurement of utilities services is contained in the Armed Services Procurement Regulation (ASPR) Supplement No. 5, "Procurement of Utility Services", dated 1 Oct 1974, which is incorporated in DFAR, part 8.3 in its entirety. In accordance with ASPR S5–104 and ASPR S5–106.3, the contracting officer shall at least annually determine the existence of competition, and if competition is feasible the contracting officer must use competitive procedures to obtain utilities services. In addition, the Federal Acquisition Regulation (FAR) Part 6, "Competitive Requirements" (1 Apr 1984), now requires that contracting officers prepare, in writing, a justification for other than full and open competition for contracts, including utilities contracts, exceeding $100,000. The justification must be approved by a duly authorized individual other than the contracting officer. This revised procedure, in effect, now requires the contracting officer to obtain authorization to use a sole source for most of the utilities service contracts. The contracting officers now find that even though they have been buying utility services on a sole source basis for years, they cannot continue without checking for the possibility of competition. Contracting officers must prepare a written justification and obtain approval for less than full and open competition. The contracting officers should be advised accordingly and encouraged to seek assistance from installation judge advocates.

For the judge advocate at the installation, assisting in procurement of a gas supply from a field producer through a request for proposals (RFP) will be a challenge. As in many procurement actions, there will be a specialized vocabulary. In gas, the British thermal unit (Btu), the dekatherm, per thousand cubic feet (MCF), pounds per square inch (psi), and many engineering terms dealing with

quality of gas will be a greater problem for the lawyers to learn than for the post engineers. Drafting the RFP and evaluating complex responses of gas suppliers will be a challenge. In the future, the proposed FAR Part 41 may affect some procedures related to utility service acquisition. 51 Fed. Reg. 16988 (1986). That effect would not be limited to gas service acquisition.

Installations which have given consideration to combinations of gas utility service using traditional firm service and interruptible regulated rates may have some "learning curve" advantages over others. Perhaps only a portion of gas needs might be met with a transported commodity. This glut of lower priced gas reserves, however, may not last more than a few years. The benign regulatory climate may be brief. Efforts to take advantage of market conditions should move with all deliberate speed.

Unbundling the procurement of gas utility service by local procurement of the commodity will still leave the issue of transportation. Transportation of gas under regulated rates is another area with its own arcane language. Of the few installations that have attempted this more competitive approach to gas service procurement, some have achieved savings of over one dollar per MCF. Considering that an installation may purchase several hundred thousand or even a few million MCF of gas per year, the cost avoidance could be substantial.

In summary, legal officers should become more familiar with the utility purchases at their installations, consult with facilities engineers about possible savings and the use of alternate suppliers, consult with attorneys at the Regulatory Law Office as necessary, and discover and report proceedings under Dep't of Army, Reg. No. 27–40, Legal Services—Litigation (4 Dec. 1985).

Contract Appeals Division Notes

Pathman—Jurisdictional Oddity

Ronald A. Kienlen
Deputy Chief Trial Attorney

At first blush, *Pathman v. United States,* Cl. Ct. No. 136–85C (May 30, 1986), would seem to be the answer to every overworked contracting officer's prayers, as well as the answer to the prayers of the overworked lawyer who has to review a contracting officer's decision before it is issued. According to *Pathman,* if a contracting officer is going to deny a claim, there is no need for the contracting officer to take any action whatsoever except to record in the file the date when that claim was received. The jurisdictional clock begins to run sixty days after the contractor asks for a final decision.

The United States Claims Court, in a decision by Judge Phillip R. Miller, dismissed as untimely an appeal by Pathman from the contracting officer's failure to issue a final decision. Pathman had waited (patiently, it seems) from May 6, 1983 (date of certified claim in the amount of $522,907.28 and of a request for the issuance of a final decision) until May 11, 1985 (when suit was commenced in the Claims Court) for the contracting officer to issue a final decision on the certified claim. *Pathman* held that the Contract Disputes Act required the contractor to appeal final decisions within twelve months if they were going to appeal to the Claims Court. *Pathman* held that the twelve month jurisdictional limitation period (ninety days for board's of contract appeals) applied not only to appeals from actual final decisions but from refusals or failures to issue final decisions as well.

Pathman's claim for an equitable adjustment of $428,608.17 was first submitted on September 28, 1976. The General Services Administration contracting officer acknowledged on May 10, 1978 that Pathman was entitled to an equitable adjustment and made a settlement offer in the amount of $202,000.00. Pathman rejected the offer. The contracting officer then requested an audit to determine entitlement and told Pathman that no further action would be taken until the audit was completed. The audit report was issued on August 17, 1978. On February 16, 1981, Pathman's attorney submitted a written request for a final decision to the contracting officer. No decision was issued. On May 6, 1983, Pathman submitted a written request for a final decision that included the certification that is required by the Contract Disputes Act (CDA) for claims exceeding $50,000.00. Again, no final decision was issued. Pathman commenced its suit for $522,907.18 in the Court of Claims on March 11, 1985. The court held that the six year statute of limitation under 28 U.S.C. § 2501 (1982) did not apply to claims under the disputes clause of the contract, citing *Nager Electric Co. v. United States,* 177 Ct. Cl. 234, 244, 368 F.2d 847, 854 (1966). Although this was a pre-CDA contract, the court found that Pathman followed the CDA procedures, including the certification and submission of the claim, and such actions were clear indications of the plaintiff's election to invoke the CDA process. Finally, the court held that the claim was untimely because the CDA requires timely appeals from final decisions of contracting officers whether the decision is actually issued or only deemed to have been issued because the contracting officer refused to act within sixty days.

The court acknowledged that four decisions of the Claims Court held that the jurisdictional limitation did not apply to suits appealing adverse decisions that had been "deemed" to have been made pursuant to 41 U.S.C. § 605(c)(5) (1982), *G&H Machinery Company v. United States,* 7 Cl. Ct. 199 (1985), held that it would be unfair to impose on the contractor the burden of appealing a

"deemed" decision of the contracting officer. In effect, the contractor would then be made to bear the consequences of the contracting officer's dereliction of duty in failing to perform the deciding function within the time allowed by law. The Claims Court went on to note than § 605(c)(5) uses permissive language in providing that the failure of the contracting officer to issue a final decision *will authorize* the commencement of a suit on the contractor's claim. In *Vemo v. United States*, 9 Cl. Ct. 217 (1985), the court cited *G&H Machinery* with approval, and, in addition, noted that the court would not be happy to be flooded with premature law suits that could have been negotiated and settled.

Following *Vemo*, the Claims Court issued the decision in *Turner Construction Company v. United States*, 9 Cl. Ct. 214 (1985). The Claims Court concluded that the express language of the statute applied only to actual decisions issued by a contracting officer. The *Turner* court noted that the twelve month limit provision contemplated an actual receipt of an actual decision before the jurisdictional twelve month period would begin to run. Then, in *LaCoste v. United States*, 9 Cl. Ct. 313 (1985), the Claims Court followed the earlier decisions and noted that they were comprehensive and well reasoned. In *LaCoste*, the court did go on to find that the appellant's undue delay in submitting its claim to the contracting officer raised the equitable doctrine of laches and concluded that the contractor's claim was thereby barred.

The *Pathman* court rejected those four decisions and concluded that, by reducing the appeal period to the Claims Court from the six years under the Wunderlich Act to twelve months under the CDA, Congress intended to impose a burden on contractors to speedily prosecute their claims. The court instead stressed the language in the CDA that says that a failure by the contracting officer to render a decision will be deemed a decision by the contracting officer denying the claim, and the language in the CDA that says a decision by the contracting officer is entitled to finality if it is not appealed. The court concluded that Congress made no effort to distinguish between actual decisions and deemed decisions. Thus, timeliness was a requirement for redress from either an actual or deemed decision by the contracting officer.

