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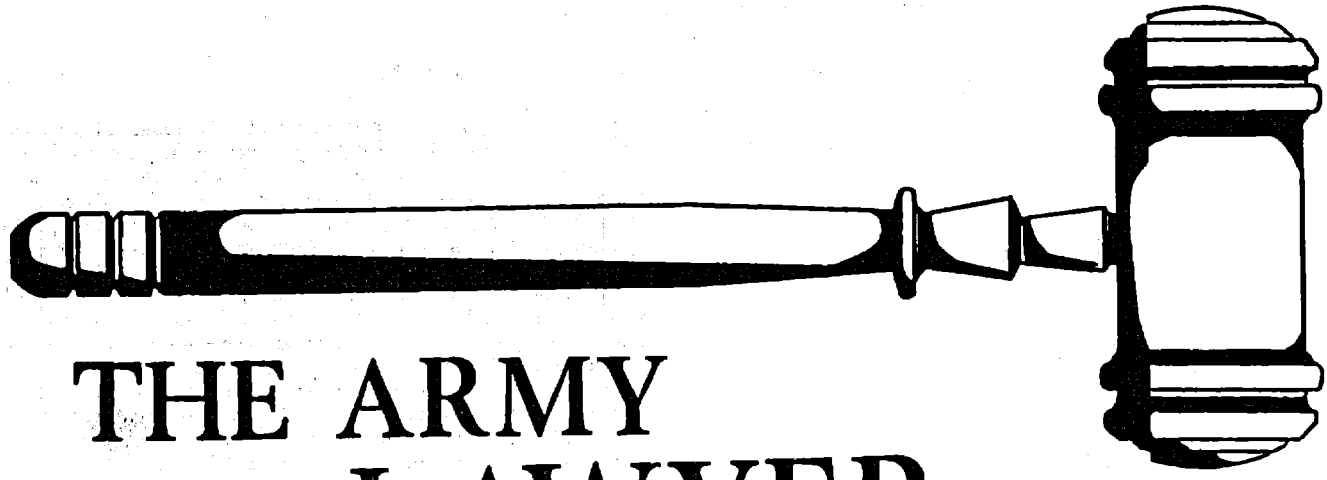

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Distribution. Special.

Special Interest Items for Article 6 Inspections

The following checklist, dated 24 October 1986, has been distributed by The Judge Advocate General to all command and staff judge advocates and will be used by general officers when conducting UCMJ art. 6 inspections. This checklist supersedes the one that appeared in The Army Lawyer, *Feb. 1986, at 5. Comments about the checklist are welcome and should be forwarded to the Executive, Office of The Judge Advocate General, Washington, D.C. 20310–2200.*

1. GENERAL AREAS FOR INQUIRY.

a. Office appearance and morale. Adequacy of facilities.

b. Relations with commander(s) and staff and legal counterparts (if any), higher headquarters (incl OTJAG) and subordinate commands.

c. SJA objectives for coming 12 months.

d. Personnel status (officer, civilian, enlisted): authorizations filled? Critical losses identified to PT or other appropriate office?

e. Relations with the media. Do judge advocates and other personnel understand the rules?

f. Positive and negative trends in functional areas.

g. Is the office engaged in any non-JAG missions?

h. Is there a program designed to brief those leaving service as to their post-employment restrictions?

i. Does the office have a plan for professional development of all personnel? Is budget consideration given for personnel to attend career enhancing conferences or training?

j. Status of relations with local officials, including the local bar?

k. Condition of library and library holdings?

l. Is the office doing something new and innovative in support of the Family Action Plan?

m. Does the office have a current, functional SOP?

n. Does the office have a plan for premobilization legal counseling?

o. What provision has the office made for mobilization and deployment plans pertaining to Military Law Centers and JA sections?

p. Does the SJA office or the command have a Defense Technical Information Center account?

q. Enlisted Considerations.

(1) Who manages local assignments—AG or SJA?

(2) Are there shortages? If so, why?

(3) Is there a SQT training program for legal specialists?

r. What are office policies for sponsoring and developing summer interns?

2. INTRODUCTORY PROGRAM FOR NEWLY ASSIGNED JA'S.

a. Does SJA office have one?

b. Do new JA's spend time with troop units?

3. PHYSICAL FITNESS AND WEIGHT CONTROL.

a. Does SJA office have a regular PT program?

b. Have personnel over 40 been medically screened?

c. When was last PT test? Did all personnel participate?

d. Are overweight personnel in a medically supervised weight control program?

e. Are personnel professional in appearance? Uniform? Grooming?

f. See also, item 7, DA MANDATED TRAINING.

4. LEGAL ASSISTANCE.

a. Is there a viable, aggressive preventive law program?

b. Are offices attractive and professional? Sufficient privacy?

c. Are experienced officers assigned. Are any members of local bar?

d. How does the SJA determine client satisfaction?

e. Are legal services publicized?

f. Are soldiers getting legal assistance for OER/EER appeals? Is there any significant manpower impact from this requirement?

g. How does the office handle circumstances in which both spouses seek representation in domestic relations matters?

h. Army Tax Assistance Program. What is the SJA doing to improve tax assistance for soldiers?

i. What is the waiting time for an appointment? For a will, separation agreement, or power of attorney?

j. Is there an in-court representation program? Pro se assistance?

k. How has the office been innovative?

5. CLAIMS.

a. Are experienced officers supervising claims office? How long have they been assigned that duty?

b. Is the claims office monitoring potential tort claims?

c. Are judge advocates or claims attorneys investigating tort claims over $15,000? Is USARCS provided immediate notification of these claims? Is there continuing coordination with USARCS on these claims?

d. What is the relationship with MEDDAC? Involved in risk management program? Is there a MOU with MEDDAC?

e. How much was recovered in medical care recovery claims last FY? Is a judge advocate actively managing the recovery program?

f. Are small claims procedures being used?

g. What is average processing time for payment of claims?

h. How much was collected in carrier recoveries last FY? What is current trend?

i. Is the office monitoring obligations against Claims Expenditure Allowance (CEA)?

j. Does the office have a current Claims Manual?

k. Does claims office staffing indicate requisite support of claims mission?

l. Are claims personnel sufficiently trained? Which, if any, have attended USARCS-sponsored workshops?

m. Is office properly equipped, receiving sufficient administrative support, and presenting a professional appearance?

n. How does SJA determine client satisfaction?

o. Is USARCS promptly notified of changes in address or telephone number?

6. LABOR COUNSELOR PROGRAM. (Policy Letter 85–3)

a. Does SJA office have a designated Labor Counselor?

b. Has the Labor Counselor had sufficient training?

c. Are library assets adequate?

d. Is the labor counselor position either civilianized or occupied by an experienced judge advocate?

e. How long do judge advocates remain in the position of labor counselor prior to being rotated to other positions within the SJA Office?

f. Do the labor counselor and the SJA have a close working relationship with the Civilian Personnel Officer? With the Equal Employment Opportunity Officer?

7. DA MANDATED TRAINING.

a. Do OSJA personnel participate in required training such as physical training, weapons qualification, and NBC training?

b. Are military judges and TDS personnel invited to participate with OSJA?

8. TERRORIST THREAT TRAINING. (Policy Letter 85–5)

a. Are personnel properly trained in legal aspects of countering terrorist threats?

b. As a minimum, do all personnel have a working knowledge of AR 190–52, TC 19–16, and the MOU between DOD, DOJ, and FBI on use of Federal military force in domestic terrorist incidents?

9. RESERVE JUDGE ADVOCATE TRAINING.

a. Does the office train JAGSO units? If so, what training schedule do they use?

b. Are IMA's assigned to the office? Are there vacancies? What management plan is used to schedule ADT, keep the IMA's informed of office developments, and assist them in getting required retirement points?

c. What kind of working relationship does the SJA have with the appropriate Army SJA in his area?

d. Does the office participate in On-Site Reserve instruction?

10. RECRUITING FOR THE RESERVE COMPONENTS. (Policy Letter 86–5)

a. Does the SJA have a program to identify quality legal specialists and court reporters for service with the Reserve Components?

b. Is information about these soldiers being forwarded to the OTJAG Senior Staff NCO?

c. Does the SJA encourage quality judge advocates and legal enlisted soldiers to join a Reserve Component? Is TJAGSA Guard and Reserve Affairs Division notified when a quality judge advocate expresses an interest in joining a Reserve Component?

11. AUTOMATION. (Policy Letter 85–4)

a. Who is the automation manager?

b. What are the automation needs?

c. What is the plan to satisfy these needs?

d. What is the current status?

12. STANDARDS OF CONDUCT. (AR 600–50)

a. Does the SJA office have a designated Ethics Counselor?

b. Is there an active discussion with GO and SES personnel concerning their SF 278?

c. Are the 278's reviewed with each GO at the time they are first assigned to the command or assume a new duty position in the command?

d. Is there an active standards of conduct training program?

e. Are the SJA and Ethics Counselor familiar with the filing requirements for 278's and 1555's.

f. Does the SJA have a firm grasp on the proper approach to take if local senior personnel (including the CG) are alleged to have committed violations of the standards of conduct?

13. INTELLIGENCE OVERSIGHT.

a. Is the SJA aware of the mission, organization, and function of intelligence units within his jurisdiction?

b. Does the office maintain a library of current intelligence directives and regulations?

c. Have intelligence oversight attorneys received INSCOM-sponsored training on intelligence law topics and oversight responsibilities? Do they have the necessary security clearances?

14. MILITARY JUSTICE.

a. Are appropriate confinement and finance and accounting offices being notified by electronic message within 24 hours of convening authority action IAW paragraph 12–3, AR 27–10?

b. Has an active witness/victim assistance program been developed and implemented? If implemented, what is SJA's impression of program effectiveness?

c. Is the jurisdiction experiencing any problems with requests for civilian and overseas witnesses?

d. Are rates for Article 15's and courts-martial, and courts-martial processing times comparable to area command and Army-wide rates?

e. Does a mutual support agreement exist between the SJA and TDS, in which responsibility for Priority III duties is clearly defined? Is it working?

f. How are relations between OSJA, TDS, and Trial Judges?

g. What efforts are being made to ensure that JA personnel are involved in the criminal justice process at early stages?

h. Do commanders at all levels receive adequate instruction regarding military justice duties, especially avoidance of unlawful command influence?

i. Do court facilities (courtroom, deliberation room, witness waiting rooms and judge's chamber) meet professional standards?

15. TRIAL COUNSEL ASSISTANCE PROGRAM.

a. Are trial counsel using the services of the Trial Counsel Assistance Program?

b. Are the chief of military justice and all trial counsel attending TCAP seminars?

c. Are trial counsel satisfied with the assistance rendered by the Trial Counsel Assistance Program?

16. LITIGATION.

a. Does the office have a program in the area of Contract Fraud?

b. What is being done to foster close relationships with U.S. attorneys?

c. Is the office having any problems with the U.S. Attorney's office?

d. What kind of relationship does the office have with the Magistrate's Court?

e. What support is given the local hospital activity in litigation matters, medical malpractice questions, and quality assurance/risk management issues?

f. Any jurisdictional problems on post?

g. What type of contact has the office had with local authorities concerning child abuse and spouse abuse cases?

h. Is the office sensitive to the requirement for detailed, complete investigative reports in all cases in litigation (IAW AR 27–40)?

i. Does the office promote active participation of local counsel in the prosecution and resolution of cases in litigation.

j. Does the SJA office take an active role in the disposition of administrative complaints in areas such as Civilian Personnel and Equal Employment Opportunity law.

17. CONTRACT LAW.

a. To what extent is nature of legal work in SJA office shifting from military justice to civil law areas such as acquisitions, environmental, litigation, etc?

b. What activities at the installation are facing commercial activities review? (Contracting out a major activity such as DEH may require the usual contracts lawyer to work full time on the CA project for an extended period.)

(1) Is the SJA comfortable that adequate legal support is available?

(2) Is the SJA prepared to discuss contract types with his commander?

c. Has the SJA visited the contracting office? Is at least one lawyer designated and trained to provide installation contracting support? Does the contracting officer know who his lawyer is? Does the contracting officer view "his" lawyer as part of the contracting team or merely another obstacle to be overcome?

d. Is the installation anticipating any significant procurement of ADP equipment within the coming year?

e. How is the Acquisition Law Specialty program viewed by the SJA and other JA's? What interest is expressed in the specialty? The LL.M. Program?

f. Is the SJA involved in acquisition issues?

g. How closely does the SJA monitor acquisition law advice?

h. Has the acquisition portion of the mobilization plan been reviewed?

i. What acquisition law advice is planned for predeployment and deployment?

j. What training by members of the SJA office has been given (is planned) for members of the command concerning irregular acquisitions and fiscal law matters?

k. How many contracts, and what percentage of annual contract dollars, were awarded during the last quarter of the fiscal year? Could any have been awarded earlier with advance planning?

l. How many contracts were awarded during the past quarter and past fiscal year other than by full and open competition? What percentage of total contracts awarded and total contract dollars were involved in these awards?

m. How many bid protests were filed during the past quarter and past fiscal year? How many were sustained? What issues were involved and what remedial measures were taken? To what extent was the SJA consulted and involved?

n. How many contract claims were filed during the past quarter and past fiscal year? What issues were involved and what, if any, remedial measures were taken? To what extent was the SJA consulted and involved?

o. How many contracting officers' final decisions were issued during the past quarter and past fiscal year? What issues were involved? How many were appealed to the ASBCA or Claims Court? To what extent was the SJA consulted and involved?

p. What is the general attitude of the command group and staff concerning acquisition law issues? What actions has the SJA taken to foster sensitivity to acquisition law issues?

18. ENVIRONMENTAL LAW.

a. Has the SJA appointed an Environmental Law Specialist? Are there any on-going violations of federal or state environmental laws?

b. How is the SJA associated with environmental personnel to make sure legal consideration is given to all environmental related projects?

19. TRIAL DEFENSE SERVICE.

a. Is SJA support adequate?

b. Is an effort being made to enhance professional development?

20. MILITARY JUDGES.

a. Is SJA support adequate?

b. Is an effort being made to enhance professional development?

21. INTERNATIONAL AND OPERATIONAL LAW.

a. Is the OSJA involved in review of war plans, highlighting law of war issues?

(1) Have attorney(s) within the office received training in this area and have they been designated or specialized to handle operational law problems?

(2) Do designated officers have the proper security clearances to review the necessary plans and documents?

b. Is there a program to support TRADOC and MACOM requirements for training regarding Geneva and Hague Conventions?

(1) Does the SJA take a personal interest in such program?

(2) Do attorneys participate in or review training?

(3) When an attorney is designated as an instructor at a TRADOC post, are there adequate hours provided for LOW training and current POI's prepared?

(4) What form has law of war training taken? (Classroom, field exercises, CPX, etc.)

(5) Are unit personnel trained to the DOD/Army standard, i.e., commensurate with their duties and responsibilities?

(6) Is there a viable, aggressive law of war training/preventive law program?

22. OVERSEAS SJA OFFICES.

a. Is there an attorney within the office designated to handle SOFA matters?

b. Are the SJA and designated specialist familiar with the SOFA supplementary agreement and the provisions of AR 27-50?

c. Is there a certified trial observer in the office?

d. Are trial observer reports adequate and are there any problems in regard to rights guaranteed to US soldiers, dependents and civilians?

e. Are there good working relations with the local national prosecutors and policy officials?

f. Is the legal assistance officer familiar with special problems facing the soldier overseas? Is there a local national attorney on the staff or available for consultations?

g. Is the claims officer familiar with handling foreign claims?

23. ETHICS.

a. Has an active training/review program been established to sensitize judge advocates, civilian counsel and support personnel to their ethical responsibilities?

b. What major issues/problems in the ethical conduct of SJA personnel have arisen in the past year? How were they

resolved? Have the lessons learned been communicated to TJAGSA personnel responsible for instruction in this area?

c. Does every attorney have a personal copy of the current ABA Model Code of Professional Responsibility and Judicial Conduct?

24. FELONY PROSECUTION PROGRAM.

a. Is the SJA aware of the program, and what are his/her plans to participate in the program?

b. If the program has been implemented, how is it progressing, and what tangible results have been achieved? What problems have been encountered; how have they been resolved; and have those problems, solutions, and results been communicated to DAJA–LTG, the OTJAG staff activity responsible for oversight of the program?

25. REGULATORY LAW.

Are procedures in effect for learning of and reporting to JALS–RL of utility rate increases and other proposals affecting local Army activities?

26. TRANSITION TO WAR.

a. Do contingency plans exist in the SJA office for a partial or complete (Division) (Corps) move out?

b. Do SJA personnel have assigned roles for partial or complete move-outs?

c. Do SJA personnel know what items of personal equipment they must have available for contingency plan execution?

d. Are contingency plans flexible?

e. Are SJA contingency plans coordinated with the Headquarters and the HHC?

A Procedural and Substantive Guide to Civilian Employee Discipline*

Major Gerard A. St. Amand
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Introduction

Management's goal in connection with civilian employee misconduct is to take proper and effective disciplinary action, and to have that action sustained if the employee challenges it. The ability to take effective disciplinary action is critical to maintaining a well-disciplined work force. To help management attain this goal, we, as attorneys and advisors to management, must understand what disciplinary tools are available, what procedures must be followed to impose the various types of disciplinary actions, and what circumstances permit us to legally impose discipline. This article will examine the various types of disciplinary actions that federal supervisors can use, and the procedural and substantive requirements for imposing discipline.

Because most of this area is covered in detail in sections of Title 5, United States Code, and implementing regulations of the Office of Personnel Management (OPM) and the Department of the Army, this article will concentrate on these statutory and regulatory provisions and the cases interpreting them. This article will also examine some of the procedural and substantive constitutional issues that affect civilian employee discipline

Types of Disciplinary Action

General

Disciplinary tools available to federal managers range from counseling to removal. The Army's regulation on civilian employee discipline, Army Regulation 690–700, chapter 751,[1] establishes two categories of disciplinary actions. The first category, informal disciplinary actions, includes oral admonishments and written warnings.[2] The second category, formal disciplinary actions, includes letters of reprimand, suspensions, reductions in grade or pay, and removals.[3] Informal action is encouraged as a first step in constructive discipline. Formal disciplinary action may be imposed for a first infraction, however, if appropriate.[4]

Informal Disciplinary Actions

Oral admonishments, oral counselings, and warning letters are usually actions taken by the first or second line supervisor. Even though some of these informal actions are oral, it is important to make an official written record of any such disciplinary action. A written record will make it easier to prove that management took these informal actions, and thus help to justify later more serious disciplinary action if the employee commits additional misconduct. Documenting informal disciplinary action is particularly important in the military services because many supervisors are in the military and move often. Without a written record of the minor disciplinary infractions in this transient environment, a problem employee may continue to be a problem employee, and more serious adverse action which is warranted may never be pursued. Informal

*This article was written while the author was the senior instructor in the Administrative and Civil Law Division at TJAGSA.

[1] Dep't of Army, Reg. No. 690–700.751, Personnel Relations and Services, Discipline (15 Nov. 1981) (I05, 8 July 1985) [hereinafter AR 690–700.751 (I05 1985)].

[2] AR 690–700.751, para. 1–3*b*.

[3] AR 690–700.751, para. 1–3*c* (I05 1985).

[4] AR 690–700.751, para. 1–3*b* (I05 1985).

disciplinary action should be documented on the Standard Form 7B (Employee Record Card).[5]

Formal Disciplinary Actions

Formal disciplinary actions are initiated by the supervisor, but they must be coordinated with the servicing civilian personnel office (CPO) and the labor counselor.[6]

Written reprimands. The written reprimand is the least severe of the formal disciplinary actions. It is a letter that may be imposed by the immediate supervisor and placed in the employee's official personnel file (OPF) for a period of one to three years.[7] The supervisor who imposes the written reprimand decides how long the letter will remain in the employee's OPF within this broad time constraint.[8]

Suspensions. Suspensions are divided into two categories based on their length: suspensions for fourteen days or less, and suspensions for more than fourteen days.[9] Suspensions, regardless of their length, result in the employee not reporting to work and not being paid for the period of suspension. The procedural requirements to suspend an employee differ depending on the length of the suspension.[10] Because the length of the suspension is measured in calendar days, a fourteen-day suspension amounts to a ten-workday suspension for employees working a normal tour of duty, Monday through Friday.

While there is no specific limit on the length of a suspension, a suspension cannot be indefinite. The suspension must have a definite ending time, or there must be a specific condition subsequent that will end the suspension.[11] For example, the Merit Systems Protection Board (MSPB) and the courts have recognized the propriety of an "indefinite" suspension pending disposition of criminal charges.[12] While termed indefinite, such a suspension is not truly indefinite because a specified condition subsequent—disposition of the criminal charges—will end it. Indefinite suspensions pending disposition of criminal charges are discussed more fully later in this article.

Reductions in grade or pay. While reduction in grade or pay are more frequently used in connection with performance problems, they may be appropriate for some misconduct problems. Most frequently, this type action is used for disciplinary purposes to reduce someone from a supervisory to a nonsupervisory position because the employee's misconduct adversely impacts on the special trust and confidence required of management personnel.

Removals. The most serious disciplinary action is removal—firing the employee.

Procedural Requirements for Imposing Formal Disciplinary Actions

The procedures required to impose formal disciplinary action vary depending on the type of action. As expected, the more serious the action, the more extensive the procedural requirements to protect the employee being disciplined.

Written Reprimand

A written reprimand, the least severe of the formal disciplinary actions, is the easiest to impose. If a supervisor, after obtaining all reasonably available relevant information, decides that a letter of reprimand is warranted, he or she may issue the letter. Prior coordination with the CPO and labor counselor is required, however.[13] In the process of gathering all the relevant information, the supervisor may, but does not have to, interview the employee involved.[14] Supervisors deciding to interview the employee should be aware that although the employee generally has no right to counsel at such an interview, if the employee is part of a collective bargaining unit represented by a union, the employee may be entitled to union representation at the interview.[15] Consult AR 690–700, chapter 751, paragraph 3–2 for more detailed guidance, to include guidance on the content of a letter of reprimand.

Suspensions for Fourteen Days or Less

The next more serious adverse action is the suspension for fourteen days or less. There are significant statutory procedural requirements for this type of adverse action.[16] These statutory requirements apply only to suspensions imposed against nonprobationary, competitive service employees.[17] Excepted service employees, even those who are preference eligibles, may be summarily suspended for fourteen days or less.[18]

Nonprobationary, competitive service employees are entitled to the following procedural protections in connection with a suspension for fourteen days or less: advance written notice specifying the reasons for the proposed action; the

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[5] *Id.* The SF 7B is outdated for many personnel purposes but may still be used to record informal disciplinary action. Some commands have fashioned local forms for this purpose. Labor counselors should consult their civilian personnel office regarding local practice.

[6] AR 690–700.751, para. 1–3c (I05 1985).

[7] AR 690–700.751, para. 3–2*a* (I05 1985).

[8] *Id.*

[9] 5 U.S.C. § 7502, 7512 (1982).

[10] 5 C.F.R. § 752.201(c) (1986).

[11] 5 U.S.C. § 7501(2) (1982); Martin v. Department of Treasury, 12 M.S.P.R. 12 (1982).

[12] *Martin*; Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976).

[13] AR 690–700.751, para. 3–2 (I05 1985).

[14] *Id.*

[15] *See* 5 U.S.C. § 7114(a)(2)(B) (1982).

[16] 5 U.S.C. § 7503 (1982).

[17] *Id.* OPM regulations provide for a one-year probationary period. 5 C.F.R. §§ 315.801–909 (1986).

[18] *See* Bredehorst v. United States, 677 F.2d 87, 89–90 (Ct. Cl. 1982). The excepted service consists of those civil service positions that are not in the competitive service or the Senior Executive Service. 5 U.S.C. § 2103 (1982).

right to review all the material and information relied upon by management in support of the proposed action; the right to reply, orally and in writing, to the charges; the right to representation during this process; and the right to a final writing decision, specifying the reasons for the action, prior to the effective date of the action.[19]

The right to review all the information relied upon by management in proposing this action does not include the right to have the agency make its officials available for questioning by the employee.[20] Such a right exists only during the appeals process before the MSPB for actions appealable to the board.[21]

True Adverse Actions

Suspensions for more than fourteen days, reductions in grade or pay, and removals are the most serious disciplinary actions and are often referred to as true adverse actions. The procedures leading to the imposition of true adverse actions are very similar to those required for suspensions for fourteen days or less. The differences lie primarily in the types of employees who receive the procedural protections and in the amount of time given to the employee to exercise his or her rights.

Nonprobationary, competitive service employees and preference eligible, excepted service employees who have completed a one-year period equivalent to the probationary period receive the procedural protections in connection with the true adverse actions.[22] Although these protections apply to a larger group of employees than are covered for suspensions of fourteen days or less, management still has summary disciplinary authority over nonpreference eligible, excepted service employees and probationary employees.[23]

The only other significant difference in the procedures leading to the imposition of a true adverse action compared to a suspension for fourteen days or less is in the amount of time given for advance notice and opportunity to reply to the proposed action. More time is given in connection with a true adverse action. This additional time requirement has caused concerns over the timing of the advance notice and the duty status of the employee during the notice period. Usually the employee must be given thirty days advance written notice prior to imposition of a true adverse action.[24] If the agency has reasonable cause to believe that a crime has been committed for which imprisonment may be imposed, however, the notice period may be reduced to seven days.[25] Regardless of the length of the notice period, the employee is normally in a full duty status during the notice period.[26] If necessary, however, an employee can be placed in a paid, nonduty status during the notice period.[27]

The statutory provision governing procedures for true adverse actions also provides for an optional predecisional hearing in connection with a true adverse action.[28] The Army does not provide a predecisional hearing, however.

Proper Role of Proposing and Deciding Officials

While most of the procedural requirements are fairly specific and very few disputes have arisen over their meaning, the precise role of the proposing and deciding officials in the discipline process has generated an extensive amount of litigation. Understanding the proper role of these officials is critical to assuring that the predecisional procedural requirements are successfully met.

Normally, within the Department of the Army, when a suspension or more serious adverse action is initiated, the immediate supervisor proposes the adverse action. In such a case the immediate supervisor is the proposing official. After the employee's reply, the final decision is normally made by the next level supervisor in the employee's chain of supervision. This higher level supervisor is the deciding official. While this two-tiered system seems to be the normal way of imposing serious disciplinary actions, there is no prohibition in statute or regulation against the proposing and deciding officials being the same person.[29]

While the proposing official is not automatically disqualified from also being the deciding official, there are some limitations on who can be the deciding official in an employee discipline case. Generally, "[i]t is violative of due process to allow an individual's basic rights to be determined either by a biased decision-maker or by a decision-maker in a situation structured in a manner such that 'risk of unfairness is untolerably high.' "[30] This does not, however, prohibit a person from serving as deciding official merely because he or she is already familiar with the facts, or that he or she has expressed a predisposition contrary to the employee's interest.[31] The key seems to be the risk that the decision will be based on something other than the facts.

Aside from concern over who can properly serve as deciding official, another serious issue concerns ex parte communications between the deciding official and others. Such ex parte communications are not per se improper. The Court of Appeals for the Federal Circuit has found that

[19] 5 U.S.C. § 7503 (1982).

[20] *See* Depte v. United States, 715 F.2d 1481, 1484 (Fed. Cir. 1983); Hazlitt v. Department of Justice, No. 85–606 (Fed. Cir. Apr. 25, 1985).

[21] *See* 5 C.F.R. §§ 1201.71–.75 (1986) governing discovery in MSPB proceedings.

[22] 5 U.S.C. §§ 7511–7514 (1982). Preference eligible employees are generally employees with some type of prior military service or some special relationship to someone having prior military service. *See* 5 U.S.C. § 2108(3) (1982).

[23] 5 U.S.C. §§ 7511–7514 (1982).

[24] 5 U.S.C. § 7513(b)(1) (1982).

[25] 5 C.F.R. § 752.404 (d)(1) (1986).

[26] 5 C.F.R. § 752.404(b)(3) (1986).

[27] *Id.*

[28] 5 U.S.C. § 7513(c) (1982).

[29] DeSarno v. Department of Commerce, 761 F.2d 657, 660 (Fed. Cir. 1985).

[30] Svejda v. Department of Interior, 7 M.S.P.R. 108, 111 (1981) (quoting Withrow v. Larkin, 421 U.S. 35, 58 (1975)).

[31] *Id.*

ex parte communication with the deciding official by an adversary bent on reprisal constitutes a violation of due process.[32] In the absence of contacts motivated by personal animus, however, courts have found nothing wrong with ex parte communications between proposing and deciding officials;[33] between deciding officials and advisors (*e.g.*, agency attorney, personnel specialist);[34] with witnesses (deciding official acting as investigator);[35] or with superiors.[36] Of course, if these contacts develop new information or allegations upon which the adverse action will be based, it may be harmful procedural error if the employee is not advised of the new information and provided an opportunity to reply to it.[37]

Summary

The procedures just discussed are set forth in federal statute and implementing regulations. Agency counsel must be aware, however, that when dealing with an employee in a collective bargaining unit, the collective bargaining agreement must also be examined for additional procedural requirements that may have been negotiated by the agency and the union.

While we should always strive to follow all required procedures, whether required by statute, regulation, or collective bargaining agreement, failure to do so does not necessarily require that the adverse action be overturned. Only harmful errors require reversal of an adverse action.[38] The burden is on the employee to prove, in the appropriate forum, that had the error not occurred, the agency might not have imposed the adverse action as it did.[39]

Appeal and Grievance Rights

While the procedures leading to the imposition of disciplinary action vary somewhat depending on the type of disciplinary action involved, of greater significance are the employee rights to challenge a disciplinary action through a grievance or appeal. An employee's right to grieve or appeal a disciplinary action depend primarily on three factors: whether the employee is covered by a collective bargaining agreement; the type of disciplinary action imposed; and the employee's individual status.

Without a Collective Bargaining Agreement

True adverse actions. If the employee is not covered by a collective bargaining agreement between management and a labor organization, he or she can appeal a true adverse action to the MSPB.[40] The employee receives a full administrative hearing before a presiding official of the MSPB at which the agency has the burden of proving the propriety of the disciplinary action.[41]

Other disciplinary actions. For other disciplinary actions, the Army employee has only a right to grieve the action under the Army grievance procedure.[42] Under this grievance procedure there is no entitlement to a hearing and there is no administrative review outside the Department of the Army. The final decision on the grievance is made within Army channels.[43]

Because of the significant difference between a fourteen day and a fifteen day suspension in terms of appeals rights, courts frown on attempts to limit the employee's appeal rights by splitting suspensions of more than fourteen days into two or more lesser suspensions. Such splitting of punishment for the same offense will not defeat the employee's appeal rights.[44]

With a Collective Bargaining Agreement

If the employee is covered by a collective bargaining agreement between management and a labor organization, his or her appeal and grievance rights change. Every collective bargaining agreement between management and the exclusive representative of a group of employees must contain a grievance procedure that provides, as a possible last step, for binding arbitration of disputes that cannot be resolved under the grievance procedure.[45] Arbitration under this process provides the employee and the union a full administrative hearing before an independent private arbitrator outside the agency.

True adverse actions. If an employee is covered by a collective bargaining agreement, he or she can appeal true adverse action to the MSPB or grieve the action under the negotiated grievance procedure. The employee must make an election; he or she cannot use both procedures.[46] The arbitrator must apply the same substantive rules that the MSPB would apply.[47]

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[32] Sullivan v. Department of Navy, 720 F.2d 1266 (Fed. Cir. 1983).

[33] *See DeSarno*, 761 F.2d at 659–61 where the court upheld the same person being both proposing and deciding official.

[34] *See* Lizut v. Department of Army, 30 M.S.P.R. 119, 127 (1986); *but see* Camero v. United States, 375 F.2d 777, 778–79 (Ct. Cl. 1967).

[35] Depte v. United States, 715 F.2d 1481, 1484 (Fed. Cir. 1983).

[36] Gonzales v. Defense Logistics Agency, 772 F.2d 887 (Fed. Cir. 1985).

[37] *See* 5 U.S.C. § 7513(b) (1982); *Lizut*, 30 M.S.P.R. at 127; Forrester v. Dep't of Health and Human Services, 27 M.S.P.R. 450, 455 (1985).

[38] 5 U.S.C. § 7701(c)(2)(A) (1982).

[39] 5 C.F.R. § 1201.56(c)(3) (1986).

[40] 5 U.S.C. § 7513(d) (1982).

[41] 5 U.S.C. §§ 7701(a), (c) (1982); 5 C.F.R. § 1201.56(a) (1986).

[42] Dep't of Army, Reg. No. 690–700.771, Department of the Army Grievance System, para. 1–7 (15 Sept. 1982) [hereinafter AR 690–700.771].

[43] AR 690–700.771, subchapter 5.

[44] Lyles v. United States Postal Service, 709 F.2d 358, 359 (5th Cir. 1983).

[45] 5 U.S.C. § 7121(b) (1982).

[46] 5 U.S.C. § 7121(e)(1) (1982).

[47] Cornelius v. Nutt, 105 S. Ct. 2882, 2888–89 (1985).

It is important to realize that an employee who elects to grieve under the negotiated grievance procedure instead of appealing to the MSPB risks not having the matter heard outside the agency. Under the negotiated grievance procedure, an employee may file a grievance that will be considered at various steps by agency officials. The employee cannot invoke arbitration, however. Only the union can do that. If the union elects not to invoke arbitration, the employee's grievance and appeal rights end.[48]

Other disciplinary actions. If there is a collective bargaining agreement, lesser disciplinary actions may also be grievable and arbitrable under the negotiated grievance procedure.[49] This is a significant benefit to the employee because without a collective bargaining agreement, the employee cannot challenge these types of disciplinary actions outside the agency.

Employee Status

In addition to the type of disciplinary action at issue and the existence or absence of a collective bargaining agreement, the status of an employee is also a factor that can determine what, if any, appeal rights an employee has in connection with a disciplinary action.

Generally, a probationary employee cannot appeal a disciplinary action to the MSPB.[50] In addition, a probationary employee normally cannot arbitrate a disciplinary action.[51]

Excepted service employees who are not preference eligibles also cannot appeal a disciplinary action to the MSPB.[52] There is no case law concerning the right of nonpreference eligible, excepted service employees to arbitrate a disciplinary action.

Procedural Rights for Probationary and Excepted Service Employees in Disciplinary Actions

While the above discussion notes that probationary and excepted service employees generally enjoy very few rights in connection with disciplinary actions, they do enjoy some rights.

Probationary Employee Rights

Both the predecisional and the appeal and grievance rights that probationary employees enjoy depend in part on the basis for the disciplinary action.

Predecisional rights. If the probationary employee is fired because of alleged unsatisfactory conduct or performance during the probationary period, the agency need only give the employee written notice stating the reasons for and the effective date of the separation.[53] If the probationary employee is fired, in whole or in part, because of conditions arising before appointment, however, the agency must provide the employee advance written notice, an opportunity to respond in writing, and a final written decision.[54]

Postdecisional rights. When the agency purports to fire a probationary employee for preemployment matters or for unsatisfactory conduct or performance during the probationary period, the probationary employees can appeal the firing to the MSPB if the firing is allegedly based on partisan political reasons or marital status.[55] These two extremely narrow grounds have been interpreted very strictly by the MSPB and the courts.

Partisan political reasons have been found to relate solely to recognized political parties, candidates for office, and political campaign activities.[56] Firing an employee because of his or her affiliation with a labor organization does not constitute firing based on partisan political reasons.[57]

Marital status relates to a person being married or single, and discrimination on the basis of marital status is not the same as sexual discrimination.[58] Employees have been unsuccessful in attempts to obtain an expansive interpretation of "marital status" discrimination. For example, alleged discrimination on the basis of pregnancy was found to be sex discrimination, not marital status discrimination.[59] Further, alleged discrimination on the basis of marriage to a person of another race was found to be racial discrimination, not marital status discrimination.[60]

Probationary employees fired for preemployment matters have an additional basis for appeal to the MSPB. They may appeal if the limited procedures required by 5 C.F.R. § 315.805 have allegedly not been followed.[61] In such an appeal, however, there is no substantive review of the propriety of the employee's firing, only a review of the procedural requirements.[62]

If a probationary employee appeals to the MSPB based on a nonfrivolous allegation of partisan political or marital status discrimination, or that proper procedures were not followed for a firing allegedly based on preemployment matters, then the employee may also raise additional allegations of discrimination based on sex, race, religion, color,

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[48] *See* Billops v. Department of the Air Force, 725 F.2d 1160 (8th Cir. 1984) for discussion of employee's dilemma.

[49] 5 U.S.C. § 7121 (1982).

[50] Stern v. Department of Army, 699 F.2d 1312 (Fed. Cir. 1983).

[51] Immigration and Naturalization Serv. v. Federal Labor Relations Auth., 709 F.2d 724 (D.C. Cir. 1983).

[52] Ralston v. Department of Army, 718 F.2d 390 (Fed. Cir. 1983).