The court dealt summarily with the requirement that the limitations period begins to run only after *receipt* of the final decision. It concluded that receipt is inapplicable to a decision which does not require receipt in order for the decision, *i.e.*, the deemed denial, to be effective.

Pathman holds that once the contractor chooses to initiate the CDA process by filing a claim and asking for a final decision, the contractor is obligated to move ahead by either appealing the deemed denial or by petitioning the contract appeals boards to require the contracting officer to issue a final decision by a date certain. *Pathman* does not deal with the issue of determining when a decision will have been received by the contracting officer for the purpose of computing the sixtieth day on which a final decision will have been deemed to have been issued denying the claim.

The *Pathman* decision is one of a series of cases that attempts to deal with the difficult issue of delay in the resolution of contract disputes, whether the delay was caused by the government, the contractor, or both parties. Clearly, the *Pathman* decision, with a claim of a half million dollars, will be appealed to the Federal Circuit in light of the four prior cases which had clearly rejected the kind of reasoning adopted in *Pathman*. What should contracting officers and their legal advisors do in the meantime?

Should they rely on the reasoning of *Pathman* and simply do nothing where they would otherwise issue a final decision denying a contractor's claim? That would seem to be a preferred strategy. By doing nothing, one could argue, the contractor is not alerted to its appeal rights and thus is not encouraged to appeal the deemed denial of the decision; and, the government has an additional jurisdictional argument in its arsenal upon which to defeat a claim, while avoiding substantive issues.

Such an approach overlooks the fact that *Pathman* has four cases against it when it goes up for review on appeal. It overlooks the fact that the CDA not only requires that a decision be issued by the contracting officer, but also that the decision be mailed or otherwise given to the contractor, state the reasons for the decision, and inform the contractor of its appeal rights (41 U.S.C. § 605(a) (1982)). All of these elements are in fact missing from a deemed final decision of the contracting officer.

The requirements placed in the CDA for the existence of a final decision by the contracting officer before a contractor could appeal were designed to ensure that the government had the opportunity to resolve an appeal at the administrative level. That was also the reason why Congress put in a requirement for certified claims in excess of $50,000.00. Such certification was to be accompanied by cost data that would enable a claim to be settled earlier at an administrative level without escalating the claims either to the boards of contract appeals or to the Claims Court. The contracting officer's final decision thus became a condition precedent to an appeal to the boards of contract appeals or to the Claims Court. *Pathman* seems to have misconstrued this condition precedent to an appeal or trial process with the event which begins the running of the limitation period. The limitation period begins once the contractor has been formally advised that the government will no longer administratively consider the claim at the contracting officer level.

The Contract Appeals Division has concluded that it is not in the government's interest to raise the *Pathman* argument in cases before the Armed Services Board of Contract Appeals. The *Pathman* rationale has been soundly rejected by four prior decisions of the Claims Court and *Pathman* itself is certain to be appealed. Nor is *Pathman* the most desirable result, because it would encourage contracting officers to avoid issuing final decisions. We will not raise the *Pathman* motion unless it is accepted by the Court of Appeals for the Federal Circuit.

Rights Determinations of Army Employee Inventions

John H. Raubitschek
Patents, Copyrights, and Trademarks Division

On July 17, 1986, the Court of Appeals for the Federal Circuit in *Heinemann v. United States*[1] affirmed the dismissal by the Claims Court on motion for summary judgment of a suit by an Army employee. The employee, located at Picatinny Arsenal, had invented an intelligent anti-armor munition on which the Army obtained U.S. Patent No. 4,050,381. The suit was based on "unauthorized use" of the patented invention by the Army in the Search and Destroy Armor (SADARM) program under 28 U.S. § 1498(a) (1982).

The actual use of the invention was never addressed by the court because the initial focus was on the ownership of the invention. Although ownership of Army inventions is generally determined by the Patents, Copyrights, and Trademarks Division,[2] this was not done because the inventor had transferred all his rights to the Army in an assignment agreement. Subsequently, when he sued the Army, the trial judge held that the assignment was invalid because of incomplete information given to the inventor by an Army Materiel Command (AMC) attorney and remanded the case to the Army to make a rights determination under Executive Order 10096.[3] We determined that the Army was entitled to ownership of the invention and our decision was sustained by the Commissioner of Patents and Trademarks, the Claims Court, and the Court of Appeals. Accordingly, the inventor's suit for damages, which would have involved many millions of dollars, was dismissed.

This case is of interest for several reasons. First, the Executive Order under which the agencies make several hundred rights determinations each year was held to be constitutional. Although the Seventh Circuit had previously held so in *Kaplan v. Corcoran,*[4] there was some question about the effect of this ruling on the Claims Court until the decision by the Federal Circuit. This decision also disposes of any lingering concern about inventors' common law rights in their inventions as recognized in *United States v. Dubilier Condensor Corp.*[5] because these rights were changed by the issuance of the Executive Order in 1950. Further, the proceedings pointed out a potential problem for the government in accepting voluntary assignments from its inventors, a commonplace practice. As a result, AMC has implemented a procedure to document that the inventor has been given complete information on his or her rights.[6]

---

[1] 230 U.S.P.Q. (BNA) 431 (1986).

[2] Dep't of Army, Reg. No. 27-60, Legal Services—Patents, Inventions, and Copyrights, para. 4-9 (15 May 1974).

[3] 4 Cl. Ct. 564 (1984).

[4] 545 F.2d 1073 (1976).

[5] 289 U.S. 178 (1933).

[6] For further information about employee rights determinations, see Raubitschek, *Government Employee Inventions,* 33 Fed. B. News & J. 215 (1986).

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Table of Contents

Administrative and Civil Law Notes

Digests of Opinions of The Judge Advocate General

DAJA–AL 1986/1731, 6 May 1986. Retired Grade of Officers.

10 U.S.C. § 1370 (1982) states that an officer in a grade above major and below lieutenant general must serve on active duty satisfactorily for at least three years to voluntarily retire in that grade. The Judge Advocate General received an inquiry on the effect of an earlier voluntary retirement on retired grade, title, wear of the uniform, and recall grade.

The Judge Advocate General noted 10 U.S.C. § 772(c) (1982) states that a retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade. AR 670–1, para. 33–3c permits retired personnel not on active duty to wear a uniform. The grade worn, however, "will be as shown on the retired grade of rank line on the retirement order." The Judge Advocate General opined that the foregoing precludes a retired officer from wearing insignia or using a title of a grade higher than that at which retired. He further opined that an officer's actual retired grade must be used on all official documents such as the DD Form 2, retired ID card.

Finally, The Judge Advocate General opined that an officer, retired as a brigadier or major general, may be recalled to active duty, in peacetime, only in his or her retired grade and not in any higher grade temporarily held.

DAJA–AL 1985/2947, 29 May 1986. Authority to Convene Administrative Separation Boards.

The Judge Advocate General was asked whether a soldier could validly be referred to an administrative separation board by an officer on the separation authority's staff.

The Secretary of the Army has broad statutory authority to separate enlisted soldiers, subject to the constraints of DOD directives and regulations. DOD Directive 1332.14, Enlisted Administrative Separations, defines who may act as a convening authority, but contains no provision for delegation of this authority to members of the convening authority's staff. The Judge Advocate General opined that, to the extent AR 635–200, para. 1–21g attempts to permit such delegation, it conflicts with the DOD directive. Therefore, para. 1–21g is legally objectionable and should not be followed.