[53] 5 C.F.R. § 315.804 (1986).

[54] 5 C.F.R. § 315.805 (1986).

[55] 5 C.F.R. § 315.806(b) (1986).

[56] Mastriano v. Federal Aviation Admin., 714 F.2d 1153 (Fed. Cir. 1983).

[57] *Id.*

[58] *See* Stokes v. Federal Aviation Admin., 761 F.2d 682, 685 (Fed. Cir. 1985).

[59] Ott v. Department of Navy, 2 M.S.P.R. 587 (1980).

[60] Shoh v. General Services Admin., 7 M.S.P.R. 626 (1981).

[61] 5 C.F.R. § 315.806(c) (1986).

[62] Hibbard v. Department of Interior, 6 M.S.P.R. 181 (1981).

national origin, age, or handicapping condition.[63] Allegations of discrimination based on race, religion, color, sex, national origin, age, or handicapping condition do not, standing alone, give a probationary employee an appeal right to the MSPB. A remedy under those circumstances is only through equal employment opportunity channels.[64] The MSPB will examine closely any allegation forming the basis for its jurisdiction to assure that it is nonfrivolous, before considering the merits of any other discrimination claims.[65]

Special Counsel action. In addition to the rights just mentioned, a probationary employee also has the right to file a complaint with the Office of Special Counsel alleging that the adverse action constitutes a prohibited personnel practice as defined in 5 U.S.C. § 2302(b). If the adverse action appears to have been taken for improper reasons in violation of section 2302(b), the Special Counsel may, at his discretion, seek corrective action.[66] Initially, the Special Counsel seeks corrective action by requesting the agency to take corrective action.[67] If the agency refuses to take the requested corrective action, the Special Counsel may take the case to the MSPB.[68] If the Special Counsel gets involved in a case before the personnel action is taken, he may be able to obtain a stay in the contemplated adverse action from the MSPB.[69] The stay of a probationary employee's firing on application of the Special Counsel does not change the individual's status to nonprobationary, however, should the stay extend beyond the one-year probationary period. The stay merely preserves the status quo.[70]

The possible existence of a prohibited personnel practice does not, however, give the probationary employee an independent appeal right to the MSPB. The employee may complain to the Special Counsel, but the Special Counsel has discretion in pursuing the matter.[71]

Army grievance procedure. The final avenue for a probationary employee to challenge a firing would be to grieve under the agency's grievance procedure. Every agency must have a grievance procedure for its employees.[72] The Army's procedure is at AR 690–700, Chapter 771. Under OPM regulations, probationary employees do not have a right to grieve a firing, although OPM does permit agencies to extend their grievance procedures to probationary employees for firings based on misconduct.[73] The Army does not extend its grievance procedures to allow such a grievance by a probationary employee.[74]

Excepted Service Employee Rights

The rights excepted service employees enjoy in a disciplinary action depend mostly on whether they are preference eligible employees. In many instances these employees, if not preference eligibles, have even fewer rights than probationary employees.

Predecisional rights. If the excepted service employee is a preference eligible beyond the first year of employment, then he or she receives the same predecisional rights as a nonprobationary competitive service employee for true adverse actions.[75] Those employees receive no predecisional rights for suspensions of fourteen days or less, however.[76] Those excepted service employees who are not preference eligibles receive no predecisional rights in connection with any type of adverse disciplinary action.

Postdecisional rights. Only preference eligible, excepted service employees have appeal rights to the MSPB.[77] Nonpreference eligible, excepted service employees have no MSPB appeal rights, even if an action is allegedly taken because of partisan political reasons or marital status. The Office of Personnel Management has not extended an MSPB appeal right to these employees as it has for probationary employees.[78]

Special Counsel action. Excepted service employees have the same rights as probationers and all other employees to complain to the Special Counsel, if a personnel action is allegedly based on a prohibited personnel practice.

Army grievance procedure. Excepted service employees who have completed a one-year period of employment, equivalent to the one-year probationary period, may grieve

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[63] 5 C.F.R. § 315.806(d) (1986).

[64] *See* Dep't of Army, Reg. No. 690–600, Equal Employment Opportunity Discrimination Complaints (1 Mar. 1986) for equal employment opportunity complaint procedures for Army civilian employees.

[65] *See* Stokes v. Federal Aviation Admin., 761 F.2d 682 (Fed. Cir. 1985). The employee must include in the appeal an allegation of partisan political or marital status discrimination supported by factual assertions indicating that allegations are not merely pro forma pleadings. If the employee does that, the employee has a right to a hearing on jurisdiction to present evidence to support those factual allegations. The burden is on the employee to support allegations with facts that if uncontroverted, would support a finding that partisan political or marital status discrimination was the basis for the adverse action. If the employee fails, the case may be dismissed for lack of jurisdiction.

[66] 5 U.S.C. § 1206(c)(1) (1982).

[67] 5 U.S.C. § 1206(g) (1982).

[68] 5 U.S.C. §§ 1206(c)(1)(B), (g)(1) (1982).

[69] 5 U.S.C. § 1208 (1982).

[70] Special Counsel v. Department of Commerce, 23 M.S.P.R. 136, 137 (1984).

[71] *See* Wren v. Merit Systems Protection Board, 681 F.2d 867 (D.C. Cir. 1982); Borrell v. United States Int'l Communications Agency, 682 F.2d 981 (D.C. Cir. 1982).

[72] 5 C.F.R. § 771.301(a) (1986).

[73] 5 C.F.R. § 771.206(c)(2)(ii) (1986).

[74] AR 690–700.771, para. 1–7(b)(9).

[75] 5 U.S.C. §§ 7511–7513 (1982).

[76] 5 U.S.C. §§ 7501–7503 (1982).

[77] 5 U.S.C. §§ 7511–7513 (1982); Ralston v. Department of Army, 718 F.2d 390 (Fed. Cir. 1983).

[78] 5 C.F.R. §§ 752.401(b), 752.405(a) (1986).

their disciplinary actions, including removals, under the Army grievance procedure.[79]

Constitutional Right to Due Process

The rights of probationary and excepted service employees just discussed are based on statute and regulation. Absent additional rights properly granted by a collective bargaining agreement, these are the only rights these employees have in connection with a disciplinary action, unless they can demonstrate that they have a constitutional right to a hearing based upon the implication of a property right or a liberty interest.

Property Right

An expectancy in continued federal employment in the absence of cause has been found to create a property right protected by the due process clause of the fifth amendment to the Constitution.[80] When a property right is implicated, the person to be adversely affected is entitled to "some kind of prior hearing."[81] An expectancy in continued employment may be created by statute, regulation, or other understanding between the employer and the employee.[82]

Statutory right. A property right has been created by statute for nonprobationary, competitive service employees and preference eligible, excepted service employees beyond their first year of employment. This property right is created by language that states that these employees may only be removed "for such cause as will promote the efficiency of the service."[83] The Supreme Court in *Arnett v. Kennedy* found that this language created an expectancy in continued federal employment absent cause, and that the procedural protections provided to these employees satisfied due process requirements.[84] The Court reaffirmed that aspect of *Arnett* in *Cleveland School Board v. Loudermill.*[85]

Other property right. The Supreme Court in *Board of Regents v. Roth* indicated that a property right could also be created by something other than a statutory provision.[86] The Court suggested that any rules or understandings between an agency and its employees that created an expectancy in continued employment absent cause created a property right in employment. On that basis, courts have found property rights created by language in agency handbooks suggesting that employment would not be terminated except for cause.[87] In these cases, the courts found that the employees were entitled to a hearing in connection with their termination even though statutes and implementing OPM and agency regulations provided them no such right. While the implication of a property right may trigger a right to a hearing, that hearing does not necessarily have to be a formal trial-type hearing, and absent a statutory change, that hearing is not one before the MSPB.[88]

Liberty Interests

A second way to assert some right to procedural due process protection is to establish that a "liberty interest" is at stake.

Nature of the interest. A liberty interest includes the right not to have stigmatizing information about you disseminated without an opportunity to respond.[89] Stigmatizing information in an employment context refers to a person's general character, reputation, or misconduct that could adversely affect the individual's ability to take advantage of other employment opportunities.[90] To be actionable in an employment context, the stigmatizing information must be associated with the loss of a job and it must be disseminated.[91]

In *Walker v. United States,*[92] the Court of Appeals for the Tenth Circuit found a liberty interest implicated when the Air Force fired a probationary employee for falsifying a preappointment document. Reference to a person as a liar was viewed as the type of information that could, if disseminated, adversely affect the individual's ability to take advantage of other employment opportunities.[93] Proof of that was the Air Force's refusal to hire him again based on that information. The court found dissemination because the Air Force disclosed the reasons for the firing to the Oklahoma Employment Security Commission for use in determining the individual's entitlement to unemployment benefits.[94]

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[79] AR 690–700.771, para. 1–7(b)(9).

[80] Arnett v. Kennedy, 416 U.S. 134, 151–52 (1974).

[81] Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

[82] Perry v. Sinderman, 408 U.S. 593, 601 (1972).

[83] 5 U.S.C. § 7513(a) (1982).

[84] *Arnett,* 416 U.S. at 151–52 (citing 4 U.S.C. § 7501 (1970)).

[85] 470 U.S. 532 (1985). For a discussion of *Loudermill,* see St. Amand, *Probationary and Excepted Service Employee Rights in Disciplinary Actions in the Wake of* Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1.

[86] 408 U.S. at 470.

[87] *See* Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979) (relying in part on FBI handbook language, "You may assume your job is secure if you continue to do satisfactory work," court found expectancy in continued employment absent cause, and therefore, a property right); Paige v. Harris, 584 F.2d 178 (7th Cir. 1978) (relying on language in HUD handbook regarding employee "tenure" after three years, court said tenure suggested permanence, which suggested continued employment absent cause, and therefore, a property right). *But see* Fiorentino v. United States, 607 F.2d 963 (Ct. Cl. 1979) (court examined same HUD handbook as *Paige* court, but found no property right).

[88] *Roth,* 408 U.S. at 570; 5 U.S.C. § 7701 (1982).

[89] Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

[90] Paul v. Davis, 424 U.S. 693, 706 (1976).

[91] Bishop v. Wood, 426 U.S. 341, 348 (1976).

[92] 744 F.2d 67 (10th Cir. 1984).

[93] *Id.* at 69.

[94] *Id.*

Nature of the remedy. Courts have consistently held that if only a liberty interest is at stake, and not a property right, the employee is entitled only to a hearing to clear his or her name, not to gain reinstatement.[95] Therefore, the right to a hearing exists only if the individual asserts that the information is false. There is no right to a hearing to argue that the information at issue provides insufficient justification for the adverse action which the individual has just experienced.[96]

Substantive Requirements for Disciplinary Actions

General

The preceding sections focused exclusively on the procedural aspects of disciplinary actions. This section will focus on the substantive aspects by examining the proof requirements to sustain a disciplinary action, whether challenged in an appeal to the MSPB or in a grievance and subsequent hearing before an arbitrator.

In every disciplinary action the agency must: prove that the employee committed the act of misconduct forming the basis for the discipline; prove that the discipline is for "such cause as will promote the efficiency of the service;"[97] prove the appropriateness of the penalty choice; and follow proper procedures.[98]

Proving the Employee's Act of Misconduct

This proof requirement seems elementary on the surface. There are several issues related to proving the employee's act of misconduct that deserve examination.

General. Proving the act of misconduct in a hearing before an MSPB presiding official or an arbitrator is no different than doing it in any other administrative forum. Formal rules of evidence do not apply in these proceedings.[99] Presiding officials can admit any category of evidence, and any evidence that is relevant, material, and not unduly repetitious will be admitted.[100] Therefore, hearsay is admissible and even standing alone may be sufficient proof.[101] Hearsay alone will usually not be sufficient, however, when contradicted by sworn nonhearsay testimony.[102] For a detailed discussion of the use of hearsay in MSPB proceedings, see *Borninkhof v. Department of Justice*[103] and *Behensky v. Department of Transportation.*[104]

Evidence of conviction. Agency counsel will encounter cases in which there is no independent evidence of the employee's misconduct. The agency will seek disciplinary action based on evidence that the employee was convicted in state or federal court. Generally, if the agency disciplines an employee for misconduct that formed the basis for a federal or state conviction, the agency may meet its obligation to prove the misconduct by introducing proof of the conviction.[105] The MSPB has recognized the applicability of collateral estoppel or issue preclusion to deny an employee the right to relitigate before the board what has already been decided against him or her in a criminal trial.[106]

One of the requirements for use of collateral estoppel is actual litigation over the issue in dispute. This requirement raises a serious question about the propriety of using collateral estoppel based on a nolo contendere plea or what is known as an "Alford plea" of guilty. An Alford plea of guilty is a guilty plea wherein the individual does not admit the underlying facts.[107] The Court of Appeals for the Federal Circuit has suggested that collateral estoppel may properly be applied in both nolo contendere and "Alford plea" situations.[108]

If collateral estoppel is available, it simplifies the agency's proof. If the agency has independent evidence to prove the misconduct, however, it is wise to use that evidence to preclude the case later being lost if the criminal case is reversed on appeal.[109]

Evidence of indictment. Occasionally, an agency wants to discipline an employee but lacks the independent proof and the individual has not been convicted. Rather, the individual has been indicted and is awaiting trial.

It is well settled that an indictment is not evidence or proof of the underlying misconduct.[110] Agencies may take disciplinary action, however, when they have reasonable cause to believe that an employee has committed a crime for which imprisonment may be imposed.[111] Evidence of

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[95] *Roth*, 408 U.S. at 573 n.12.

[96] *Id.* at 573.

[97] 5 U.S.C. §§ 7503(a), 7513(a) (1982).

[98] For a discussion of the requirement to follow proper procedures and to meet all these proof requirements, see Parsons v. Department of the Air Force, 707 F.2d 1406, 1408 (D.C. Cir. 1983); Young v. Hampton, 568 F.2d 1253, 1257, 1264 (7th Cir. 1977); and Douglas v. Veterans Administration, 5 M.S.P.R. 280, 302, 307–08 (1981).

[99] 5 C.F.R. § 1201.61–.67 (1986) (MSPB); Behensky v. Department of Transportation, 27 M.S.P.R. 690, 696 (1985) (MSPB); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (arbitration).

[100] 5 C.F.R. § 1201.62 (1986).

[101] Borninkhof v. Department of Justice, 5 M.S.P.R. 77, 83 (1981).

[102] *See* Sarver v. Department of Treasury, 30 M.S.P.R. 226, 228–229 (1986).

[103] 5 M.S.P.R. 77 (1981).

[104] 19 M.S.P.R. 341 (1984).

[105] Previte v. Small Business Admin., 11 M.S.P.R. 137, 139 (1982).

[106] *Id.*

[107] North Carolina v. Alford, 400 U.S. 25, 37–38 (1970).

[108] Crofoot v. Government Printing Office, 761 F.2d 661, 665 (Fed. Cir. 1985).

[109] *See* Wiemers v. Dep't of Justice, 29 M.S.P.R. 9, 10 (1985); Underwood v. U.S. Postal Service, 18 M.S.P.R. 708, 711 (1984).

[110] Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983).

[111] *Id.*; 5 U.S.C. § 7513(b)(1) (1982).

indictment provides this reasonable cause.[112] Evidence that the employee was arrested or that the employee is under investigation does not, standing alone, provide the necessary reasonable cause.[113]

Typically, the discipline imposed based on an indictment is an indefinite suspension pending resolution of the criminal charges. This type of disciplinary action will be discussed in detail later in this article.

Proving the Connection Between the Misconduct and the Efficiency of the Service

Proving that the employee did something wrong, even criminal, is not sufficient to justify disciplinary action. Serious disciplinary actions may only be taken "for such cause as will promote the efficiency of the service."[114] This requirement to prove this impact on the efficiency of the service has become known as the "nexus requirement."

The nexus requirement: the general rule. The nexus requirement is not something created by the Civil Service Reform Act of 1978.[115] It has existed since the passage of the Lloyd-LaFollette Act in 1912,[116] and has been the subject of much judicial interpretation by the various federal courts. The MSPB first examined in detail this nexus requirement in *Merritt v. Department of Justice.*[117] The board examined prior judicial precedent and established the foundation for all subsequent board decisions in this area. The board held that agencies must introduce evidence of the nexus between the misconduct and the efficiency of the service; mere assertion or argument is insufficient.[118] This nexus must be proved by a preponderance of the evidence.[119]

The nexus requirement flows from the cause standard found at 5 U.S.C. §§ 7503 and 7513. While both of those sections apply only to certain designated employees, generally nonprobationary competitive service employees, the board in *Merritt* also examined 5 U.S.C. § 2302(b)(10), which makes it a prohibited personnel practice to take a personnel action against an employee for conduct that does not adversely affect his or her performance or the performance of others. The board concluded that, in part, section 2302(b)(10) extended the cause standard from 5 U.S.C. §§ 7503 and 7513 to virtually all personnel actions against all employees.[120] The agency may, therefore, face the nexus requirement even in lesser adverse actions and those taken against employees other than nonprobationary, competitive service employees. It is unlikely that this additional concern will arise in an employee appeal to the MSPB, because of the limits on the board's jurisdiction. It could arise in an arbitration hearing or another administrative proceeding, however.[121]

Presenting evidence of nexus. In August 1984, the MSPB rendered several decisions in the nexus area that provide helpful guidance and appear to make the agency's burden more reasonable.[122] These nexus cases, like most nexus cases, are fairly fact specific while continuing to apply the guidance initially set out in *Merritt.* Taken together, however, these cases help to categorize somewhat the types of evidence that the board will accept as adequate proof of the required nexus.

The best evidence demonstrates direct impact, that has already occurred, on the job site, e.g., fellow employees are afraid to work with the offending employee.[123] In many cases, that type of evidence is not available. The second type of evidence to look for reflects reasonable cause to fear impact in the future, *e.g.*, the nature of the offense and the nature of the employee's duties lead the supervisor to lose confidence in the employee's ability to continue to perform satisfactorily.[124] If that evidence is not available, the final type to look for is evidence that the misconduct affects the organization in a broader sense, *e.g.*, bad publicity or the need to use agency resources to deal with the misconduct.[125]

A troublesome area concerning nexus has been the employee's absence from work during incarceration. In an early court case dealing with this issue, the Army argued that the employee's absence from work because of his being in jail pursuant to his conviction was evidence of nexus relating to the underlying misconduct.[126] The court ruled, however, that the agency could not use incarceration as evidence of nexus for the underlying offense.[127] The MSPB in 1984 reaffirmed that court holding.[128] In doing so, however, the board sanctioned another approach that may accomplish the same end sought by the agency. The board

[112] *Brown,* 715 F.2d at 667.