The Judge Advocate General next addressed whether boards erroneously convened by a staff officer are void per se. Resolution of this question depends on the intent of the proponents. The DOD and Army proponents advised The Judge Advocate General that a board so convened and otherwise procedurally correct did not lead to a separation that was void per se. Rather, the validity of the separation authority's action to separate the soldier would be contingent on whether the error materially prejudiced a substantial right of the respondent.

The Judge Advocate General emphasized that, although separations in cases referred to a board by a staff officer may be valid, such practice cannot be condoned—it is legally objectionable and should not be continued.

Note: AR 635–200, para. 1–21g has been amended in Enlisted Ranks Personnel UPDATE # 9 to delete the purported delegation authority.

Contract Law Note

The Anti-Deficiency Act in a Nutshell

The fastest way to get the attention of government contracting and comptroller personnel is to whisper in their ears that they have, or are about to have, a "3679" violation, a violation of the "Anti-Deficiency Act." Currently referred to as violations of Title 31, United States Code funding limitations, these statutory provisions, which require investigation of alleged violations, naming of responsible parties, reports to Congress, and which carry potential criminal and administrative sanctions, can wreak havoc within any command and affect everyone including the commander and the judge advocate.

The issues involved are complex and the references diverse. The following synopsis of statutory and regulatory limitations and exceptions provide a starting point for the judge advocate in identifying potential violations of the Anti-Deficiency Act.

Authorizing, Obligating, or Expending in *Excess* of Available Funds

The Anti-Deficiency Act prohibits the over-authorization, over-obligation, and over-expenditure of appropriated funds.

31 U.S.C. § 1341(a) (1982) prohibits an officer or employee of the United States Government from making or authorizing an expenditure or obligation *exceeding an appropriation* or fund.

31 U.S.C. § 1512 (1982) *requires apportionment* of appropriated funds.

31 U.S.C. § 1514(a) (1982) *requires* the Secretary of the Army (and all other agency heads) to prescribe by regulation a *system of administrative control* designed to restrict obligations and expenditures to the amount of apportionments and to enable the Secretary to fix responsibility for any over-obligation or over-expenditure. The Army has implemented § 1514 by developing a system of "administrative subdivisions of funds" (allocations, suballocations, allotments and sub-allotments). Primary regulatory guidance in this area is found in Dep't of Army, Reg. No. 37–20, Administrative Control of Appropriated Funds (1 Aug. 1980) [hereinafter AR 37–20].

31 U.S.C. § 1517 (1982) prohibits any officer or employee of the United States Government from making or authorizing an expenditure or obligation *exceeding an apportionment* or the *amount permitted by regulations* prescribed under § 1514(a). Federal Acquisition Reg. § 32.702 (1 Apr. 1984) [hereinafter FAR], which implements the Act, requires that contracting officers, before executing any contract, obtain written assurance from responsible fiscal authority that adequate funds are available (or expressly condition the contract upon availability of funds).

Authorizations to obligate and expend come to the installation in the form of administrative limitations (allotments, suballotments, allocations, or suballocations) or as targets and allowances from higher commands and as certifications and commitments by finance officers. Expenditures are payments by cash, check, or equivalent action.

Obligations result from the placing of orders, awarding of contracts, and other commitments by federal agencies. Obligating the government in excess of the funds certified or committed is not, per se, a violation of the Anti-Deficiency Act. If, however, the certification creates an "administrative subdivision of funds," an over-obligation is a violation of the Act (31 U.S.C. § 1517 (1982)). If the certification is not an "administrative subdivision," a violation may still occur if the over-obligation causes an administrative subdivision (§ 1517), apportionment (§ 1517), or appropriation (§ 1341(a)) to be exceeded.

The Department of Defense (DOD) has limited authority under 41 U.S.C. § 11 (1982) to incur obligations in excess of available funds for clothing, subsistance, forage, fuel, quarters, transportation, and medical and hospital supplies.

Obligating in *Advance* of Available Appropriations

There are both statutory and regulatory prohibitions against obligating the government before funds are available.

31 U.S.C. § 1341(a) (1982) prohibits an officer or employee of the United States Government from involving the government in a *contract or obligation* for the payment of money *before an appropriation is made.* FAR § 32.704(c) provides that government personnel who encourage a contractor to continue work in the absence of funds will incur a violation of 31 U.S.C. § 1341(a) (1982) that may subject the violator to civil or criminal penalties.

Bona Fide Needs Rule

31 U.S.C. § 1502 (1982) provides that appropriations limited for obligation to a definite period (*e.g.*, the Operation and Maintenance appropriation is available for obligation for only one fiscal year) may only be used to pay for expenses properly incurred during the period of availability. Violations of this bona fide needs rule are not, per se, violations of the Anti-Deficiency Act. Actions that violate the rule are, however, frequently violations of § 1341(a) of the Act (obligating the government before an appropriation is made).

Supplies Rule

Current fiscal year appropriations are available to purchase the supplies to be used in the current fiscal year; next year's money is available to purchase next year's needs. For example, entering into a contract in FY 87 for the acquisition of goods needed in FY 88 may be a violation of § 1341(a). The contract obligation could only be properly charged to FY 88 funds. FY 88 funds are not available in FY 87 when the contract is executed. The contract therefore obligates the government in FY 87 in advance of available appropriations (FY 88) in violation of § 1341(a). There are, however, exceptions for the acquisition of supplies.

Replenishment of Stock. An order or contract for the replacement of stock is viewed as meeting a bona fide need for the year in which the contract is made as long as it is intended to replace stock used in that year, even though the replacement items will not be used until the following year. "Stock" in this context refers to "readily available common-use standard items." 44 Comp. Gen. 695 (1965).

Long Lead-time. It is proper to take deliveries in one fiscal year based upon a contract concluded in the previous year if the material contracted for was not obtainable on the open market at the time needed for use, provided the intervening period (between contract and delivery) was necessary for production or fabrication of the material. 37 Comp. Gen. 155 (1957).

Services Rule

Appropriations available for this fiscal year are to be used to acquire the services to be performed this fiscal year. Next year's money is to be used for services performed next year. Incurring an obligation in one fiscal year for services to be performed in the next fiscal year may be a violation of the bona fide needs rule and § 1341(a)'s prohibition against obligating the government in advance of available funds. Again, there are exceptions.

Maintenance of Tools and Facilities. DOD Appropriation Acts allow award of service contracts of up to twelve months duration crossing from one fiscal year into the next if the services are for the maintenance of tools and facilities.

Non-Severable Services. An exception exists when a need arises in one fiscal year for services which, by their nature, cannot be separated for performance in separate fiscal years. These are known as "single undertakings" or services that are "entire." An example is the painting of a building. The services performed include preparing, priming, and painting. These are not severable tasks but constitute an entire service, a single undertaking. The painting contract may be awarded in one fiscal year and funded with moneys available at the time of award even though performance may continue into the next fiscal year. If, however, the services are severable (*e.g.*, driving a bus, divisable into daily performances) the general rule must be applied.

Voluntary Services Prohibition

31 U.S.C. § 1342 (1982) prohibits officers or employees from *accepting voluntary services* except in emergencies involving the safety of life or government property. Other exceptions are authorized by statute: *e.g.*, Red Cross, 10 U.S.C. § 2602 (1982); student interns, 5 U.S.C. § 3111 (1982); and Army Reserve, 10 U.S.C. § 4541 (1982). Accepting of gratuitous services is not prohibited where the service provider agrees in advance in writing not to seek reimbursement from the government. Ms. Comp. Gen. Dec. B–193035, 79–1 CPD para. 260.

Processing Violations

Reporting and processing requirements for apparent violations are contained at paragraphs 2–2 through 2–6, AR 37–20. The commander is required, where appropriate, to appoint a board of officers to investigate in accordance with Dep't of Army, Reg. No. 15–6, Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977). A "flash report" through command channels to the Comptroller of the Army and "serious incident report" (Dep't of Army, Reg. No. 190–40, Military Police—Serious Incident Report (1 Sept. 1981)), if applicable, must be transmitted. Disciplinary action or criminal punishment may be imposed upon those individuals found responsible for the violations.

Legal Assistance Items

Tax Notes

Capital Gains Tax After the Reform Act of 1986

The Tax Reform Act will generally reduce tax rates, reducing the highest rate of personal income tax from 50 percent to 28 percent (an actual rate of 33 percent will result for higher income taxpayers due to a phase out of personal exemptions and the 15 percent rate). With this reduction in rates, however, will come an offsetting reduction in the number of deductions and credits available to taxpayers. Thus, the tax base will be broadened, while tax rates will be reduced.

One of the items which will be lost under the Tax Reform Act is the capital gains exclusion. Currently, taxpayers can exclude sixty percent of gains on assets they have held over six months. This 60 percent exclusion of gain results in only 40 percent of the gain being taxed. This translates to a maximum rate of tax on capital gains of 20 percent for the highest bracket taxpayer (50% rate of tax $\times$ 40% of gain). For taxpayers in the 30 percent tax bracket, the effective rate of tax on capital gains is 12 percent.

Effective 1 January 1987, the capital gains exclusion will be eliminated. This means that capital gains will be taxed as ordinary income, thus taxed at a rate of 28 or 15 percent, depending on the taxpayer's bracket. Because the capital gains exclusion will be eliminated next year, taxpayers must consider whether they should sell appreciated assets this year while the exclusion is still available. Answering that question is not simple, and involves two competing considerations and a number of other factors. The first consideration is tax reduction. By selling the asset before 1987, the taxpayer will pay less tax on the gain. That principle obviously advises selling the asset now. The second principle is tax deferral. Expressed another way, the question is whether the taxpayer would be better off to pay a little more tax later, in exchange for not having to pay any tax immediately. Whether this would be advantageous depends on a number of factors and assumptions, such as how much longer the taxpayer intends to hold the property and thus keep the tax not immediately paid invested, what rate of return on the money can be reasonably anticipated, and what tax bracket the taxpayer would be in when the property is finally sold. As a rule of thumb, invested money should double in about seven years. Thus, as long as the property were to be held for a significant period, a taxpayer would seem better off to retain the property and defer tax rather than sell the property and pay the tax.

Another factor that must enter into the analysis is the nature of the property. If the asset is one that the taxpayer is pleased with, and would like to hold in a portfolio long-term, and therefore would likely buy back if sold, then transaction costs of selling and repurchasing the property must also be factored into the equation. For example, if the taxpayer held a blue chip stock that the taxpayer wanted in a retirement portfolio, if the stock were sold, the taxpayer would pay a broker commissions on the sale and commissions again on the repurchase. These commissions combined could amount to as much as ten percent of the sales price. If real property is involved, the taxpayer would have to factor in the costs of realtor's fees, closing costs, and the loss due to giving up a low mortgage rate, if any.

Thus, the transaction costs can be very significant, which advise against selling property that the taxpayer might intend to repurchase.

An additional factor that is more difficult to quantify is the degree to which the property may have already and excessively lost value in response to tax reform. This may be particularly true in connection with real estate. Tax reform will generally preclude deduction against earned income of passive losses from rental property. There will, however, be a limited exception permitting a deduction of up to $25,000 against earned income for those who actively participate in management of property and have less than $100,000 of adjusted gross income. Because of this change in the law, property may have already lost value, and that loss may be out of proportion to the actual economic significance of the tax change. Therefore, the investor should also evaluate whether the property has recently declined in value due to the change in the law, and whether it is likely to rebound or continue to decline in value in the future.

The last factor which should be considered by the taxpayer is the possibility of the law changing in the future. The capital gains exclusion has been adjusted many times in the past in response to perceived needs of the economy. The Tax Reform Act of 1986 retains the structure of capital transactions, but just eliminates the capital gains exclusion. Thus, in the future, the law could easily be changed to reinstate the capital gains exclusion.

As these factors would indicate, the decision as to whether to sell or hold a given piece of property depends on all of the facts and circumstances of the property and the taxpayer. In the simplest analysis, if a taxpayer has an appreciated asset that is no longer a sound investment, the taxpayer should probably sell it now while the capital gains exclusion is available and thereby reduce tax. This would be wise unless the taxpayer believes the property is artificially depreciated currently and will rebound in the near future. Property that the taxpayer wants to own and would likely buy back if sold probably should not be sold for the reasons stated above. Most of our soldiers currently are in a 30 percent or less tax bracket, and thus have an effective rate of tax on capital gains of only 12 percent or less. Under the new law, many of our soldiers will be taxed at the 15 percent rate, and, thus, the differential in tax on capital gains will be slight (15%–12%). For the more senior officers who will pay tax at the 28 percent rate, the differential is more significant. Assets that have depreciated in value should probably not be sold this year. If sold currently, they would offset gains which are already partially offset by the capital gains exclusion. Next year, those losses could be used to offset gains that are fully taxed. In conclusion, while there are situations that would warrant selling an asset today, taxpayers should not hastily conclude that they should sell all holdings in the name of the lost capital gains exclusion. Major Mulliken.

State Income Tax Forms

A major challenge facing offices conducting a tax assistance program is obtaining all of the state tax forms and instructions needed by the installation. Last year, the Army Law Library Service was able to procure, on a trial basis, copies of a three-volume set published by CCH entitled State Personal Income Tax Forms. These volumes include both reproducible forms and explanations of how the forms are to be completed. This year, funding of this publication, or an equivalent, will have to be budgeted locally, as funds are not available in the Army Law Library Service budget. Chiefs of legal assistance should consider whether this or an equivalent publication is needed, and if so, arrangements should be made locally to fund and order the publication.

ABA Legal Assistance Award

On October 9, 1986, Mr. Clayton B. Burton, Chairman of the American Bar Association's Standing Committee on Legal Assistance to Military Personnel (LAMP committee) presented an ABA award to General John A. Wickham, Jr., Chief of Staff of the Army, on behalf of the Gander Legal Assistance Team, in recognition of the Army's legal assistance effort to help the survivors of the soldiers who died in the Arrow Airlines crash in Gander, Newfoundland. Mr. Burton's presentation was made during the 1986 JAG Conference and Annual Continuing Legal Education Program at The Judge Advocate General's School. Mr. Burton made the following comments:

> Since 1941, the American Bar Association has recognized the importance of legal assistance. The LAMP committee is one of the thirty-five Standing Committees of the ABA. Its lawyer members represent a combined total of over 155 years of cumulative experience in the delivery of legal services to the military. These seven volunteer lawyers spend over 3200 hours and travel almost 100,000 miles per year in the quest of their sole mission, to aid in the delivery of legal assistance to over nine million potential clients.
>
> Fifteen times in its forty-five year history, LAMP has recognized outstanding achievement in this field. This historic occasion is another of those times.
>
> The truly unfortunate tragedy at Gander, Newfoundland, last December put the Army and its lawyers to the ultimate test. The families of the 248 soldiers who were killed were scattered throughout the United States, Europe, the Far East, and Central America. Clearly, the Army was tasked with one of the most exhausting and logistically complex legal assistance scenarios it had ever faced. The entire Army, from the staff in Washington to the casualty assistance officers and active duty and Reserve judge advocates, worked together as the Gander Legal Assistance Support Team. The needs of these deserving families were met in exemplary fashion.
>
> General Wickham, you and the Army as an institution can be justly proud of these most unique accomplishments.
>
> It is with great pleasure and pride as an attorney, and as a representative of the over 600,000 lawyer members of the ABA, that I present to the Army this recognition of those achievements.