[113] Larson v. Department of Navy, 22 M.S.P.R. 260 (1984); Martin v. Department of Treasury, 12 M.S.P.R. 12 (1982).

[114] 5 U.S.C. §§ 7503(a), 7513(a) (1982).

[115] Pub. L. No. 75–454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.). Sections currently setting out nexus requirements are 5 U.S.C. §§ 7503(a), 7513(a) (1982).

[116] 37 Stat. 555 (1912).

[117] 6 M.S.P.R. 585 (1981).

[118] *Id.* at 605.

[119] *Id.*

[120] *Id.* at 602.

[121] For example, the issue could arise in an MSPB proceeding brought by the Special Counsel under 5 U.S.C. § 1206(c)(1)(B) (1982).

[122] *See* Jaworski v. Department of Army, 22 M.S.P.R. 499 (1984); Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Franks v. Department of the Air Force, 22 M.S.P.R. 502 (1984); Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984); Backus v. OPM, 22 M.S.P.R. 457 (1984).

[123] *Backus,* 22 M.S.P.R. at 461.

[124] *Jaworski,* 22 M.S.P.R. at 502; *Honeycutt,* 22 M.S.P.R. at 494.

[125] *Franks,* 22 M.S.P.R. at 504.

[126] Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977).

[127] *Id.* at 1260.

[128] *Abrams,* 22 M.S.P.R. at 486.

upheld the Navy's charging an employee with absence without leave (AWOL) during the period of incarceration, and its subsequent removal of the employee, in part, for excessive AWOL.[129]

Exception: the presumption of nexus. The MSPB in *Merritt* clearly established the general rule that requires agencies to present evidence in every case to prove nexus by a preponderance of the evidence.[130] The board also recognized that in "certain egregious circumstances," nexus could be presumed from the nature and seriousness of the misconduct.[131] In doing so, the board suggested that it was adopting an approach already recognized by the Court of Claims and the Court of Appeals for the D.C. Circuit.[132]

The Court of Appeals for Federal Circuit in *Hayes v. Department of Navy*[133] agreed that nexus could be presumed in egregious circumstances, and upheld the MSPB's decision presuming nexus where the employee was convicted of assault and battery on a ten year old girl. While this presumption helps the agency, it applies only in egregious circumstances. What constitutes egregious circumstances will have to be determined on a case by case basis.[134]

This presumption is a rebuttable one.[135] The employee may present evidence to rebut the presumption and force the employing agency to present evidence of nexus. The limited case law in this area indicates that the employee's burden is a heavy one. To rebut the presumption, the employee has to demonstrate that the misconduct has no adverse impact on his or her performance, no adverse impact on the performance of other employees, and no adverse impact on the organization.[136] In no case in which the issue of employee rebuttal has been raised has the employee been successful in rebutting the presumption.

If the agency is able to prove that the employee committed an act of misconduct and that the misconduct adversely affects the efficiency of the service, it has justified the taking of disciplinary action. To sustain the specific action taken, however, the agency also has to demonstrate the appropriateness of the specific discipline imposed.

Demonstrating the Appropriateness of the Penalty Choice

Early in the MSPB's existence, it was confronted with a question concerning its authority to mitigate an agency's penalty choice. In *Douglas v. Veterans Administration,*[137] the board concluded that it had the authority to mitigate the agency's penalty. *Douglas* provided detailed guidance concerning the scope of the board's review and the relevant factors it would consider in assessing penalties. This case continues to be the lead case in the area.

Douglas noted that the choice of penalty will be left largely to agency discretion, but that the board will review the agency's choice to assure consistency with law, rule, and regulation, and to assure consideration of other relevant factors.

The list of other relevant factors set out in *Douglas,* known as the "Douglas factors," include:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[138]

The board explicitly stated that its list of relevant factors was not exhaustive and that the agency need not address the listed factors mechanically.[139] This approach was approved by the Court of Appeals for the Federal Circuit.[140]

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[129] *Id.*

[130] 6 M.S.P.R. at 605.

[131] *Id.*

[132] *Id.*

[133] 727 F.2d 1535 (Fed. Cir. 1984).

[134] *See id.* at 1539 n.3 for a list of cases where conduct was so egregious that nexus could be presumed.

[135] *Meritt,* 6 M.S.P.R. at 605.

[136] Abrams v. Department of Navy, 714 F.2d 1219, 1223 (3d Cir. 1983); Johnson v. Department of Health and Human Services, 22 M.S.P.R. 521, 527 (1984).

[137] 5 M.S.P.R. 280 (1981).

[138] *Id.* at 305–06.

[139] *Id.* at 306.

[140] Nagel v. Department of Health and Human Services, 707 F.2d 1384, 1386 (Fed. Cir. 1983).

The board wants to see that the agency considered factors like the "Douglas factors" in deciding what disciplinary action to impose. Further, because the appropriateness of the agency's penalty choice is part of the agency's burden of proof, the agency must present evidence concerning its penalty choice even in the absence of an employee challenge to the penalty.[141]

What has developed into the most important "Douglas factor" is consistency of the penalty with the agency's table of penalties. The Army published a new table of penalties in July 1985.[142] The Army's table of penalties sets recommended punishments for a variety of offenses. The punishments vary depending on the seriousness of the offense and whether the offense is the first, second, or third offense by the offending employee. Since *Douglas*, the MSPB and the courts have addressed some important issues concerning tables of penalties.

Offense not listed on table of penalties. One of these issues concerned the choice of penalty when the offense committed is not listed on the table of penalties. Most tables, including the Army's, suggest that in such a case the supervisor should look to an offense found on the table that is of similar seriousness.[143] This approach has been sanctioned by the courts.[144] That does not guarantee, however, that the MSPB or the courts will agree with the agency on what is an offense of similar seriousness.

Punishment in excess of table of penalties. Most agencies, including the Army, establish their tables as guides that are not mandatory.[145] The ability to impose a penalty in excess of that on the table of penalties was recognized in *Weston v. Department of Housing and Urban Development.*[146] To impose such a penalty, however, the agency has a heavy burden to justify why the recommended penalty in the table of penalties is inadequate.

Defining a first offense. Most tables of penalties provide recommended penalties for various offenses depending on whether the misconduct is the first, second, or third offense. For purposes of determining if the misconduct is the first or later offense, all prior misconduct, not just offenses of the same type, may be considered.[147] Whether the employee may challenge the previous disciplinary action, now being used to enhance the punishment, depends on the circumstances surrounding the agency's handling of that earlier action. If the employee had been informed of the previous disciplinary action in writing, had an opportunity for a substantive review of the action by a higher authority than the one who took the action, and if the action was made a matter of record, then the agency can use that prior disciplinary action to enhance the punishment for the current misconduct, and the employee may not relitigate the prior action.[148] Failure to meet these three requirements with respect to the prior disciplinary action does not preclude the agency's use; it merely allows the employee to challenge the merits of the prior action during the current action.[149]

If the agency successfully proves that the employee committed the act of misconduct, that discipline is for just and proper cause, and that the penalty imposed is appropriate, then the adverse action should be sustained. The only remaining hurdle that could cause reversal of the action is the agency's failure to follow proper procedures.

Following Proper Procedures

The procedural requirements for disciplinary actions were discussed earlier in this article. Procedures are mandated by statute, implementing regulations of OPM and the employing agency, and collective bargaining agreements. Failure to follow these procedures may, but does not necessarily, result in reversal of the adverse disciplinary action. Only harmful error warrants reversal of the adverse action.[150]

The Court of Appeals for the Federal Circuit has determined that there is no per se harmful error with respect to any procedural error, even for procedures mandated by statute.[151] For the board to overturn an agency action because of a procedural error, the employee must show that the error would possibly have affected the agency's substantive decision.[152]

This section has discussed the substantive proof requirements associated with disciplinary actions. In connection with the discussion on proving that the employee committed the act of misconduct, reference was made to a special type of disciplinary action, an indefinite suspension pending disposition of criminal charges. Because of the increased use of this action and its unique nature, a detailed discussion of it follows.

Indefinite Suspension Pending Disposition of Criminal Charges

General. The ability of a federal agency to indefinitely suspend an employee pending disposition of criminal charges has been recognized by the MSPB and the federal

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[141] Parsons v. Department of the Air Force, 707 F.2d 1406, 1409 (D.C. Cir. 1983).

[142] AR 690–700.751 (I05 1985), appendix A.

[143] *Id.*

[144] McLeod v. Department of Army, 714 F.2d 918, 922 (9th Cir. 1983).

[145] AR 690–700.751 (I05 1985), appendix A.

[146] 724 F.2d 943 (Fed. Cir. 1983).

[147] Villela v. Department of the Air Force, 727 F.2d 1574 (Fed. Cir. 1984).

[148] Bolling v. Department of the Air Force, 9 M.S.P.R. 335 (1981).

[149] Parsons v. Department of the Air Force, 21 M.S.P.R. 438, 443 (1984).

[150] 5 U.S.C. § 7701(c)(2)(A) (1982).

[151] Handy v. United States Postal Service, 754 F.2d 335 (Fed. Cir. 1985); Baracco v. Department of Transportation, 735 F.2d 488 (Fed. Cir. 1984).

[152] *Handy; Baracco*; 5 C.F.R. § 1201.56(c)(3) (1986).

courts.[153] Such a suspension must be based on reasonable cause to believe that the employee committed a crime for which imprisonment can be imposed.[154]

Establishing reasonable cause. Many cases rely upon an indictment to establish the requisite reasonable cause.[155] An indictment is not, however, the only evidence providing the necessary reasonable cause. While an arrest or an investigation standing alone is insufficient,[156] a combination of circumstances that includes an arrest or investigation may suffice.[157]

Nature of the action. An indefinite suspension is a temporary action and requires that there be a determinable condition subsequent that will terminate the action.[158] Therefore, if the suspension is imposed pending disposition of criminal charges, the agency must promptly terminate the suspension when the charges are resolved.[159]

In addition, this type of suspension is viewed as a suspension for more than fourteen days and thus is treated as a true adverse action for all procedural and substantive purposes.[160] This requires that the agency prove the nexus between the indictment and the efficiency of the service; demonstrate the appropriateness of this penalty choice; and follow the procedures for imposing a true adverse action. Because the statutory basis for this adverse action is the same as that permitting reduction of the notice period from thirty to seven days, only a seven-day advance notice period is required in these actions.[161]

Action upon resolution of criminal charges. The agency may not continue the suspension after the charges are resolved, whether the employee is acquitted, the charges are dismissed, or the employee is convicted. The agency has to decide whether to reinstate the employee or to initiate an adverse action based on the underlying misconduct.[162] Acquittal or dismissal of the charges does not necessarily entitle the employee to reinstatement, because the agency may be able to prove the underlying misconduct by the lower administrative standard—preponderance of the evidence.[163]

Effect of reinstatement on the original suspension. The critical issue arising upon reinstatement of an employee after acquittal or dismissal of charges concerns the employee's entitlement to back pay for the period of suspension. The Court of Claims held that the employee's acquittal and subsequent reinstatement did not entitle the employee to back pay, unless it could be demonstrated that the suspension was unjustified or unwarranted when it was imposed or during the period it was in effect.[164] This decision was based on the Back Pay Act,[165] which permits back pay only if the employee has been subjected to an unwarranted or unjustified personnel action. The D.C. Circuit Court of Appeals has taken a different approach, however. It determined that an agency's failure to initiate adverse action proceedings based on the underlying conduct, after an employee's acquittal, rendered the earlier suspension unjustified and entitled the employee to back pay for the period of suspension.[166]

Recent MSPB decisions have aligned more closely with the D.C. Circuit than with the Court of Claims. For example, the board in *Covarrubias v. Department of Treasury,*[167] found unreasonable the agency's refusal to vacate a suspension, which had been based on an indictment, after the indictment was dismissed. The indictment was apparently dismissed based on facts that indicated that no prosecution was warranted. In fact, it appeared that had all the facts been known earlier, no indictment would have been sought and no suspension based thereon would have been imposed. The agency subsequently took no adverse action based on the underlying misconduct. While the board in *Covarrubias* carefully noted that its decision was based on the specific circumstances of that case,[168] subsequent board decisions seem to have developed a general rule that agencies must vacate a suspension which is based on pending criminal charges, when those charges are disposed of favorably to the employee, unless the agency initiates another separate adverse action based on the underlying misconduct.[169]

Constitutional Considerations

The focus of this section has been on the statutory and regulatory provisions governing the substantive aspects of employee discipline. Just as there were constitutional concerns in the procedural aspects of discipline, there are also significant constitutional concerns in the substantive aspects of discipline. This paragraph will address two important

[153] Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976); Martin v. Department of Treasury, 12 M.S.P.R. 12 (1982).

[154] 5 U.S.C. § 7513(b)(1) (1982).

[155] *Martin*; Johnson v. Department of Health and Human Services, 22 M.S.P.R. 521 (1984).

[156] Larson v. Department of Navy, 22 M.S.P.R. 260, 262 (1984).

[157] *Honeycutt*, 22 M.S.P.R. at 494 (arrest report, arrest warrant, bail bond form, appellant statements); *Backus*, 22 M.S.P.R. at 460 (police report, victim's statement, arrest warrant, arraignment).

[158] *Martin*, 12 M.S.P.R. at 17.

[159] *Id.* at 20.

[160] *Id.* at 19–20.

[161] Littlejohn v. United States Postal Service, 25 M.S.P.R. 478, 482 (1984); 5 U.S.C. § 7513(b)(1) (1982); 5 C.F.R. 752.404(d)(1) (1986).

[162] *Brown*, 715 F.2d at 669; *Martin*, 12 M.S.P.R. at 20.

[163] *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); *Jankowitz*, 533 F.2d at 542.

[164] *Jankowitz*, 533 F.2d at 542–44.

[165] 5 U.S.C. § 5596(b) (1982).

[166] *Brown*, 715 F.2d at 669.

[167] 23 M.S.P.R. 458 (1984).

[168] *Id.* at 461.

[169] *See* McKinnon v. Department of Agriculture, 25 M.S.P.R. 476, 477 (1984); Beamer v. Department of Justice, 25 M.S.P.R. 483, 487 (1984).

constitutional questions. First, may an employee be disciplined for refusing to answer questions from his or her employer, if the employee's refusal to answer is based on his or her fifth amendment right against self-incrimination?[170] Second, may an employee be disciplined merely for what he or she says, in the face of an asserted first amendment right?[171]

Fifth Amendment. Federal employees have the same rights under the fifth amendment, including the right against self-incrimination, as all other persons in the United States.[172] Two general consequences flow from that right. First, an employee may not be disciplined for properly invoking his or her privilege against self-incrimination.[173] Second, later criminal prosecution cannot constitutionally use statements coerced from an employee in an earlier disciplinary investigation by threat of discipline for failure to answer questions.[174]

The federal courts, while recognizing the employees' constitutional rights, have mapped out a clear course describing how to discipline an employee in this situation. The method involves rendering the assertion of the fifth amendment privilege null. If an employee properly invokes the fifth amendment privilege in refusing to answer a work-related question asked by the employer, the employer should advise the employee first that the reply, and its fruits, cannot be used against him or her in a criminal proceeding, and second, that he or she is subject to disciplinary action for refusing to answer. Following this court-suggested course of action results in use immunity by operation of law.[175] Because of this immunity, the employee's refusal to answer is no longer a proper invocation of his or her fifth amendment privilege. While this course of action will legally enable the agency to discipline the employee, the agency should coordinate with appropriate civil authorities to assure that the relative interests of the criminal and employment actions are considered prior to possibly foreclosing one or the other.

It should be recognized that these steps are necessary only if the employee asserts a proper fifth amendment privilege. The employee's refusal to answer the employer's question for fear of disciplinary action, not criminal action, is not a proper fifth amendment invocation.[176]

First Amendment. When an employee alleges that he or she has been disciplined for exercising a free speech right under the first amendment, there are two issues that have to be examined. First, is the speech at issue constitutionally protected? Second, if the speech is constitutionally protected and it is a substantial part of the reason for the disciplinary action, is reversal of the disciplinary action required?

In 1968, the Supreme Court decided *Pickering v. Board of Education,*[177] which established the framework for deciding what speech is constitutionally protected in a public employment context. That decision has long been the starting point for any first amendment analysis in connection with free speech and public employment.

More recently, the Supreme Court reexamined *Pickering* in *Connick v. Myers.*[178] The court reemphasized that determining if speech is constitutionally protected requires balancing the employee's right, as a citizen, to comment on matters of public concern, against the government's interest, as an employer, to promote the efficiency of the service.[179] The Court noted, however, that before getting to the balancing test, a threshhold determination must be made that the speech is on a matter of public concern and not on a purely employment-related matter. If the speech is not on a matter of public concern, there is generally no first amendment protection.[180]

These cases formed the decision basis for a decision by the Court of Appeals for the Federal Circuit, *Brown v. Federal Aviation Administration,*[181] arising out of the much publicized federal air traffic controller strike. In that case, Brown, an FAA supervisor, addressed a group of his striking air traffic controllers at the union hall, and advised them that if they stayed together, they would win. These remarks were videotaped and later broadcast nationally on television. Brown also told a reporter that he supported some of the strike demands. The court reviewed Brown's firing, which had been upheld by the MSPB, and considered whether his remarks were constitutionally protected. The court recognized that the strike was a matter of public concern thus meeting the threshhold requirement, but determined that Brown's remarks were only tangentially related to that concern. Applying the balancing test established by the Supreme Court, the court found that the timing of the remarks, at the beginning of the strike, and Brown's position as a supervisor, from whom management should reasonably expect loyalty, rendered the speech not protected by the first amendment.[182] The court did, however, direct the MSPB to mitigate the penalty based on the *Douglas* criteria discussed earlier.[183]

If, using the balancing test established by the Supreme Court, the speech is constitutionally protected, does that

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[170] U.S. Const. amend. V.

[171] U.S. Const. amend. I.

[172] *See* Weston v. HUD, 724 F.2d 943 (Fed. Cir. 1983).

[173] Gardner v. Broderick, 392 U.S. 273, 279 (1968).

[174] *See* Garrity v. New Jersey, 385 U.S. 493 (1967).

[175] *Weston,* 724 F.2d at 948.

[176] Devine v. Goldstein, 680 F.2d 243 (D.C. Cir. 1982).

[177] 391 U.S. 563 (1968).

[178] 461 U.S. 138 (1983).

[179] *Id.* at 142 (quoting *Pickering,* 392 U.S. at 568).

[180] *Connick,* 461 U.S. at 147.

[181] 735 F.2d 543 (Fed. Cir. 1984).

[182] *Id.* at 548.

[183] *Id.* at 548–49.

alone require reversal of the disciplinary action? The short answer is no. The employee has the burden of showing that his or her protected speech was a substantial or motivating factor in the employer's decision to discipline.[184] Even if the employee can prove that, the Supreme Court's controversial decision in *Mt. Health City School District Board of Education v. Doyle* allows the agency/employer to defeat the employee's claim, if it can prove by a preponderance of the evidence that it would have taken the same action even absent the employee's protected speech.

The key to *Mt. Healthy*, and its significance in areas other than the first amendment, is the Court's unwillingness to put an employee in a better position after the speech than the employee would have been in otherwise. Engaging in free speech should not immunize an employee from otherwise proper disciplinary action.[185]

Conclusion

This article has provided an overview of the various types of disciplinary actions that may be taken against a federal civilian employee, the procedures required to impose these disciplinary actions, and the substantive proof requirements that must be satisfied to ensure a given action is sustained if the employee challenges it. While it does not examine every conceivable procedural and substantive issue to be faced by agency counsel, it provides a meaningful framework within which to evaluate a proposed disciplinary action, develop and provide appropriate legal advice to supervisors and personnel specialists on contemplated disciplinary actions, and prepare for and represent the command at administrative hearings in which the disciplinary actions are challenged.

[184] Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

[185] *Id.* at 285.

Reviewing Solicitations—A Road Map Through the Federal Acquisition Regulation

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Introduction

This article is not designed for regularly assigned contract attorneys. It should be too basic for them. Rather, it is intended for those attorneys who, without much or any government contract experience, are suddenly required to substitute for the regular contract attorney. It should also help the experienced attorney who last worked with contracts in the days of the Armed Services Procurement Regulation[1] and the Defense Acquisition Regulation.[2]

This article deals with the solicitation document itself and guides the novice through it.[3] The Federal Acquisition Regulation,[4] Defense Federal Acquisition Regulation Supplement,[5] and Army Federal Acquisition Regulation Supplement[6] contain the required information, including the mandated solicitation provisions and contract clauses. Wherever the FAR is referenced, you should also check the corresponding DFARS and AFARS sections and any local regulations. This article will focus on the three most common types of solicitations: supply, service, and construction.

The solicitation will contain a Standard Form (SF) 33[7] if it is for services or supplies, or an SF 1442[8] if for construction.[9] Block 4 of SF 33 and block 2 of SF 1442 state whether the solicitation is for a sealed bid or negotiated procurement.

If it is an invitation for bids (IFB), review FAR Part 14, especially the required solicitation provisions and contract clauses.[10] If it is a request for proposals (RFP), review FAR Part 15.

At this point, the analysis will diverge. The Uniform Contract Format (UCF) is essentially required for supply and service contracts but need not be used for construction contracts.[11] The UCF is designed to facilitate the preparation of the solicitation and the contract and to provide bidders and contractors easier use of the document. It is

[1] Armed Services Procurement Reg. (1 Oct. 1975) [hereinafter ASPR].

[2] Defense Acquisition Reg. (1 July 1986) [hereinafter DAR].

[3] *See* Dep't of Army, Pam. No. 27-153, Contract Law, app. A (25 Sept. 1986) for a solicitation checklist.

[4] Federal Acquisition Reg. (1 Apr. 1984) [hereinafter FAR].

[5] Defense FAR Supplement (1 Apr. 1984) [hereinafter DFARS].

[6] Army FAR Supplement (1 Dec. 1984) [hereinafter AFARS].

[7] Standard Form 33, Solicitation, Offer and Award (Apr. 1985).

[8] Standard Form 1442, Solicitation, Offer and Award (Construction, Alteration, or Repair) (Apr. 1985).

[9] Construction includes alteration, repair, dredging, excavating, and painting. FAR § 36.102.

[10] "Provisions" and "clauses" are not synonymous. Provisions are instructions to the bidders which are not part of the contract. Clauses are part of the contract.

[11] The UCF also need not apply to other contracts such as shipbuilding or subsistence (FAR § 14.201-1), but this article will only discuss the much more common construction contracts. The UCF does not apply to small purchases and other simplified purchase procedures which are governed by FAR Part 13.

used to the maximum extent practicable. Because the UCF presents a logical and widespread approach, it will be scrutinized. Construction contracts will be treated later in the article.

The UCF, detailed in FAR § 14.201 and FAR § 15.406–1, divides the solicitation into four parts, comprising thirteen sections. Each section serves a different purpose and relates to different FAR Parts. The Table of Contents on SF 33 will identify which pages of the solicitation contain each section.

An especially valuable tool is FAR § 52.300, the Provision and Clause Matrices. These matrices separate contracts by subject matter and type of payment, *e.g.*, fixed price supply, cost type service, etc. The vast majority of contracts you will encounter will be fixed price. Once you have identified the type of solicitation you are reviewing, the matrix will list applicable solicitation provisions and contract clauses. Few of the provisions and clauses are mandatory for all solicitations. Most of the provisions/clauses are denominated "required-when-applicable" or "optional." The matrix will refer you to the FAR section that will help you decide which are required in your case. Reading FAR Parts 14 and 15 will enable you to identify many matters not required because, for example, they concern IFBs while your solicitation is an RFP.

The matrix will also identify which provisions/clauses must be in full text and which may be incorporated by reference and where in the UCF the particular provision/clause should be.

Reviewing solicitations requires constant cross reference between and within sections. For example, if section B reveals it is an indefinite delivery contract, check section I and ensure it contains the clauses at FAR § 16.505. If section I contains warranty provisions, verify if section D reflects any needed Packaging and Marking requirements.

Supply and Service Contracts

Part I of the UCF is the schedule composed of eight sections, A–H. Section A is the solicitation/ contract form itself—the SF 33.

Block 5 contains the date the solicitation was issued. Block 9 sets the bid closing date. The bidding period for IFBs must be at least thirty days if synopsis in the Commerce Business Daily is required.[12]

Blocks 12–18 are the offer portion of the form which the bidder must fully complete and have signed by an authorized official.[13] Block 12 sets the bid acceptance period during which the offer remains firm. Block 12 is optional. The contracting officer may choose to use FAR § 52.214–16, the Minimum Bid Acceptance Period provision, to set a specific date.

Block 14 contains the offeror's acknowledgment of amendments, vitally important because the failure in an IFB to acknowledge a material amendment will render the bid non-responsive.

Block 21 contains the accounting and appropriation data. Ensure that last year's construction funds are not being used to fund this year's laundry services contract. If Block 21 states that funds will be cited on individual delivery orders, then the contract is a requirements contract and FAR subpart 16.5 should be reviewed.[14]

Section B is Supplies or Services and Prices/Costs, in which the bidder inserts its prices for the various contract line item numbers (CLINs). In a supply contract, CLIN 0001 might be for first articles; CLIN 0002 might be for the delivery of a production quantity of the item. Each CLIN should describe the item or service being procured, the quantity, the unit, the unit price, and the total price. The description might be to a national stock number or to "laundry services IAW para C.5.1" of the contract. Frequently, unit prices are not solicited, only a lump sum bid.

Section B will identify what the government is buying. If it is a service contract, review FAR Part 37. Other special categories of contracting are outlined in FAR Parts 34–39. There is no separate chapter for supply contracts. If it is an automatic data processing equipment (ADPE) contract, review DFARS Part 70.[15]

Reviewing the schedule also requires a study of FAR Part 16, Types of Contracts, to ensure that the correct type has been selected. If it is an IFB, fixed price or fixed price with economic price adjustment are the only types permitted. Conversely, a firm fixed price contract may be inappropriate for a research and development project.[16] If the schedule gives an estimated quantity or a minimum/maximum quantity, then review FAR subpart 16.5 on Indefinite-Delivery Contracts. If section B also contains option periods, then examine FAR subpart 17.2 to ensure that such options are appropriate.

Section C deals with descriptions and specifications. In supply contracts it may be short. The contractor may simply be required to produce supplies in accordance with a specific technical data package or military or federal specifications which are either attached or otherwise available; or the requiring activity may have provided product specifications. Such specifications should be functional in nature and as unrestrictive as possible. For example, the product description should not parrot the specification of a particular manufacturer's product to the exclusion of other similar products that would meet the government's needs. This problem can often be handled by a size range or performance minimums rather than exact requirements.

In service contracts, section C is normally very long. Office of Federal Procurement Policy Pamphlet No. 4[17]

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[12] FAR § 14.202–1(a).

[13] If the contract is with the Small Business Administration under the 8(a) program, review FAR Part 19.8, and especially § 19.809 on how the contract should be prepared.

[14] For a discussion of bidding in general, see Hopkins, *Bidding Federal Contracts*, 23 A.F.L. Rev. 73 (1982–1983).

[15] *See* Reardon, *Army Automatic Data Processing Acquisition Update*, The Army Lawyer, Feb. 1986, at 16; Reardon, *Automatic Data Processing Equipment Acquisition*, The Army Lawyer, Aug. 1984, at 19.

[16] *See* Mancuso, *The Use of Firm Fixed Price Contracts for R & D Study Contracts*, 12 Nat'l Con. Mgmt. Q.J. 27 (1978).

[17] Office of Federal Procurement Policy Pamphlet No. 4, A Guide for Writing and Administering Performance Statements of Work for Service Contracts (Oct. 1980) [hereinafter OFPP Pam. No. 4].

suggests an approach to writing section C. Section C–1 is "General," a broad overview of work including all tasks, personnel related items including security clearances, etc., and specific requirements for quality control. C–2 lists definitions and acronyms. C–3 is government furnished property (GFP), facilities, equipment and services. It should cite all items that the government will provide to the contractor. This may range from a building to material to telephone service.

C–4 is contractor furnished items. Frequently, this is extremely short, simply saying that the contractor is responsible for providing all items necessary for contract performance other than those identified as government furnished in Section C–3.

C–5 is specific tasks—the meat of the service contract. This describes what the government wants and what standards it will supply.[18] It should be "performance-oriented" stating what the government wants, not how it is to be done. Specifying how a contractor is to perform the tasks deprives the government of something it is buying—the contractor's managerial and creative skills. Furthermore, such specificity can lead to an impermissible personal services contract.[19]

Section C–6 is applicable technical orders, specifications, regulations, manuals and directives. For example, in food service or ambulance service contracts, C–6 might contain a listing of applicable Army regulations plus any appropriate Health Services Command directives. Such publications are identified as mandatory or advisory depending on their application to the contract.

Much of section C, and C–5 in particular, is beyond the lawyer's expertise. We have no way of determining if drawings are correct, if electrical wiring diagrams are error free, or if the specifications for hospital cleaning are accurate. We must, however, be attuned to possible areas for confusion and litigation:

Is it clear?—*e.g.*, does "days" mean work or calendar days?

Is it consistent?—*e.g.*, does it refer to square feet in one place but square yards in another?

Is something omitted?—*e.g.*, do the specifications discuss maintenance calls during the week, but omit the weekend?

Is it restrictive? Is it written in such a way that only one of two contractors could possible comply. For example, a requirement that a painting contractor be located within five miles of the post should be rejected unless sufficient justification is provided.

Is it "gold plated"? Are the specifications far beyond the government's minimum needs? A requirement that a plumbing contractor repair all fixtures within twenty minutes of its reporting is far beyond what can normally be expected. Such specifications may force many (or all) potential contractors to refuse to bid or force exorbitant bids to ensure compliance. Either way the best interests of the government are not served.

Section D, Packaging and Marking, is normally omitted in service contracts for obvious reasons. Even in supply contracts it is a relatively short section. There is no FAR Part of this subject. Usually, the contractor will be required to comply with specific packaging requirements contained in military or federal standards.[20] If warranties are involved, however, special marking may be required.[21]

Section E deals with Inspection and Acceptance. Part 46 pertains to this subject. Section E should contain the appropriate clauses at FAR subpart 46.3. Any first article requirements should be here.[22]

Starting with section E, FAR clauses and provisions are used. Most of these clauses may be incorporated by reference but some must be set out in full text. The matrices identify which is which.

Section F is entitled Deliveries or Performance. FAR Parts 12, Contract Delivery or Performance, and 47, Transportation, are the most applicable. The section will state the term of a services contract or the delivery schedule in a supply contract. If the solicitation includes an option, this section may describe how the option will be exercised.[23]

Section G concerns contract administration—FAR Part 42. Frequently, this is a very short section. A Contracting Officer's Representative (COR) might be named, any required accounting and appropriation data may also be inserted, and any particulars as to invoicing addressed.

Section H deals with special contract requirements, *i.e.*, those requirements that are not included in section I or in other sections of the uniform contract format. In other words, it is a catch-all. Matters frequently wind up in section H because the contracting officer is not sure where else to place them. Often clauses dealing with options, insurance, or mobilization requirements are here. It is easier to identify what should not be in section H than what should be. For example, according to the matrices, no FAR clause should be in section H.

Part II contains only one section, section I, Contract Clauses. FAR Part 52 contains the contract clauses that are identified by 52.2 followed by the number of the applicable FAR part; for example, clauses dealing with services, FAR Part 37 will be contained in FAR 52.237.

Most of the clauses will be incorporated by reference so they are merely listed by number (*e.g.*, I.9), FAR reference (*e.g.*, 52.233–01), title (*e.g.*, Disputes) and date (*e.g.*, Apr. 84).

The clauses should be listed in numerical order. In virtually every contract the clause from FAR Part 2 "Definitions" is first, then clauses from FAR Part 3, *i.e*, the "Officials Not to Benefit," "Gratuities," and "Covenant Against Contingent Fees" clauses. It will then contain

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[18] *See* Clarke, *Performance Specifications in Commercial Activity Contracts*, The Army Lawyer, Sept. 1984, at 14; Hopkins & Wilks, *Use of Specifications in Federal Contracts: Is the Cure Worse Than the Disease?*, 86 Mil. L. Rev. 47 (1979).

[19] *See* FAR § 37.104; Byers, *Personal Services Contracts*, The Army Lawyer, Jan. 1983, at 8.

[20] *See* FAR §§ 10.004(e), 47.305–10, 52.247.26.

[21] FAR § 46.706(b)(5).

[22] "First articles" include "preproduction models, initial production samples, test samples, first lots, pilot logs, and pilot models." FAR § 9.301.

[23] *See* FAR § 17.207.

clauses from either FAR Part 14 or 15. Thereafter, although the exact clause may differ, virtually all contracts will have clauses from the following parts: 22, Equal Employment Opportunity; 29, Taxes; 32, Financing; 33, Protests and Disputes; 43, Changes; and 49, Terminations.

Beyond that skeletal outline, the contents of section I will depend on the nature of the contract. An indefinite delivery contract requires clauses at 52.216. Supply contracts may contain Buy American Act clauses. If there is government furnished property, the clauses from 52.245 are required. The matrices are invaluable.

Part III, List of Documents, Exhibits, and Other Attachments, is also composed on one section. Section J is normally a one page list, but the FAR requires that the title, date, and number of pages for each attached document be given.[24] This is critical to avoid confusion because so many government documents go through several editions.

Part IV, Representations and Instructions, consists of three sections, K, L, & M. Upon award, the contracting officer does not include Part IV in the resulting contract but retains it in the contract file. Award, however, often incorporates section K in the contract even though not physically attached.[25] Thus, substantive requirements must not be imposed in sections L & M and should not be included in section K.

Section K is Representations, Certifications and Other Statements of Offerors. This is the third and final section that the offeror must complete. Here the bidder will certify its status (small business, woman owned, regular dealer, corporation, parent company, not debarred, etc.), its manner of performing (equal employment, Buy American, clean air and water), and how its bid was prepared (independent price determination, contingent fee representation and agreement). False certification are prosecutable as false statements under 18 U.S.C. § 1001 (1982).[26]

Section L is the instructions, conditions and notices to the offerors—essentially, how the offeror should prepare and format its offer. If it is an IFB, the section is usually small—frequently containing just the provisions of FAR § 14.201–6. Negotiated procurements require much more extensive instructions. The starting point is the provisions set forth in FAR § 15.407. After that, section L should explain how the offeror should submit its offer in a manner conducive to evaluation. For example, in formal source selection processes, the offeror might be required to submit different volumes dealing with technical, management, quality, and cost proposals. Section L should not contain matters not needed for evaluation or some other pre-award purpose.

Remember that substantive requirements must not be imposed in section L. An offeror should not discover in section L, for example, that a fire safety or mobilization plan is required. These should be listed in section C.

As in section I, many of the provisions in section L may be incorporated by reference, but others must be set out in full; for example, the provision advising bidders of the availability of certain publications.[27] In negotiated contracts, section L must also contain FAR § 52–216–01 which advises what type of contract the government expects to award. That provision should be consistent with the format in section B.

Section M is the evaluation factors for award. In IFBs it is normally very short because the evaluation criteria are limited and specific.[28] Frequently the only provision will be "Contract Award—Sealed Bidding,"[29] although "Evaluation of Bids for Multiple Awards,"[30] "Evaluation of Options,"[31] or "Progress Payments Not Included"[32] may also be appropriate.

In negotiated procurements, even for firm fixed price contracts, the evaluation factors may be much more elaborate.[33] Section M should state the evaluation factors and their relative importance.[34] This section corresponds to section L; for example, section M should not discuss how quality control will be evaluated if section L did not mention it.

Technical exhibits follow. In service contracts, one typical exhibit is the Performance Requirement Summary (PRS). The PRS is addressed in OFPP Pamphlet No. 4 and its preparation is fully detailed in Chapters 3 and 4 of that publication. A full explanation of the PRS is beyond the scope of this article.

The PRS should make it clear that it is not the government's sole remedy for poor performance. It is in addition to other contractual remedies such as those expressed in the inspection of services and default clauses. Consequently, it is not necessary for the PRS to list verbatim every step of every task. It should, however, discuss how or if reperformance of an unsatisfactory task will be handled, *i.e.*, will it be allowed and if so, will any deductions be made?

Closely allied to the PRS is the Quality Assurance Surveillance Plan also addressed in OFPP Pamphlet No. 4. The plan, however, is for information purposes only and is not part of the contract.

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[24] FAR §§ 14.201, 15.406–4.

[25] FAR § 14.201–1(c). Negotiated contracts requiring a bilateral award document shall incorporate section K by reference in the signed document. FAR § 15.406–1(b).

[26] *See* FAR § 52.214–4.

[27] FAR § 52.210–2.

[28] *See* FAR §§ 14.407–1(a), 14.201–8.

[29] FAR § 52.214–10.

[30] FAR § 52.214–22.

[31] FAR § 52.217–5. *See* FAR § 17.208 for other possibly appropriate evaluation of option provisions.