Family Law Notes

Texas Child Support Guidelines Rescinded

In the August 1986 issue of *The Army Lawyer*, we reported at page 78 that Texas had adopted statewide child support guidelines as required by the Child Support Enforcement Amendments of 1984. The action was taken by

the promulgation of an order by the Texas Supreme Court on May 19, 1986.

In July, the court decided it lacked authority under state law to issue such an order using the procedure it followed, and rescinded the order. An announcement of the rescission appeared in the "Texas Lawyers' Civil Digest" on July 21, 1986. The statement reads as follows:

> Child Support Guidelines Rescinded
> Order of the Supreme Court of Texas
>
> The order of this Court of May 19, 1986 promulgating Child Support guidelines is rescinded, effective this date. Subsequently, this Court will appoint a Task Force to recommend to the Court child support guidelines.
>
> In chambers, this 16th day of July, 1986.

Wisconsin Child Support Guidelines

The Wisconsin Supreme Court recently provided a significant interpretation of that state's child support rules. The statutory percentage guidelines were held to be inapplicable in situations where supported children resided in different households. Reversing a lower court's ruling that the statutory amount should simply be divided between the children in such cases, the supreme court held that this approach yielded unreasonable results because support would be determined without reference to the children's actual needs. *In re B.W.S.*, 131 Wis. 2d 301, 388 N.W. 2d 615 (1986).

Instead, the court must use statutory criteria, rather than the percentage guidelines, to determine the actual needs of the children; these needs then determine the support obligation. In the instant case, the support obligee fathered an illegitimate child and then married another woman, by whom he had two more children. At issue was the appropriate amount of support for the illegitimate child. The trial court awarded ten percent of the father's pay because it was approximately one-third of the percentage guideline of twenty-nine percent for three children. In rejecting this mechanical approach, the supreme court suggested that the ten percent figure was too low.

The statutory criteria a Wisconsin court should weigh in a situation such as this are found in Wis. Stat. Ann. § 767.51(5) (West Supp. 1986). They are:

> [A]ny relevant facts including but not limited to:
>
> (a) The needs of the child.
>
> (b) The standard of living and circumstances of the parents.
>
> (c) The relative financial means of the parents.
>
> (d) The earning ability of the parents.
>
> (e) The need and capacity of the child for education, including higher education.
>
> (f) The age of the child.
>
> (g) The financial resources and the earning ability of the child.
>
> (h) The responsibility of the parents for the support of others.
>
> (i) The value of the services of the custodial parent.

Analytically, of course, the percentage guidelines adopted by Wisconsin are merely a shorthand method of weighing all these factors in routine cases. *In re B.W.S.* demonstrates, however, a fact situation in which courts may be willing to ignore such guidelines.

Garnishment

One of the frustrations with publishing research aids such as our "All States" guides is the difficulty in keeping them up-to-date. For example, we just thoroughly revised the guide on state garnishment laws and procedures. There is a significant change that needs to be noted.

Recently, the West Virginia legislature amended portions of the state garnishment law to increase the effectiveness of child support enforcement. As of July 1, 1986, the ceiling on garnishments for support obligations was increased from the previous twenty percent of disposable pay to percentage limits that match the federal maximums (as found in 15 U.S.C. § 1673(b) (1982)). The change will be incorporated in W. Va. Code § 48A–5–3(g), and it applies only to support garnishments; the old limitation of twenty percent of weekly pay (or thirty times the federal hourly minimum wage, whichever is lower) still applies to garnishments arising from nonsupport obligations.

A second change in the state law involves priorities in honoring garnishment orders. Now support garnishments (and voluntary and involuntary wage assignments) have priority over all other wage attachment actions, even other process that chronologically precedes the support action.

Please post this change in your new garnishment guide.

Stepparent Adoptions

Alaska has provided some good news for stepparents who desire to adopt their stepchildren. In *In re J.J.J.*, 718 P.2d 948 (Alaska, 1986), the state supreme court interpreted the Uniform Adoption Code, as enacted by Alaska, to deny an absent biological father the authority to block an adoption by his former wife's current husband. The court held that a biological parent who only occasionally pays support and sporadically communicates with the child could not prevent the adoption.

The issue is not an easy one, of course, but questions regarding stepparent adoptions will only increase if the divorce rate remains at its current level. Recognizing this fact, the court discussed varying approaches taken by several states and recommended by commentators. An alternative to stepparent *adoption* is an intermediate arrangement whereby the stepparent is awarded custody rights over the stepchild; such an order avoids the drastic step of terminating the biological parent's legal ties with the child while preserving the stability of the child's home environment, perhaps even in the event of the custodial parent's death. The Alaska court seemed to prefer this approach, but it felt precluded by state statutes from entering such an order. Thus, it faced the all-or-nothing proposition of fully protecting the stepparent's interests by permitting the adoption, to the serious detriment of the biological father's interests, or prohibiting the adoption, thereby denying all legal status for the existing family relationship between the stepparent and stepchild.

The case is interesting for several reasons. First, the court made its decision after fully considering the strong arguments advanced by a biological father who desired to retain his relationship with his seven-year-old son. Second, it allowed the adoption to proceed, without the biological father's consent, based on parental neglect that occurred largely before the immediate litigation; while the matter was pending, the absent father exhibited a more responsible attitude toward his (now former) son than he had in the past. Third, the case defined a "significant failure to provide support," one of the statutory prerequisites for allowing an adoption over parental objection. Similar terms appear in many states' adoption statutes. The court held that a failure to voluntarily pay support for a twelve month period met the statutory nonsupport test. It refused to "credit" the absent parent with sums of support "paid" by garnishment initiated by a state agency. Finally, the court allowed the adoption, thereby terminating the biological father's relationship with the child, even though the biological mother was gravely ill and not expected to survive long.

The lessons for our clients from this case are twofold. First, an absent parent's refusal to consent to an adoption is not necessarily the final word on the matter, and if you represent a custodial parent and his or her spouse it may pay to explore appropriate state law. On the other hand, if you are advising an absent parent who anticipates an undesired attempt at stepparent adoption by the former spouse's new marital partner, your client needs to know that payment of child support and maintenance of ties with the child (such as letters and visitation) are crucial factors the court may examine in determining whether to allow the adoption over an objection.

Claims Report

United States Army Claims Service

Workman's Compensation and the Overseas Civilian Employee—A New Development

Lieutenant Colonel Ronald A. Warner
Chief, Foreign/Maritime Claims Division

Recently, the Department of Labor (DOL) notified the US Army Claims Service (USARCS) of a significant change in cognizability of the Federal Employees' Compensation Act (FECA) of certain types of claims arising in overseas locations. Specifically, this change affects the availability of FECA benefits to a U.S. citizen who is a federal civilian employee working overseas and who suffers deleterious effects from medical treatment furnished by the employing agency. In the context of the Department of Defense, the DOL's Office of Worker's Compensation Programs (OWCP) had consistently held that any claim for personal injury suffered by a federal employee because of medical care or treatment provided by an overseas military medical treatment facility (MTF) was cognizable under FECA when such treatment was an entitlement of the employee's employment overseas. FECA benefits would therefore apply whether the illness or injury which generated the visit to the MTF was employment-related or not; the essential condition precedent to FECA jurisdiction was whether the medical care was an entitlement of employment. In a decision issued on 25 June 1986 by DOL's Employees' Compensation Appeals Board (ECAB), *In the Matter of Beverly Sweeny and Department of Defense, Overseas Schools,* this interpretation was substantially restricted.

In *Sweeny,* the board ruled that the OWCP's rule exceeded any authority given by FECA or any other statute or regulation. Coverage for deleterious effects of agency-provided medical care was expressly limited by DOL directive to the four classes of medical service programs authorized by Pub. L. No. 79–658 (5 U.S.C. § 7901 (1982)): treatment of on-the-job illness and dental conditions requiring medical attention; preemployment and other examinations; referral of employees to private physicians and dentists; and preventive programs relating to health. Further, the board recognized compensation for complications arising from treatment of a nonemployment-related condition at an employer health facility in the following situations: when the OWCP has given specific authorization for the treatment; when the medical treatment is rendered at a point in time when the causal relationship of the injury to employment was in question; and when the "human instincts doctrine" applies. The human instincts doctrine applies when an employer furnishes emergency medical treatment to an employee for a nonwork-related condition while the employee is at work. Finally, the board held that FECA benefits may be available in situations where the circumstances or location of employment create an enhanced dependency upon agency-provided medical care. These situations exist when the employee does not have "the freedom and opportunity" to receive treatment at alternative medical facilities or when the employee receives a special benefit due to employment status while receiving treatment at the agency facility. Determination of cognizability in such situations will require an analysis of the circumstances of each case.

Sweeny involved negligent medical management of a knee injury suffered by the claimant, a federally employed school teacher, while skiing in Austria. The board examined the circumstances under which the claimant elected to use medical treatment offered by a military MTF rather than alternative sources of medical care. The board held that while the claimant was entitled to use military MTFs as

part of her employment, this entitlement did not bestow any special benefit not otherwise available to her from other sources and her choice of military medical care for her nonemployment-related injury did not have sufficient connection with her employment to warrant a finding that she suffered injury in the performance of duty within the coverage of the Federal Employees' Compensation Act. OWCP has advised USARCS that the rule and rationale of *Sweeny* will govern future decisions concerning cognizability of FECA in deleterious effects cases.

The effect of this substantial change of position upon the administration of medical malpractice claims by federal employees overseas is difficult to assess. When a claim is cognizable under FECA, any other remedy is barred pursuant to the exclusivity provision of the Act (5 U.S.C. § 8116(c) (1982)). Accordingly, where a federal employee suffers injury through medical neglect at a MTF overseas, his or her remedy in tort under the Military Claims Act (MCA) (10 U.S.C. § 2733 (1982)) is barred if the injury is cognizable under the FECA. A determination of whether this exclusivity bar existed was rather simple under the rule prior to *Sweeny*. Now, however, it will be necessary to examine each case on an ad hoc basis to determine where the claimant's remedy lies. An assessment by claims personnel that any particular case falls within FECA coverage will be subject to a potentially conflicting decision by the OWCP. Because OWCP decisions are slow in coming and are subject to several layers of appeal, claimants may find their MCA remedy in administrative limbo for an extensive period of time. Must an injured employee file a claim under the MCA in order to avoid expiration of the statute of limitations while OWCP processes the FECA claim? What obligation does the Army have to process the MCA claim while awaiting OWCP determination of FECA cognizability? These and many other questions are in need of resolution.

Representatives of USARCS plan to meet with their counterparts from the other services and representatives of the DOL to attempt to clarify the practical problems generated by the *Sweeny* decision. More specific guidance will be published as it is developed. Field claims offices should be aware, however, that claims by federal civilian employees for injury or death resulting from the harmful effects of medical treatment rendered by military MTFs overseas are no longer automatically cognizable under FECA. Offices should treat these claims as viable MCA claims until such time as the issue of FECA applicability is settled. Potential claimants should still be advised of the necessity to file for FECA benefits, because failure to do so may jeopardize any ultimate remedy under FECA or the MCA, or both.

Personnel Claims Tip of the Month

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

This month's tip concerns the proper measures for securing motorcycles and bicycles. Claims for the theft of improperly secured motorcycles or bicycles are denied if the motorcycle or bicycle could reasonably have been secured. It is not enough to lock the wheels together with a chain. Securing a motorcycle or bicycle means chaining it to a fixed object, such as a bike rack, pole, or tree. You should give consideration to securing the motorcycle or bicycle indoors in a basement or hallway if there is no fixed object within walking distance and local regulations permit. Motorcycles and bicycles should be secured at all times when not in use.

Affirmative Claims Tip

Recovery Judge Advocates (RJA) maintain close working relationships with many offices on their installations, such as the Provost Marshal, Post Engineer, and Post Maintenance Officer. The reports of accidents, damage, and repair they provide are valuable in the investigations conducted by the RJA to assess proximate cause and liability for potential property damage assertions. Maintaining these contacts is important to any successful recovery program.

Additionally, the RJA should coordinate regularly with the magistrate court prosecutor where a magistrate court system is established. A potential recovery opportunity is presented in instances where civilian defendants have destroyed or damaged government property and have been cited by the military police. The magistrate court prosecutor should be encouraged to seek restitution, asking that the magistrate require the offender, as part of the sentence, to repay the government for its loss. The RJA should monitor these cases and arrange to have offenders execute a written acknowledgement of the debt and establish a repayment plan.

Let Us Hear From You

Field Claims Office practice is challenging and presents varied problems for resolution. The Claims Service would welcome hearing from judge advocates who have encountered special situations and particularly difficult issues in their claims practice. The sharing of this information will be valuable to all judge advocates. Potential articles resulting from these submissions or other individual research by judge advocates in any claims area will be considered for publication in *The Army Lawyer*. For details regarding the submission of such materials or inquiries about the particulars of this plan, contact the Deputy Director, U.S. Army Claims Service, Fort George G. Meade, Maryland, 20755–5360, AUTOVON 923–7622.

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).

2. TJAGSA Claims Course Cancelled

The 8th Claims Course, scheduled for 26-30 January 1987, has been cancelled. The next claims course is the U.S. Army Claims Service Training Seminar, scheduled for 6-10 July 1987.

3. TJAGSA CLE Course Schedule

December 1-5: 23d Fiscal Law Course (5F-F12).

December 8-12: 2d Judge Advocate and Military Operations Seminar (5F-F47).

December 15-19: 30th Federal Labor Relations Course (5F-F22).

1987

January 12-16: 1987 Government Contract Law Symposium (5F-F11).

January 20-March 27: 112th Basic Course (5-27-C20).

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).

4. Legal Assistance Symposium to be Held in Florida

The Florida Bar's Military Law Committee will sponsor a legal assistance symposium on Saturday, January 24, 1987, at the Omni Hotel in Miami. Registration will be free for all active duty and Reserve Component judge advocates and for interested civilian attorneys.