[32] FAR § 52.232–15.

[33] The subject of evaluation factors can be mind-numbing. For a thorough discussion, see Babin, *Federal Source Selection Procedures in Competitive Negotiated Acquisitions*, 23 A.F. L. Rev. 318 (1982–1983).

[34] FAR § 15.605(e).

Another frequently used technical exhibit is a detailed list of the government furnished property. This is especially important in commercial activities contracts when the amount of GFP is substantial. If the contractor is required to submit data, forms and other reports, then a contract data requirements list[35] may also be an exhibit.[36]

In contracts to which the UCF applies, the FAR requires that the order of precedence clause be used.[37] That clause states that any inconsistency shall be resolved by giving precedence in the following order: the schedule (excluding the specifications), *i.e.*, Part I except section C; representations and other instruction, *i.e.*, Part IV; contract clauses, *i.e.*, part II section I; other documents, exhibits and attachments, *i.e.*, part III, section J; the specifications, *i.e.*, section C.

Construction Contracts

While construction contracts need not follow the UCF, much of what has been discussed is equally applicable.

Construction contracts are governed by FAR Part 36; however, the corresponding DFAR and AFARS parts are extremely important.

One difference is apparent. Construction contracts expected to equal or exceed $100,000 are required to have pre-solicitation notices.[38] These forms describe the solicitation in sufficient detail to stimulate the interest of the greatest number of prospective bidders.

SF 1442 is the solicitation, offer and award form for construction contracts. The form is self explanatory, but some items need highlighting. Unlike other IFBs, construction solicitations need only provide a "sufficient time for bid preparation."[39] Block 11 states when the contractor shall begin and complete performance. It will frequently reference a required clause concerning commencement, prosecution, and completion.[40] Make sure the block and clause agree. Block 13B concerns offer guarantees which are governed by FAR § 28.101–1. Block 13D sets the minimum bid acceptance period. Blocks 14–20c constitute the offer portion of the form. Block 17 is where the contractor will submit its bid prices—the equivalent of section B in the UCF. If more space is needed, then a separate page is inserted. Block 18 concerns performance and payment bonds that are discussed at FAR § 28.102

Because the UCF does not apply, construction solicitations come in all arrangements. Sometimes the SF 1442 is first, and sometimes it is in the middle of the solicitation after the instructions to bidders. Whatever the order, the solicitation will contain instructions to bidders or offerors (similar to section L of the UCF); Representations and Certifications, (similar to UCF section K); General Provisions (similar to UCF section I); Special Provisions (UCF section H); Labor Standards Provisions;[41] and Schedule of Drawings and Technical Specifications (UCF section J). These selections are *similar* but not identical to the UCF section indicated. For example, the general provisions will normally contain clauses that in the UCF would be in section E, such as the inspection of construction clause.[42] Again, the matrices are indispensable.

Care must be taken in reviewing drawings. Certainly, the lawyer will not know if the dimensions are correct or if they accurately reflect the number of fire hydrants, but the drawing notes must be reviewed to ensure they are consistent with the remainder of the contract.

Conclusion

No article can identify every possible problem one might encounter in reviewing solicitations. This article has, however, provided the novice who is suddenly required to review a solicitation with a format to guide him or her through the document and facilitate his or her reference to the FAR and its subordinate regulations.

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[35] Dep't of Defense, Form No. 1423, Contract Data Requirements List (1 June 1969).

[36] *See* OFPP Pam. No. 4, para. 3–5; DFAR § 27.410–6.

[37] FAR §§ 14.201–7(d), 15–406.3(b). The clauses are at FAR §§ 52.214–29 and 52.215–33.

[38] FAR § 36.302. The notice is given on a SF 1417, Pre-Solicitation Notice (Construction Contract) (Apr. 1985).

[39] FAR § 36.303(a).

[40] FAR § 52.212–3.

[41] FAR provisions for the labor standards involving construction have not yet been issued. *See* FAR subpart 22.4. In the interim, the DAR clauses may be used. *See* DAR §§ 18–701 through 18–704.

[42] FAR § 52.246–12.

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The Constitutional Parameters of Hearsay Evidence

Lieutenant Colonel James B. Thwing
Trial Counsel Assistance Program

"The Sixth Amendment guarantee of confrontation . . . should not blind us to the reality that the question of the admission of hearsay statements . . . in a criminal . . . case, turns on due process considerations of fairness, reliability, and trustworthiness."[1]

There can be little doubt that, with the adoption of the Federal Rules of Evidence in 1975 and the Military Rules of Evidence in 1980, there has been a revolution in evidentiary engineering at the trial and the appellate levels of both federal and military courts. An especially fertile field for revolutionary change has been in the area of hearsay evidence and, in this regard, hearsay evidence admitted under those rules[2] providing for the admissibility of unique hearsay evidence not otherwise admissible under the traditional hearsay rules.[3] The unfortunate circumstance of a rising tide of criminal cases involving child victims has served as a primary foundation for the introduction of unique hearsay evidence. The continuing need for the introduction of this evidence, coupled with a growing trend by both trial and appellate courts to be receptive to its introduction, has in turn made way for the introduction of unique hearsay evidence in other types of criminal cases.[4] Ironically, while the continuing growth of case law in this area indicates that prosecutors have become skilled in meeting the technical

[1] United States v. Medico, 557 F.2d 309, 314 n.4 (2nd Cir.), *cert. denied*, 434 U.S. 986 (1977).

[2] Fed. R. Evid. 803(24) and 804(b)(5) and Mil. R. Evid. 803(24) and 804(b)(5).

[3] Traditional hearsay rules include dying declarations and declarations against penal interests, for example.

[4] United States v. Inadi, 106 S. Ct. 1121 (1986); United States v. Powell, 22 M.J. 141 (C.M.A. 1986).

requirements exacted by the "new" rules of evidence, several recent opinions by the Court of Military Appeals[5] and the Supreme Court[6] reveal that these successes may very well be blinding prosecutors to an even more necessary understanding of the constitutional requisites of confrontation embraced in the sixth amendment that coexist with these rules. These cases offer a profitable pause in the growth of evidentiary law surrounding hearsay evidence.

This article will take advantage of this "pause" to focus briefly on the history of the sixth amendment as it relates to the rudimentary rights of confrontation and how the United States Supreme Court has dealt with issues surrounding hearsay evidence and the sixth amendment confrontation clause. It will discuss the guidelines the Supreme Court has established in this area and the effect these guidelines have upon the admissibility of hearsay evidence as it has developed since the adoption of the Federal and Military Rules of Evidence. This discussion will provide military prosecutors with a vantage point for understanding the constitutional underpinnings of hearsay evidence and a basis for introducing hearsay evidence at trial that satisfies both the rules of evidence and the desires of the constitution in this important area.

Confrontation and Hearsay: The Development of a Framework

Despite the sixth amendment's requirement that a defendant in a criminal prosecution "be confronted with the witnesses against him,"[7] the Supreme Court has not found it easy to determine to what extent this constitutional right is applied to an accused where hearsay evidence has been admitted as substantive evidence of the accused's guilt in a criminal proceeding. Indeed, in *California v. Green*,[8] Justice Harlan observed that all of the previous decisions of the Court had "left ambiguous whether and to what extent the Sixth Amendment 'constitutionalize[d]' the hearsay rule of the common law."[9] Justice Harlan also observed that a historical review of the intent of the Framers of the Constitution offered "very little insight into the scope of the Sixth Amendment Confrontation Clause,"[10] particularly regarding its applicability to hearsay evidence. In his own analysis, Justice Harlan viewed the confrontation clause as a means to "constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"[11] and found that the Framer's intent, especially with regard to hearsay evidence, "anticipated it would be supplemented, as a matter of judge-made law, by prevailing rules of evidence."[12] Ultimately, according to Justice Harlan, this meant that the confrontation clause was confined to an "availability rule, one that requires the production of a witness when he is available to testify."[13] This view, according to Justice Harlan, was confirmed by the Court's precedents that had recognized the dying declaration exception "which dispenses with any requirement of cross-examination"[14] and the Court's precedents which refused to make an exception for prior recorded statements, "taken subject to cross-examination by the accused, when the witness is still available to testify."[15] Interestingly, however, in *Dutton v. Evans*,[16] a case decided six months after *Green*, Justice Harlan amended his earlier views of the confrontation clause, concluding that:

> If one were to translate the Confrontation Clause into language in more common use today, it would read: "In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him." Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence. The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay.[17]

Justice Harlan also changed his position regarding the issue of availability of the declarant, observing that:

> Nor am I now content with the position I took in concurrence in *California v. Green* . . . that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so—in other words, to produce available witnesses. . . . A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant.[18]

These disparate views of Justice Harlan are indicative of the real problems the Supreme Court has encountered in assessing the constitutionality of hearsay evidence and actually characterize two rationales variously pursued by the Court in resolving issues arising in this regard: first, that the confrontation clause was a rule of necessity requiring that a declarant must be produced in court; or second, that the confrontation clause was a rule of preference requiring that a declaration be subject to cross-examination. The early precedents of the Court set the standard for the later development of these divergent themes.

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[5] United States v. Cokeley, 22 M.J. 225 (C.M.A. 1986); United States v. Cordero, 22 M.J. 216 (C.M.A. 1986).

[6] Lee v. Illinois, 106 S. Ct. 2056 (1986).

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

[8] 399 U.S. 149 (1970).

[9] *Id.* at 174 (Harlan, J., concurring).

[10] *Id.* at 175.

[11] *Id.* at 179.

[12] *Id.*

[13] *Id.* at 182.

[14] *Id.*

[15] *Id.* at 182–83.

[16] 400 U.S. 74 (1970).

[17] *Id.* at 95 (Harlan, J., concurring).

[18] *Id.* at 95–96.

In *Mattox v. United States,*[19] the Court was faced with determining whether the prior recorded testimony of two witnesses since deceased was properly admitted against the accused at his second trial. The accused was charged with murder. The prosecution established that at his first trial the accused was fully availed of the opportunity to cross-examine the two witnesses, that their testimony had been properly transcribed, and that the witnesses had died since the accused's first trial. The trial court then permitted the reading of the witnesses' former testimony into evidence and the accused was subsequently convicted. Before the Supreme Court, the accused argued that he had been denied his sixth amendment right to confront the witnesses against him. In assessing the accused's complaint, the Court found with respect to the confrontation clause that its "primary object" was to prevent the use of "deposition or *ex parte* affidavits" from being used against the accused "in lieu of a personal examination and cross-examination of the witness."[20] The Court also recognized, however, that this requirement was not without exception, stating that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[21]

Consequently, the Court determined that the testimony admitted was similar to dying declarations, which courts had historically permitted into evidence because of the necessities of the case, the prevention of manifest injustice, and the trustworthiness of such declarations. The Court found that because the accused in *Mattox* once had the opportunity to confront the witnesses and subject them to cross-examination, the substance of the confrontation clause at his second trial had been preserved.[22]

Five years later, however, in *Motes v. United States,*[23] the Supreme Court held that it was error to admit the former testimony of a prosecution witness who testified and was subject to cross-examination by the accused at a preliminary hearing. The basis for this holding was that the declarant's unavailability at the accused's trial was found to be due to the government's negligence in allowing him to escape from custody and that, under these conditions, the accused's right to confrontation had been impermissibly denied. The Court's holding in this regard demonstrated a departure from its view of the confrontation clause announced in *Mattox*:

> We are unwilling to hold it to be consistent with constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution. We need not decide more in the present case.[24]

The Court followed the *Mattox* rationale in *Pointer v. Texas.*[25] In *Pointer,* the accused was convicted of robbery. At his trial, the prosecution was unable to produce the victim allegedly robbed by the accused. Instead, the prosecution introduced evidence to show that the victim (Phillips) had moved to a different state and did not intend to return. The prosecution then offered into evidence Phillips' testimony given at a preliminary hearing in the accused's case. Although the accused objected to the introduction of this former testimony, the trial judge overruled the objection "apparently in part because, as the judge viewed it, [the accused] had been present at the preliminary hearing and therefore had been 'accorded the opportunity of cross examining the witnesses there against him.' "[26] The Supreme Court found error. In doing so, the Court determined that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."[27] In supplying its basis for finding that the preliminary examination testimony of Phillips should not have been admitted against the accused, the Court observed:

> Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment.[28]

Thus, the Court again made clear that the primary object of the sixth amendment was cross-examination and amplified this view by further holding that the *opportunity* for cross-examination had been foreclosed by the unavailability of counsel at the accused's preliminary hearing.

One leading case establishing unavailability as a constitutional prerequisite to the admission of former testimony in a criminal case is *Barber v. Page.*[29] In *Barber,* the accused was convicted of robbery primarily because of the former testimony of an accomplice (Woods) who testified against the accused at a preliminary hearing. At Barber's trial, the prosecution sought to introduce the transcript of Woods' testimony against Barber into evidence on the basis that Woods was not available because he was incarcerated in a federal penitentiary in another state. Although Barber was represented by an attorney at the preliminary hearing,

[19] 156 U.S. 237 (1895).

[20] *Id.* at 242.

[21] *Id.* at 243.

[22] *Id.* at 244.

[23] 178 U.S. 458 (1900).

[24] *Id.* at 474.

[25] 380 U.S. 400 (1965).

[26] *Id.* at 402.

[27] *Id.* at 406–07.

[28] *Id.* at 407.

[29] 390 U.S. 719 (1968).

Woods had not been cross-examined by Barber's attorney. The Court's analysis of the accused's confrontation rights centered not on the issue of cross-examination, but on the issue of whether Woods was actually unavailable. Even though the trial court had determined under the applicable state law that Woods was unavailable,[30] the Supreme Court determined that, regardless of whether the showing of unavailability was sufficient to meet state evidentiary standards, it was insufficient to meet the requirements of the confrontation clause.[31] The witness was beyond the subpoena power of the state and unable to return voluntarily, but this was not a sufficient showing of constitutional unavailability. The Court stated that "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."[32]

In amplifying its position regarding the issue of availability, the Court discussed several methods that state authorities could have used to obtain the presence of Woods, including a writ of habeas corpus ad testificundum, and noted that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff."[33]

In its quest to develop a workable solution for constitutionalizing hearsay generally, the Supreme Court ably developed these divergent rationales. Rather than adding dimension to the confrontation clause in terms of common law hearsay, however, these rationales were really definitive only as to each case. Indeed, in recent years, the growing body of hearsay law being developed, especially by lower federal courts, has revealed at least three inherent difficulties surrounding the Supreme Court's analysis of the confrontation clause. First, the rationales developed by the Supreme Court have provided only conclusions regarding the requisites of the confrontation clause rather instructive dimension regarding its desirable goals. Second, because both rationales have developed from a single hearsay exception, former testimony, they provide little direction as to other hearsay exceptions. Finally, because the particular testimony in each case was central to the conviction, neither rationale resolved issues of confrontation as they arose where hearsay evidence was tangential to the accused's conviction. In recent years, the Supreme Court has seemingly recognized these problems and has struggled toward harmonizing the rationales of unavailability and cross-examination in an effort to produce general constitutional guidelines surrounding confrontation within the context of hearsay evidence.

Confrontation and Hearsay: Toward A Solid Foundation?

In 1970, the Supreme Court considered in *California v. Green*[34] the question whether a trial court had properly admitted a witness' testimony rendered in a preliminary hearing where the witness at trial testified that he could not recall facts that he has previously testified to at the preliminary hearing. This was an interesting issue before the Court, because the witness was available and could be cross-examined except for the fact that he evinced no present knowledge of facts he had earlier testified to in the preliminary hearing. This setting seemed to satisfy both rationales announced by the Court as to the application of the confrontation clause. In commenting on this unique situation, the Court observed:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.[35]

Then, noting that "the particular vice that gave impetus to the confrontation claim was the practice of trying defendant on 'evidence' which consisted solely of ex parte affidavits or depositions,"[36] the Court determined that the confrontation clause was not violated in *Green* because the declarant was present in court and was subject to full and effective cross-examination.[37] In arriving at this holding, and in recognition of the fact that it had developed different paths in assessing the constitutionality of hearsay evidence, the Court also noted that it was not attempting to "map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements."[38] Even so, for the first time, the Court did set forth certain goals it deemed were established by the confrontation clause which could be used to give constitutional dimension to hearsay evidence. According to the Court, confrontation:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invested for the discovery of the truth"; (3) permits the jury that is to decide

[30] *Id.* at 720.

[31] *Id.* at 721.

[32] *Id.* at 724–25.

[33] *Id.* at 724.

[34] 399 U.S. 149 (1970).

[35] *Id.* at 156 (citations omitted).

[36] *Id.* at 157.

[37] *Id.* at 158.

[38] *Id.* at 162.

the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[39]

Six months after the *Green* decision, the Court was again asked to apply the confrontation clause to a question of the admissibility of hearsay evidence. In *Dutton v. Evans,*[40] the accused (Evans) was convicted of first degree murder of three Georgia patrolmen. He allegedly acted with two accomplices, Williams and Truett. At Evans's trial, Truett, who had been given immunity in exchange for his testimony against Williams and Evans, testified in specific detail concerning Evans's involvement in the murders. Apparently to substantiate this testimony, another witness, Shaw, was called to testify against the accused. Shaw was a fellow prisoner of Williams. Shaw testified that when Williams was returned to his cell after his arraignment on the murder charges, Shaw asked him: "How did you make out in court?"[41] Williams allegedly responded: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[42] Over objection, the trial court admitted this statement under the Georgia co-conspirator exception.[43] In a plurality opinion,[44] the Court held that this statement did not violate the accused's right of confrontation. Again reviewing its own historical precedents in this area, the Supreme Court observed that it was clear that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' "[45] In assessing the confrontation issue surrounding the admissibility of Shaw's statement concerning William's implicit identification of Evans as the perpetrator of the murders, the Court held that the "mission" of the confrontation clause had been met. The Court observed that there was no denial of the right of confrontation as to the question of identify raised by the Shaw's testimony because:

> First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identify and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. . . . Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. . . . His statement was spontaneous, and it was against his penal interest to make it.[46]

The Court defined these assessments as "indicia of reliability"[47] and found that they had been "widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."[48] It is interesting to note also that there were aspects of Shaw's testimony that the Court did not find present that aided the Court in approving its admissibility. For example, the Court found that the testimony of Shaw did not involve "crucial" or "devastating" evidence.[49] Further, the Court found that the testimony did not involve "the use, or misuse, of a confession made in the coercive atmosphere of official interrogation."[50] Nor did the Court find that the testimony involved "use by the prosecution of a paper transcript . . . a joint trial . . . [or] . . . the wholesale denial of cross-examination.[51]

Ten years after *Green* and *Dutton,* the Supreme Court attempted to further clarify the confrontation clause by constructing a two-part application of the clause. In *Ohio v. Roberts,*[52] the Court was faced with the issue of whether a trial court had improperly admitted into evidence rebuttal testimony in the form of former testimony. Roberts was charged, among other things, with the forgery of a check in the name of Bernard Isaacs. At a preliminary hearing in the accused's case, the accused called as a defense witness the Isaacs's daughter, Anita. She testified that she had permitted Roberts to use her apartment for several days preceding the date of the forgery offense. Anita refused to admit that she had given Roberts permission to use either checks or credit cards belonging to her parents, however. At Roberts' trial, he testified that Anita had given him her parent's checkbook and credit cards with the understanding that he could use them. The prosecution intended to call Anita as a rebuttal witness, but she failed to respond to five separate subpoenas issued by the prosecution. As a consequence, the prosecution sought and achieved admission of Anita's testimony at the preliminary hearing. In again reviewing the history of its precedents regarding the confrontation clause, the Court found that it had consistently attempted to accommodate the competing interests between the accused's right to confront adverse witnesses with the considerations of public policy and the necessities of the case first outlined in *Mattox v. United States.* As a result of this experience, the Court stated that "a general approach to the problem is

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[39] *Id.* at 158 (citations omitted).