The program will cover such topics as tax reform, bankruptcy, spouse abuse and domestic violence, family law, real estate transactions, torts, consumer affairs, and ethics. For further information about registration and participation, contact Peggy Griffin at The Florida Bar, Tallahassee, FL 32301, (904) 222-5286.

5. Civilian Sponsored CLE Courses

February 1987

1-5: NCDA, Trial Advocacy, San Francisco, CA.

5-7: ALIABA, Advanced Estate Planning Techniques, Maui, HI.

8-12: NCDA, Criminal Investigators Course, New Orleans, LA.

8-13: NJC, Current Issues in Family Law, San Diego, CA.

8-13: NJC, Capital and Felony Sentencing, San Diego, CA.

9-10: PLI, Real Estate Developments and Construction Financing, Tampa, FL.

12-13: PLI, Preparation of Annual Disclosure Documents, Atlanta, GA.

12-14: ALIABA, Trial Evidence & Litigation in Federal and State Courts, San Diego, CA.

13-14: UKCL, Securities Law, Lexington, KY.

18-20: ALIABA, Tax and Business Planning for the '80s, Orlando, FL.

18-20: ABA, Medical Malpractice, Denver, CO.

18–20: NELI, Employment Law Litigation, San Francisco, CA.

19–21: ALIABA, Environmental Law, Washington, DC.

20: NKU, Surface Mining Litigation, Lexington, KY.

22–26: NCDA, Experienced Prosecutor Course, Channel Islands Harbor, CA.

25–27: SLF, Oil and Gas Law and Taxation, Dallas, TX.

26–27: PLI, Asset-Based Financing, San Francisco, CA.

26–28: NELI, Employment Law Litigation, Key Biscayne, FL.

27: UKCL, Evidence and Kentucky Trial Practice, Louisville, KY.

27: ALIABA, Fundamentals of Effective Legal Negotiating, Worcester, MA.

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.*

6. 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. Videocassettes of Regimental Activation Ceremony Available

Videocassettes of the Judge Advocate General's Corps Regimental Activation Ceremony are now available. The ceremony, which formally activated the Corps under the U.S. Army Regimental System, was held October 9, 1986, during the 1986 JAG Conference and Annual Continuing Legal Education Program. The tape is 30 minutes long. If you are interested in obtaining a copy of the ceremony, please send a blank ¾" or VHS videocassette to: The Judge Advocate General's School, U.S. Army, ATTN: Media Services Office (JAGS–ADN–T), Charlottesville, VA 22903–1781.

2. 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.

3. Government Contracts Committee Seeks Members

Major James F. Nagle, OSJA, FORSCOM, is the new chairman of the Government Contracts Committee of the American Bar Association's General Practice Section. The committee is interested in soliciting JAGC membership in keeping with Policy Letter 86–7, Office of The Judge Advocate General, U.S. Army, subject: Professional Organizations and Activities, 14 May 1986, *reprinted in* The Army Lawyer, July 1986, at 3. It is one vehicle for JAGs to enhance their knowledge of government contracts and to participate in the ABA.

In order to be on the committee, one must be a member of the ABA and its General Practice Section. To join the ABA and the Section, contact Deb Owen at the ABA, 750 North Lake Shore Drive, Chicago IL 60611, (312) 988–5648. Major Nagle may be contacted at AUTOVON 588–3529/3604 or (404) 752–3529/3604.

4. Pennsylvania Modifies Bar Admission Rules

Major Robert Mulderig, Post Judge Advocate at Carlisle Barracks, advises that the Supreme Court of Pennsylvania amended the Pennsylvania Bar Admission Rules effective August 22, 1986. To be admitted on motion under the old rules, one had to be admitted to the bar in a reciprocal state and practice in a reciprocal state for 5 of the last 7 years. These requirements were difficult to meet for JAGs who

were stationed overseas or in states that did not have reciprocity with Pennsylvania.

The new rules provide that five years' service on active duty as a judge advocate will qualify an attorney for admission on motion, wherever the service was performed, as long as the attorney is admitted in a reciprocal state.

5. The Nick Hoge Award for Professional Development

The 1987 Nick Hoge Award for Professional Development was recently announced in HQDA Letter 690–86–13, dated 8 September 1986. This year's program is designed to contribute to the Army of values. The Nick Hoge Award recognizes DA personnel who author and submit papers on matters relating to civilian personnel administration and management that are judged professionally significant and of value to the Department of the Army. A professional Development Seminar, based on the winning paper, will be held in conjunction with the William H. Kushnick Award activities during May 1987. Competition is open to all military and civilian personnel, including local nationals and nonappropriated fund employees. Entries should be submitted to HQDA (DAPE–CPL), Washington, D.C. 20310–0300, and must reach that office no later than 6 February 1987.

Listed below are some areas of particular interest to the Department of the Army on which submission of papers is encouraged. This list is not restrictive, and areas of local command concern are included in the program's coverage.

1. Strengthening the Army's initiatives in the development of civilian leadership and values.

2. Improving customer service in civilian personnel offices.

3. Reducing administrative costs of providing civilian personnel services.

4. Enhancing the quality of worklife for the civilian work force.

5. Revising or initiating systems, programs, and procedures to effect increased quantity or improved quality and timeliness of products or services relating to such aspects of civilian personnel administration and management as:

a. Recruitment and promotions;

b. Position and pay;

c. Career planning;

d. Performance management;

e. Employee training and development;

f. Managerial and supervisory development;

g. Employee motivation and recognition;

h. Handling complaints and grievances;

i. Labor relations;

j. Mobilization planning and preparedness; and

k. Family member assistance.

6. Presenting a more effective organizational structure for accomplishing the mission and objectives assigned to the Civilian Personnel Office.

Additional information may be obtained from the local civilian personnel office or by contacting the Labor and Civilian Personnel Law Office, HQDA, DAJA–LC, Washington, D.C. 20310–2209, AUTOVON 225–9476/4369 or commercial (202) 695–9476/4369.

6. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through the Defense Technical Information Center (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.

7. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 11–40	Functional Area Assessment		11 Sep 86
AR 20–1	Inspector General Activities and Procedures		16 Sep 86
AR 27–10	Military Justice		25 Sep 86
AR 36–2	Processing Internal and External Audit Reports and Follow up on Findings and Recommendations		5 Sep 86
AR 190–16	Military Police/ Physical Security	1	1 Sep 86
AR 190–45	Military Police	102	15 Aug 86
AR 190–56	Army Civilian Police Security Guard Program		10 Sep 86
AR 210–174	Accounting Procedures for Prisoners' Personal Property and Funds		17 Sep 86
AR 220–1	Unit Status Reporting		16 Sep 86
AR 220–90	Army Bands		30 Aug 86
AR 350–41	Army Forces Training		26 Sep 86
AR 381–20	U.S. Army Counter-intelligence Activities		26 Sep 86
AR 600–8–1	Army Casualty and Memorial Affairs and Line of Duty Investigations		18 Sep 86
AR 600–50	Standards of Conduct for Department of Army Personnel		25 Sep 86
CIR 1–86–1	1986 Contemporary Military Reading List		1 Jul 86
CIR 621–86–1	Educational Program for Members of the Selected Reserve		15 Jul 86
DA Pam 310–32	Index of Graphic Training Aid (GTAs)		4 Nov 85
DA Pam 600–66–85	Leadership In Action		Jul 86
DA Pam 600–67	Effective Writing for Army Leaders		2 Jun 86
JAGR 380–5	Information Security Program	4	10 Sep 86
UPDATE 7	Finance Update		30 Aug 86
UPDATE 9	All Ranks Personnel		1 Sep 86
UPDATE 9	Enlisted Ranks Personnel		15 Sep 86
UPDATE 9	Officer Ranks Personnel		30 Sep 86
UPDATE 17	Reserve Components Personnel		26 Sep 86

8. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Bacigal, *An Alternative to the Good Faith Controversy*, 37 Mercer L. Rev. 957 (1986).

Berry, *Remedies to the Dilemma of Death-Qualified Juries,* 8 U. Ark. Little Rock L.J. 479 (1985–86).

Blair, *Lesser Included Offenses in Oklahoma,* 38 Okla. L. Rev. 697 (1985).

Blum, *The Gulf of Sidra Incident,* 80 Am. J. Int'l L. 668 (1986).

Bradley, *The Uncertainty Principle in the Supreme Court,* 1986 Duke L.J. 1.

Burnham, *Remedies Available to the Purchaser of a Defective Used Car,* 47 Mont. L. Rev. 273 (1986).

Carroll, *The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative,* 37 Mercer L. Rev. 981 (1986).

Conference on Comparative Links Between Islamic Law and the Common Law, 34 Cleve. St. L. Rev. 1 (1985–1986).

Conrad & Cole, *Tax Liens and the Homestead: A Fortress Falls,* 64 Taxes 555 (1986).

Corrigan, *On Prosecutorial Ethics,* 13 Hastings Const. L.Q. 537 (1986).

Courter, *Military Reform: Improving Our Defenses,* 9 Seton Hall Legis. J. 475 (1986).

Dripps, *More on Search Warrants, Good Faith, and Probable Cause,* 95 Yale L.J. 1424 (1986).

Foss, *Pre-Trial Strategy in American Air Disaster Litigation,* 14 Transp. L.J. 327 (1986).

Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds,* 64 N. Car. L. Rev. 443 (1986).

Imwinkelried, *The Need To Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence,* 30 Vill L. Rev. 1465 (1985).

Janulis & Hornstein, *Hospitals' Liability for Physicians' Malpractice,* 35 Def. L.J. 541 (1986).

Kaplan, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy,* 95 Yale L.J. 1210 (1986).

Kegley & Hiller, *"Emerging" Car Lemon Laws,* 24 Am. Bus. L.J. 87 (1986).

Lindsay, *Confidence and Accuracy of Eyewitness Identification From Lineups,* 10 Law & Hum. Behav. 229 (1986).

Leimberg & Plotnick, *A Sample Letter to Clients on Their Duties as Executors and Trustees,* Prac. Law., Sept. 1986, at 23.

Marcus, *The Supreme Court and the Privilege Against Self-Incrimination: Has the Burger Court Retreated?,* 38 Okla. L. Rev. 741 (1986).

McCall, Nix v. Whiteside: *The Lawyer's Role in Response to Perjury,* 13 Hastings Const. L.Q. 443 (1986).

Mirsky, *Civil Religion and the Establishment Clause,* 95 Yale L.J. 1237 (1986).

Natali, *Does a Criminal Defendant Have a Constitutional Right To Compel the Production of Privileged Testimony Through Use Immunity?,* 30 Vill. L. Rev. 1501 (1985).

Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules,* 38 Baylor L. Rev. 331 (1986).

Rasor, *Controlling Government Access to Personal Financial Records,* 25 Washburn L.J. 417 (1986).

Riesel, *Discovery and Examination of Scientific Experts,* Prac. Law., Sept. 1986, at 59.

Smith, *Playing the Acid Rain Game: A State's Remedies,* 16 Envtl. L. 255 (1986).

Symposium on the 1977 Geneva Protocols, 19 Akron L. Rev. 521 (1986).

Westenberg, *The Safety Belt Defense at Trial and in Out-of-Court Settlement,* 37 U. Fla. L. Rev. 785 (1985).

White Collar Crime: Survey of Law—1986 Update, 23 Am. Crim. L. Rev. 253 (1986).

Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs,* 72 Va. L. Rev. 813 (1986).

Note, *The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony on Psychological Profiles,* 37 U. Fla. L. Rev. 1035 (1985).

Casenote, *Federal Tort Claims Act—Government Liability for Personal Injuries to Military Personnel—* Johnson v. United States, 51 J. Air L. & Com. 1087 (1986).

RESERVED

U.S. Postal Service

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

Required by 39 U.S.C. 3685)

1A. TITLE OF PUBLICATION	1B. PUBLICATION NO.	2. DATE OF FILING
The Army Lawyer	0 3 6 4 1 2 8 7	29 September 1986
3. FREQUENCY OF ISSUE	3A. NO. OF ISSUES PUBLISHED ANNUALLY	3B. ANNUAL SUBSCRIPTION PRICE
Monthly	Twelve	$24.00 domestic $30.00 foreign

4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION *(Street, City, County, State and ZIP+4 Code) (Not printers)*

The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781

5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OF GENERAL BUSINESS OFFICES OF THE PUBLISHER *(Not printer)*

Headquarters, Department of the Army, Washington, DC 20310

6. FULL NAMES AND COMPLETE MAILING ADDRESS OF PUBLISHER, EDITOR, AND MANAGING EDITOR *(This item MUST NOT be blank)*

PUBLISHER *(Name and Complete Mailing Address)*

Colonel Paul J. Rice, Commandant, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781

EDITOR *(Name and Complete Mailing Address)*

Captain David R. Getz, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781

MANAGING EDITOR *(Name and Complete Mailing Address)*

Captain David R. Getz, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901-1781

7. OWNER *(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)*

FULL NAME	COMPLETE MAILING ADDRESS
Headquarters, Department of the Army	Washington, DC 20310

8. KNOWN BONDHOLDERS, MORTGAGEES, AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES *(If there are none, so state)*

FULL NAME	COMPLETE MAILING ADDRESS
None	

9. FOR COMPLETION BY NONPROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES *(Section 423.12 DMM only)*
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes *(Check one)*

☐ (1) HAS NOT CHANGED DURING PRECEDING 12 MONTHS

☐ (2) HAS CHANGED DURING PRECEDING 12 MONTHS

(If changed, publisher must submit explanation of change with this statement.)

10. EXTENT AND NATURE OF CIRCULATION *(See instructions on reverse side)*	AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS	ACTUAL NO. COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE
A. TOTAL NO. COPIES *(Net Press Run)*	7621	7659
B. PAID AND/OR REQUESTED CIRCULATION 1. Sales through dealers and carriers, street vendors and counter sales	0	0
2. Mail Subscription *(Paid and/or requested)*	200	200
C. TOTAL PAID AND/OR REQUESTED CIRCULATION *(Sum of 10B1 and 10B2)*	200	200
D. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES	7338	7376
E. TOTAL DISTRIBUTION *(Sum of C and D)*	7538	7576
F. COPIES NOT DISTRIBUTED 1. Office use, left over, unaccounted, spoiled after printing	83	83
2. Return from News Agents	0	0
G. TOTAL *(Sum of E, F1 and 2—should equal net press run shown in A)*	7621	7659

11. I certify that the statements made by me above are correct and complete

SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER

David R. Getz, CPT, JAGC, Editor

PS Form 3526, July 1984 *(See instruction on reverse)*

*U.S. GOVERNMENT PRINTING OFFICE: 1986-181-029:60030

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

Official Business
Penalty for Private Use $300

SECOND CLASS MAIL
POSTAGE AND FEES PAID
DEPARTMENT OF THE ARMY
ISSN 0364-1287