[40] 400 U.S. 74 (1970).

[41] *Id.* at 77.

[42] *Id.*

[43] *Id.* at 78.

[44] Justice Stewart wrote the opinion, in which Chief Justice Burger and Justices Blackmun and White concurred. Justice Harlan filed a separate concurring opinion.

[45] *Dutton,* 400 U.S. at 89 (citing *Green,* 399 U.S. at 161).

[46] *Id.* at 88–89.

[47] *Id.* at 89.

[48] *Id.*

[49] *Id.* at 87.

[50] *Id.*

[51] *Id.*

[52] 448 U.S. 56 (1980).

discernible."[53] According to the Court, the confrontation clause "operates in two separate ways to restrict the range of admissible hearsay":[54]

> First, in conformance with the Framer's preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . . The second aspect operates once a witness is shown to be unavailable . . . [T]he Clause countenances only hearsay marked *with such trustworthiness* that 'there is no material departure from the reason of the general rule.' "[55]

In summarizing this analysis, seemingly taking into consideration that it had principally ignored the issue of "availability" which had been highlighted in both *Green* and *Dutton*, the Court observed that:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of *particularized guarantees of trustworthiness.*[56]

Using this analysis of the confrontation clause, the Court assessed the accused's claims that the introduction of Anita's preliminary testimony had deprived him of face-to-face contact with her at his trial, that the testimony itself was not based upon effective cross-examination, that it was inherently suspect because of Anita's possible motivation to avoid prosecution or "parental reprobation,"[57] and that the prosecution had failed "to lay a proper predicate for admission of the preliminary hearing transcript by its failure to demonstrate that Anita Isaacs was not available to testify in person at the trial."[58] The Court found that Anita's testimony at the preliminary hearing had been adequately challenged by the accused's counsel (albeit a different counsel than at his trial)[59] and, citing *Green*, that the transcript of the preliminary hearing demonstrated sufficient " 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' "[60] Noting that unavailability was the "basic litmus of [the] Sixth Amendment,"[61] the Court agreed that "the prosecution bears the burden of establishing this predicate."[62] In this latter regard, the Court determined that this predicate had been established by the prosecution as the result of its attempts to subpoena Anita on five separate occasions, and by its efforts in contacting Anita's parents in an attempt to enlist their help in obtaining either her whereabouts or her presence at trial. According to the Court, these efforts were sufficient to satisfy the "good faith effort" test it had established regarding the issue of unavailability announced in its decisions in *Barber v. Page* and *Mancusi v. Stubbs.*[63]

Confrontation and Hearsay: Application of the "Blueprint"

The Supreme Court has had the opportunity to apply the *Roberts* analysis in two recent cases. In *United States v. Inadi,*[64] the accused was convicted of conspiring to manufacture and distribute methamphetamine and other related offenses. At his trial, evidence of five telephone conversations between the accused and various participants alleged to have conspired with the accused and which had been lawfully intercepted and recorded were admitted into evidence and played for the jury. The trial court admitted the statements pursuant to Fed. R. Evid. 801(d)(2)(E),[65] finding that they were made by conspirators during the course of and in furtherance of the conspiracy. The accused objected to the admissibility of the tape recordings on the grounds that the statements did not satisfy Rule 801(d)(2)(E) and because there was no showing that the declarants were unavailable. The accused contended that at least one of the co-conspirator declarants (Lazaro) should be made available. Eventually, the co-conspirators' statements were admitted on the condition that the prosecution produce Lazaro. The prosecution subpoenaed Lazaro, but he failed to appear, claiming "car trouble."[66] After the accused renewed the motion to exclude the tape recordings, the trial court overruled the objection, noting that two of the other four co-conspirators had testified and that a third co-conspirator (Levan) was unavailable because he had asserted his fifth amendment privilege. In assessing whether the issue of the unavailability of Lazaro had any impact upon the question of the admissibility of the tape recorded conversations, the Supreme Court was faced with applying its previously developed *Roberts* analysis. Indeed, the Court granted *certiorari* in the *Inadi* case specifically to "resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator,

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[53] *Id.* at 65.

[54] *Id.*

[55] *Id.* (emphasis added) (citations omitted).

[56] *Id.* at 66 (emphasis added).

[57] *Id.* at 72.

[58] *Id.* at 74.

[59] *Id.* at 71–72.

[60] *Id.* at 73.

[61] *Id.* at 74.

[62] *Id.*

[63] 408 U.S. 204 (1972).

[64] 106 S. Ct. 1121 (1986).

[65] This rule is identical to Mil. R. Evid. 801(d)(2)(E).

[66] *Inadi,* 106 S. Ct. at 1124.

when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E)."[67]

At the inception of its holding, the Court specifically noted that *Roberts* had been interpreted by the lower appellate court as setting forth a " 'clear constitutional rule' "[68] mandating unavailability "before any hearsay can be admitted.[69] Responding to this view of *Roberts*, the Supreme Court revived its position, previously taken in *Green*, that it had not "sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions", ' "[70] and determined that "*Roberts* . . . does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause."[71]

Instead, the Court found that the *Roberts* unavailability analysis only applied to prior testimony and that *Roberts* "could not fairly be read to stand for the radical proposition that no out-court-statement can be introduced by the government without a showing that the declarant is unavailable."[72] In contrasting the nature of prior testimony with that of statements of co-conspirators, the Court noted that where a witness has once testified before trial and is again available to testify, the Confrontation Clause operates to favor "the better evidence" which is obtained by presenting to the trier of fact "live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant."[73] According to the Court, "there is little justification for relying on the weaker version";[74] in other words, the prior testimony. The Court found, however, that these principles do not apply to statements of co-conspirators because "such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court."[75]

It is interesting to note that the reliability of the co-conspirators statements was not at issue,[76] and the Court did not assess whether the taped conversations of the co-conspirators bore "adequate 'indicia of reliability' " as either a "firmly rooted hearsay exception"[77] or because the prosecution had otherwise established "particularized guarantees of trustworthiness."[78] Instead, relying on its previous holding in *Dutton v. Evans*, the Court merely affirmed the validity of the co-conspirator exception.[79]

Most recently, in *Lee v. Illinois*,[80] the Court reversed and remanded a murder conviction where it appeared that the accused's conviction had resulted from the prosecution's use of a non-testifying coaccused's confession. The accused was tried jointly with her boyfriend, Edwin Thomas, for the murders of her aunt and a close friend of the accused's aunt. The trial was held before a judge without a jury. The accused and Thomas chose not to testify. The trial judge agreed to consider the evidence separately as to each accused. During argument on the findings, however, the prosecution referred to Thomas's confession which, contrary to Lee's confession, pointed to certain facts which indicated that both Lee and Thomas planned to commit the charged murders. In rejecting Lee's assertion that she either acted in self-defense or under intense passion with regard to the murder charges, the trial judge accepted certain statements in Thomas's confession that directly disputed these assertions. On appeal, the state appeals court conceded that the trial court had considered Thomas's confession in finding Lee guilty but held that "since the defendant's confessions were 'interlocking' they did not fall within the rule of *Bruton v. United States*."[81]

Before the Supreme Court, the State of Illinois, relying on *Roberts*, argued that Lee's sixth amendment rights had not been violated because "Thomas was unavailable and his statement was 'reliable' enough to warrant its untested admission into evidence."[82] The Supreme Court held that it was not necessary to address the question of Thomas's availability because "Thomas's statement, as a confession of an accomplice, was presumptively unreliable and . . . did not bear independent 'indicia of reliability' to overcome that presumption."[83] In discussing the lack of reliability of Thomas's confession, the Supreme Court first returned to its holding in *California v. Green* and reaffirmed the "mechanisms of confrontation and cross-examination"[84] it had ascribed to the confrontation clause in that case. The Court found that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant

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[67] *Id.*

[68] *Id.* at 1125.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1126.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 1124 n.3.

[77] Ohio v. Roberts, 448 U.S. 56,66 (1980).

[78] *Id.*

[79] *Inadi*, 106 S. Ct. at 1129.

[80] 106 S. Ct. 2056 (1986).

[81] *Id.* at 2061. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that in a joint trial, the admission of a codefendant's extrajudicial statement that inculpated the other defendant violated the defendant's sixth amendment right to confront witnesses against him when the declarant chose not to testify.

[82] 106 S. Ct. at 2061.

[83] *Id.*

[84] *Id.* at 2062.

without the benefit of cross-examination."[85] Secondly, the Court demonstrated through a brief discussion of its related opinions on the issue of reliability of accomplice confessions that it had uniformly determined that such confessions were "presumptively unreliable."[86] Finally, the Court directly applied the second part of the *Roberts* two-part test in responding to the state's argument in holding that Thomas's confession neither fell within a "firmly rooted hearsay exception" nor was supported by a "showing of particularized guarantees of trustworthiness."[87] The Court found that the presumptions of unreliability of Thomas's confession were supported rather than rebutted because of the circumstances under which it was obtained. This was because the evidence showed that "Thomas not only had a theoretical motive to distort the facts to Lee's detriment, but that he was actively considering the possibility of becoming her adversary."[88] The Court also found, contrary to the assertions by the state, that the confessions of Lee and Thomas were not interlocking, because there was a agreement at vital points in the two confessions. Accordingly, this was further evidence demonstrating a lack of reliability of Thomas's confession. In this regard, the Court held that "when the discrepancies between the statements are not insignificant, the codefendant's confessions may not be admitted."[89] Consequently, the Court stated that "[w]e are not convinced that there exist sufficient 'indicia of reliability,' flowing from either *the circumstances surrounding the confession* or the 'interlocking' character of the confessions, to overcome the weighty presumption against the admission of such *uncross-examined evidence.*"[90]

It is questionable whether the Court has determined to limit the rationale of "unavailability" established in *Roberts* as a threshold test in determining whether hearsay evidence satisfies the confrontation clause to former testimony.[91] As a result of its holding in *Inadi,* this seemed to be the case. It may also be argued, however, that because both the majority and the dissent in *Lee* assumed that the unavailability prong of *Roberts* applied to the analysis of the constitutionality of the accused's conviction, the *Roberts* two-part rationale still bears some vitality.

Confrontation and the Hearsay Rules: Reworking the "Blueprint"

There is no question that the *Roberts* rationale, especially with regard to the issue of availability, appears to conflict with Federal and Military Rule of Evidence 803[92] and their respective twenty-four exceptions. This is so because, as is inferred by Federal and Military Rule of Evidence 803, none of the exceptions identified under these respective rules depend upon the availability of the declarant.[93] A direct constitutional collision is avoided by the introductory wording of Fed. R. Evid. 803, which like Mil. R. Evid. 803 does not state that evidence satisfying an exception is admissible, but that it is "not excluded by the hearsay rule."[94] Furthermore, as the hearsay rules outlined under both Federal Military Rule 804 require a showing of unavailability of the declarant, there would appear to be no facial conflict with the *Roberts* rationale as to unavailability.[95] Even so, the issue of whether the prosecution has fully established, consistent with the requirements of the Supreme Court's *Barber-Mancusi* line of cases, that the declarant *is* unavailable despite "good faith" efforts to secure his or her presence at trial has been a matter of continuing concern of the appellate courts.[96] Interestingly, however, even after the Supreme Court's decision in *Roberts,* both federal and military appellate courts, contrary to the implications contained in *Inadi,* have refrained from construing the *Roberts'* two-part rationale as a rigid test for admitting hearsay evidence. Instead, these appellate courts have regularly construed *Roberts* as part of, rather than an exception to, the continuum of case law developed by the Supreme Court. This more "flexible" approach concerning the *Roberts* two-part rationale probably stems from the vantage points achieved by the appellate courts in being exposed to a broader range of hearsay evidence and in developing a necessary practical balance between hearsay law and the Constitution that would allow growth in the law of hearsay as well as certainty and regularity in the standards for the admission of hearsay evidence. Much of this exposure and development in federal appellate courts preceded *Roberts,* providing both for the resolution of the constitutional issues and for the subsequent flexible application of the *Roberts* two-part rationale. A classic example and model approach towards ameliorating the issues of the confrontation clause and hearsay evidence under the "rules" prior to *Roberts* is seen in *United States v. Medico.*[97]

In *Medico,* the accused was convicted of bank robbery. One facet of the evidence that led to his conviction was the testimony of William Carmody, an employee of the bank at the time it was robbed. He testified that about five minutes

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 2064.

[89] *Id.* at 2065.

[90] *Id.* (emphasis added).

[91] It should be noted that both Fed. R. Evid. and Mil. R. Evid. 804(b)(1), the "former testimony" exception, require that the declarant be unavailable.

[92] The text and outlined exceptions of Fed. R. Evid. 803 are identical to Mil. R. Evid. 803.

[93] Both Rules provide that its exceptions to the hearsay rule are not excludable "even though the declarant is available as a witness."

[94] The Advisory Committee's note to article VIII of the Federal Rules of Evidence states:

> In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.

Fed. R. Evid. art. VIII, advisory committee note.

[95] Both Fed. R. Evid. 804 and Mil. R. Evid. 804 contain separate provisions for the affirmative establishment of unavailability.

[96] *See, e.g.,* United States v. Crockett, 21 M.J. 423 (C.M.A. 1986).

[97] 557 F.2d 309 (2nd Cir. 1977).

after two men entered the bank, robbed it, and fled, he was locking the door when a customer began knocking on the door. According to Carmody, the customer (whose name was not known to Carmody) began to relay information through the door from another man who was sitting outside in a car. The information relayed to Carmody was the description and license number of the getaway car. At the trial, neither the bank customer nor the other man was present. The description of the car provided to Carmody, which he wrote down, was introduced into evidence along with testimony from another witness who testified that the license number and description of the car matched a car he had seen the accused drive. The trial court permitted the introduction of this evidence under Fed. R. Evid. 804(b)(5).[98] On appeal, the accused maintained that the admission of the evidence was in violation of his sixth amendment right to confrontation. The court of appeals disagreed. The court noted first, that "the government had made serious efforts to locate the two witnesses so that they could testify in person,"[99] and second, that, but for the failure to identify the bystander who had first communicated the information, "the testimony [met] all the specific requirements as a present sense impression under Rule 803(1) under which a hearsay statement will not be excluded even though the declarant is available."[100] Additionally, the court found, in construing "the legislative purposes which the residual exception was designed to achieve,"[101] that the evidence was clearly brought within the ambit of Rule 804(b)(5) because it contained several factors that contributed to the reliability of Carmody's testimony: the information was communicated by percipient witnesses; the time frame for the transfer of information was brief; the likelihood of inaccuracy was small; and the possibility of speculation or fabrication was not present.[102] Thus, the Court, without labeling its approach or forecasting its analysis as a "rationale" for establishing constitutional compliance for hearsay evidence, had accomplished what was envisioned by the Supreme Court in *Roberts* as a preferred approach in establishing the constitutional limits of hearsay evidence.

Federal cases subsequent to *Roberts* continue to reflect a similar careful, yet flexible, approach in assessing the constitutional implications of hearsay evidence. An example of this approach is seen in *United States v. Simmons.*[103]

In *Simmons,* the accused was convicted on two counts of possessing firearms after being previously convicted of a felony in violation of a federal statute which prohibited a convicted felon from receiving, possessing, or transporting in commerce or affecting commerce any firearm.[104] At trial, the prosecution introduced two Bureau of Alcohol, Tobacco, and Firearms (ATF) trace forms in order to prove the interstate commerce requirement of the offenses. The information on these forms showed that the firearms which the accused had allegedly sold to a state sporting goods store were manufactured outside of the state and had been shipped to the state in which the accused resided. At trial and on appeal the accused asserted that the forms violated the hearsay rule and that he had been denied his sixth amendment right to confront the witnesses against him. The Court of Appeals for the Fourth Circuit disagreed. The court found that although the ATF forms were not admissible under the public records exception to the hearsay rule (Fed. R. Evid. 803(6)) because the forms were neither made for nor kept in the regular course of business, they were admissible under Rule 803(24) because they were more probative than any other evidence that could be reasonably procured as "it was not reasonable to require the government to bring in the record custodians from different parts of the country to prove this simple fact," and there was "no reason for the manufacturers of these weapons to falsify the entries on the routine ATF forms."[105] The court concluded that the forms thus had "circumstantial guarantees of trustworthiness, equivalent to other hearsay exceptions under Rule 803."[106] In directing its consideration to the accused's claim that he had been denied his sixth amendment right to confrontation, the Court fully examined the *Roberts* two-part rationale. Recognizing that the confrontation clause "normally requires a showing of unavailability and a showing that the statement bears 'indicia of reliability,' "[107] the court did not deem the *Roberts* opinion to be conclusive as to the *type* of evidence represented by the ATF forms. Indeed, after analyzing other Supreme Court opinions, including *Mattox, Green,* and *Dutton,* the court concluded that "[t]he policy interest in minimizing expense and delay, to which the trial court alluded below when it admitted the ATF forms must be balanced against the utility of the Confrontation Clause to the defendant."[108]

The court found that this "policy interest" analysis stemmed from the *Dutton* decision because there the Supreme Court had "found that the utility of trial

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[98] Both Federal and Military Rule of Evidence 804(b)(5) require pretrial notice to the defense and provide that:

> A statement not specifically covered by any of the [preceding exceptions underlying 804] but having *equivalent circumstantial guarantees of trustworthiness,* [is no excluded by the hearsay rule if the declarant is unavailable as a witness] 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.

[Emphasis added.]

[99] *Medico,* 557 F.2d at 315.

[100] *Id.*

[101] *Id.* See S. Rep. No. 1277, 93d Cong., 2d Sess. 19, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7065–66.

[102] *Medico,* 557 F.2d at 315–16.

[103] 773 F.2d 1455 (4th Cir. 1985).

[104] 18 U.S.C. App. § 1202(a)(1) (1982).

[105] *Simmons,* 773 F.2d at 1459.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 1460.

confrontation was so remote that it did not require the prosecution to produce a seemingly available witness."[109] Furthermore, the court found that "the simple, factual statements presented on the forms, particularly when considered in light of the legal requirement for manufacturers to maintain firearms records, exhibit an exceptionally high degree of reliability."[110] According to the court, this fact, coupled with the testimony of an ATF agent who described the procedures whereby he obtained the information on the forms, met "the 'indicia of reliability' prong [of *Roberts*]."[111]

Although the military cases in this regard are of post-*Roberts* vintage, as the result of the adoption of the military rules in 1980, have applied the *Roberts* two-part rationale in a similarly careful and flexible fashion. *United States v. Hines*[112] is a representative example.

In *Hines*, the accused was charged with committing various indecent, lewd and lascivious acts with, and sodomizing his dependent stepdaughters. At the accused's trial, the victims and their mother were called to testify against the accused. Although they were sworn, they refused to testify other than to state their respective reasons for not testifying. The accused's wife refused to testify because it was "in the best interests of my husband and family."[113] One of the victims refused to testify because she loved her father and wanted him "to stay in the house."[114] As a result, the prosecution offered into evidence prior sworn statements by the witnesses that directly implicated the accused in the charged offenses. After the trial judge heard evidence that established the circumstances surrounding the making of the earlier sworn statements made by each of the witnesses, he admitted them into evidence pursuant to Mil. R. Evid. 804(b)(5). After a sweeping analysis of Supreme Court opinions predating the Federal counterpart to Rule 804(b)(5), the *Roberts* opinion, the legislative underpinnings of the Fed. R. Evid. 804(b)(5), and federal case law construing that rule, the Air Force Court of Military Review concluded that the trial judge had not erred in admitting the prior sworn statements of the victims and the accused's wife into evidence. Rather than viewing *Roberts* as an impediment to this holding, the Air Force court determined that *Roberts* actually dispelled the undermining effect that *Dutton* seemed to have on the admissibility of hearsay evidence under Fed. R. Evid. 804(b)(5). The Air Force court observed that

> [T]he elucidation of *Dutton*, provided by the Supreme Court in *Roberts*, knocked the underpinnings out from under the restrictive interpretation these [federal circuit] courts had attempted to impose on the residual hearsay exception. Soon, all the circuits with the exception of the 2nd, 6th, and D.C., citing the incisive pre-*Roberts* decision of the 4th Circuit in *United States v. West* [574 F.2d 1131, 1137–38 (4th Cir. 1978)] recognized the coextensive nature of the term "equivalent circumstantial guarantees of trustworthiness" from Fed. R. Evid. 804(b)(5) with the term "indicia of reliability" standard set by the Supreme Court for compliance by the Confrontation Clause.[115]

Accordingly, the Air Force court, noting the obvious fact that the witnesses were not available for cross-examination, determined, nevertheless, that there were eleven separate[116] "circumstantial guarantees of trustworthiness" of the prior sworn statements that established their admissibility both under Mil. R. Evid. 804(b)(5) and the Constitution.

In *United States v. Quick*,[117] the Army Court of Military Review was compelled to make a similar assessment of the constitutional implications of the confrontation clause concerning residual hearsay introduced pursuant to Rule 803(24). In *Quick*, the accused was charged with committing lewd and lascivious acts and taking indecent liberties with his three-year-old daughter. The evidence introduced against the accused included out-of-court statements made by the accused's daughter to her babysitter. These statements evolved when the daughter complained that her "bottom hurt."[118] After the babysitter queried the accused's daughter whether "she had gotten sand inside her clothing or had rubbed it against her riding toys,"[119] the daughter responded that neither of these things had happened; rather, that "My Daddy does."[120] When further questioned by the babysitter as to what she meant, the daughter stated, "He rubs my bottom."[121] Further questioning by the babysitter resulted in the accused's daughter stating that her father used his fingers and that her mother did not know about these things because her father had instructed her not to tell anyone about it.[122] At trial, the accused objected to the admission of these statements. The prosecution, noting that the daughter was present and could be called as a witness, maintained that calling the daughter as a witness would be futile because she "would [be] unexpressive and inarticulate."[123] The accused's defense counsel also apparently agreed as he declined an

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[109] *Id. See Dutton*, 400 U.S. at 88–89.

[110] *Id.*

[111] *Id.*

[112] 18 M.J. 729 (A.F.C.M.R. 1984).

[113] *Id.* at 742.

[114] *Id.*

[115] *Id.* at 735. (citations omitted).

[116] *Id.* at 741–43.

[117] 22 M.J. 722 (A.C.M.R. 1986).

[118] *Id.* at 723.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 725.

[123] *Id.*

opportunity to have the daughter brought to the court and be subjected to cross-examination.[124] Even so, the prosecution argued that the statements made by the daughter to her babysitter "bore sufficient indications of trustworthiness to be admissible under Military Rule of Evidence 802(24)."[125] Both the trial judge and the Army Court of Military Review agreed.

The Army court recognized that assessing the admissibility of the daughter's statements required a two-fold analysis: an analysis of the admissibility of the evidence in terms of the specific hearsay exception believed to provide a basis for its admissibility; and a determination whether the absence of the declarant from the courtroom "raise[d] the issue of denial of confrontation."[126] After determining that a number of factors underlying the making of the statements established an "indicia of reliability" sufficient to satisfy the requirements of Mil. R. Evid. 803(24),[127] the Army court moved to an analysis of the confrontation issue. At the outset, the Army court noted that the accused had been given an opportunity to cross-examine the accused's daughter, and citing the Supreme Court's recent decision in *Delaware v. Fensterer*,[128] observed that for confrontation purposes it is important that the accused has " 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' "[129] Going further in its analysis, taking into consideration the constitutional parameters of confrontation outlined in the *Roberts* two-part rationale, the Army court held that "under the circumstances the government was not required to show availability."[130] Consistent with the manner in which other appellate courts have applied *Roberts*, the Army court applied *Roberts* in a flexible fashion. Noting that the Supreme Court had established a rule of "necessity" requiring the prosecution to ordinarily either produce or demonstrate the unavailability of a declarant, the Army court also observed that "demonstration of unavailability is not always required."[131] Indeed, the Army court noted that the *Roberts* two-part rationale was built, in part, on the Supreme Court's prior holding in *Dutton* which had recognized that " 'the utility of trial confrontation [can] be so remote' that the government need not be required to produce even a seemingly available witness."[132] According to the Army court, "[t]his *principle* . . . [was] . . . significantly developed by the [Supreme] Court in its recent decision in *United States v. Inadi*."[133] Finding that the Supreme Court in *Inadi* had determined that statements of coconspirators derive their evidential value from the context in which they are made as opposed to their exposure to cross-examination at trial, the Army court determined that the statements of the accused's daughter achieved the same trustworthy value. In summarizing these views, the Army court observed that

> [A]ny testimony by [the accused's daughter] from the witness stand would likely have been inferior in evidentiary quality to her out-of-court statements since, first, the lapse of time would have affected her memory and, second, her motives for recounting accurate facts would be wholly dissimilar. Under these circumstances, it would make little sense to require the government to produce [the accused's daughter], since the utility of confrontation would have been negligible.[134]

Despite the relative ease with which these appellate courts have dealt with the *Roberts* two-part rationale, two recent opinions of the Court of Military Appeals seem to justify the Supreme Court's alarm in *Inadi* regarding the extent to which *Roberts* may be applied.

In *United States v. Cokeley*,[135] the accused was charged with the attempted rape of Mrs. Kathleen Grace, the dependent wife of a soldier. Shortly after the offense was reported, the prosecution, anticipating that Mrs. Grace would be leaving the area due to her husband's pending discharge from the Army, requested and was granted the opportunity to depose Mrs. Grace. Although the accused waived his right to be present at the deposition, his appointed defense counsel was present and cross-examined her. The deposition was videotaped. She was not present at trial because she was unable to travel due to her pregnancy, although the prosecution had subpoenaed her. Accordingly, the prosecution sought to introduce the deposed testimony of Mrs. Grace. The defense objected and requested a continuance of the trial. The request for continuance was reluctantly granted by the trial judge. Nearly one month later, the trial again commenced. Again Mrs. Grace was not present because she was medically unable to travel as she was recovering from an infection resulting from a Caesarean section performed on her between the original trial date and the commencement of the trial. Again, the defense requested a continuance, maintaining that Mrs. Grace's in-court testimony was crucial, reiterating its previous position that cross-examination of Mrs. Grace was necessary "in light of information that had developed at the Article 32[136] . . . investigation."[137] The trial judge denied the request for continuance and ruled that Mrs. Grace was unavailable

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[124] *Id.*

[125] *Id.* at 723.

[126] *Id.* at 724.

[127] *Id.*

[128] 106 S. Ct. 292 (1985).

[129] *Quick*, 22 M.J. at 725.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 727 (emphasis added).

[134] *Id.*

[135] 22 M.J. 225 (C.M.A. 1986).

[136] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982).

[137] *Cokeley*, 22 M.J. at 226.

to testify. The videotaped deposition was then admitted into evidence and played to the members of the court. In viewing this decision through the requirements of the confrontation clause, as interpreted by the Supreme Court in *Barber*, *Roberts*, and *Inadi*, the Court of Military Appeals held that the military judge had abused his discretion in denying the accused's request for a continuance. In analyzing Mrs. Grace's potential testimony, the Court of Military Appeals found that it was neither merely cumulative nor of a minor nature but was "absolutely necessary to prove that a crime had been committed and to describe the assailant."[138] The importance of Mrs. Grace's testimony therefore heightened the issue of her unavailability at trial. Using the general test of unavailability outlined in *Roberts* and specifically defined in Mil. R. Evid. 804(a)(4),[139] the court concluded that

> The military judge must carefully weigh all the facts and circumstances of the case, keeping in mind the *preference for live testimony.* Factors to be considered include the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay.[140]

The Court of Military Appeals held that the trial judge had erred because he seemingly "shifted the burden to the defense to demonstrate that the witness was unavailable to testify in court and that her presence was necessary."[141] According to the court, it was the government "who has the burden of demonstrating that a witness is unavailable when it seeks to introduce former testimony or a deposition."[142] The court also found that the trial judge "may have been laboring under the misconception that the witness was unavailable, at least in part, due to her aversion to appearing as a witness."[143] The court seemingly went beyond *Mancusi* and extended the good faith requirements of the government to produce witnesses who fail to appear at court. "[A] military judge is not powerless to compel the attendance of a reluctant civilian witness. Even if the witness will not voluntarily attend pursuant to the issuance of a subpoena, *a warrant of attachment can be served.*[144]

The prosecution burden for demonstrating unavailability of a witness was similarly stressed and, again, seemingly expanded by the Court of Military Appeals in *United States v. Cordero.*[145] In *Cordero*, the accused was charged with the murder of his infant son. The accused's son, prior to his death, was the victim of extensive physical child abuse by his stepmother. On the same day that Mrs. Cordero had been convicted in federal district court of committing "cruel and inhuman corporal punishment and injury"[146] upon the boy, the latter's death by accidental drowning was reported. Based upon observations of the body, investigators suspected that his death was not accidental. Mrs. Cordero was immediately suspected of murder. Accordingly, the accused, who was not under suspicion, was interviewed as a witness. His initial account of his son's death was deemed implausible by investigating officials, however. After subsequent inquiry, the accused implicated Mrs. Cordero in his son's death. Mrs. Cordero was then confronted with her husband's statement. In return, she maintained that the accused may have been responsible for his son's death. After repeated questioning, Mrs. Cordero remained firm in her account of the death. The accused was subsequently advised that he was a suspect and apprised of his wife's account of the details of the son's death. He rendered a self-incriminating statement. At trial, Mrs. Cordero was unavailable. The evidence showed that Mrs. Cordero was a German citizen and had returned to Germany following the initial investigation of the case. Although the prosecution had attempted to contact Mrs. Cordero in Germany, the attempts were unsuccessful. It also appeared, however, that the prosecution had been informed by Mrs. Cordero's civilian public defender that she would return to testify if the government would pay the cost of her transportation and grant her immunity. Even so, at a preliminary hearing set to consider the admissibility of Mrs. Cordero's pretrial statement, the trial judge ruled that the statement was admissible pursuant to Mil. R. Evid. 803(24), and that even though Mrs. Cordero was unavailable pursuant to Mil. R. Evid. 804(a)(5),[147] her sworn statement would have been admissible even if she would have been available.[148] The Court of Military Appeals summarily dispensed with this latter ruling, holding that it was error especially taking into consideration the various requirements of Mil. R. Evid 801(d)(1) and 804(b)(1). The court held in this regard, that:

> Considering the spirit of these provisions, it is hard to conceive that the drafters of the Military Rules of Evidence contemplated that an extrajudicial statement like [Mrs. Cordero'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 under the sixth amendment.[149]

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[138] *Id.* at 229.

[139] Mil. R. Evid 804(a)(4) defines unavailability to include situations where the declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

[140] *Cokeley*, 22 M.J. at 229 (emphasis added).

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* (emphasis added).

[145] 22 M.J. 216 (C.M.A. 1986).

[146] *Id.* at 219.

[147] Mil. R. Evid. 804(a)(5) defines unavailability to include situations where the declarant "is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or in the case of [804] (b)(2), (3), or (4), (the declarant's attendance or testimony) by process *or other reasonable means*" [emphasis added].

[148] *Cordero*, 22 M.J. at 220.

[149] *Id.*

In addition to this holding, the Court of Military Appeals also disagreed that Mrs. Cordero's statement was somehow admissible under any other hearsay exception. This was so, according to the court, because the underpinnings of Mrs. Cordero's statement were clouded by the interrogation techniques used by the investigators to obtain this statement. The court found that the statement itself was so much more the product of the interrogating agent than Mrs. Cordero that it deprived the factfinder of the basis for determining to what extent the statement contained the interrogator's input as opposed to Mrs. Cordero's own testimony. According to the court, "[t]o allow her extrajudicial statement to CID [Criminal Investigation Division] agents to be considered as evidence without any defense opportunity to cross-examine her simply does not conform to the requirements of the sixth amendment."[150]

Additionally, admitting that Mrs. Cordero's unavailability was not its primary concern,[151] the court, nevertheless carefully analyzed that aspect of the admissibility of her testimony. While agreeing that Mrs. Cordero was beyond the reach of process of the court-martial,[152] the court saw that Mrs. Cordero's offer to return from Germany in exchange for her transportation costs and a grant of immunity may have made her available "at least—for sixth amendment purposes."[153] In this regard, the court found that Mrs. Cordero's desire to be granted immunity, insofar as obtaining testimonial immunity from either state or federal authority *may* have required the prosecution to obtain and tender this offer because "it is easier to contend that an offer of [testimonial] immunity is included within the term 'other reasonable means' for purposes of Mil. R. Evid. 804(a)(5) and within 'a good-faith effort' for purposes of the sixth-amendment right of confrontation."[154] Otherwise, the court made it clear that the requirement of "a good-faith effort" did not compel military authorities to attempt to obtain transactional immunity from state prosecution for Mrs. Cordero if she was subject to prosecution.[155]

Because the Court of Military Appeals did not rely on the issue of Mrs. Cordero's availability to assess the admissibility of her pretrial statements, it is open to question whether its observations in this regard are now a matter of law or gratuitous supposition. Indeed, in view of the Supreme Court's holding in *Lee v. Illinois*, this discussion was not necessary. Nevertheless, taking into consideration the court's holding in *Cokeley*, decided the same day as *Cordero*, this discussion of availability must be seriously considered as an amplification of *Roberts*, especially regarding the extent to which the prosecutorial burden of "good-faith effort" can be construed by the defense when satisfaction of that burden is in issue at trial.

Conclusions

While the Supreme Court was warranted in *Inadi* in curtailing a rigid application of the two-part rationale of *Roberts*, it was unnecessary for the Court to confine the application of *Roberts* merely to former testimony. Indeed, the *Roberts* opinion continues to provide both prosecutors and trial judges with an effective framework for assessing the constitutionality of hearsay evidence within the context of the confrontation clause. Even so, the Court was quite correct in implying that this framework is not exclusive of its other opinions.

In order for prosecutors to make an effective application of *Roberts* and to take advantage of the prior opinions of the Court, that it is necessary to reverse the order of the two prongs of *Roberts*. That is, consideration of the evidence should first began with an assessment of whether the evidence bears "indicia of reliability." In defining the ultimate goals of the confrontation clause, the *Green* case gives adequate dimension to this term. These goals compel a prosecutor, in assessing hearsay evidence, to determine whether it is possible to adequately show that the evidence will provide the trier of fact with an adequate basis for judging the character and demeanor of the declarant, the ability of the declarant to accurately perceive facts, and the likelihood that the declarant accurately reported those facts. While it is arguable that the absence of the declarant will never allow the trier of fact to judge his or her character and demeanor, it is equally arguable that Mil. R. Evid. 806[156] provides that opportunity. A second assessment should include whether the evidence itself is "crucial," "devastating," or merely helpful. For example, both *Dutton* and *Simmons* clearly demonstrate that, absent the qualities of "crucial" or "devastating" value at trial, hearsay evidence may be admissible simply because, in balance, the ideal goals of the confrontation clause are overcome by the otherwise proven trustworthy nature of the hearsay evidence and the practical exigencies of the case. A third assessment of the hearsay evidence should involve determining whether it represents a type of evidence that is inherently suspect. Accomplice testimony, as typified by *Inadi*, or testimony that stems from official interrogation, as typified by *Cordero*, are examples of hearsay evidence that either require a clear and convincing demonstration of reliability or mandate the presence of the declarant in court. Consequently, it is at this juncture, the tension between whether the hearsay evidence is independently reliable or whether it requires the presence of the declarant to further establish its materiality, that the issue of availability arises.

Even if the hearsay evidence bears sufficient "indicia of reliability," however, the second prong of *Roberts*, availability of the declarant, must be considered. While the issue of the availability of the declarant cuts across each of the goals of the confrontation clause outlined in *Green*, its focal point

[150] *Id.* at 222.

[151] *Id.* at 221.

[152] *Id.* at 220.

[153] *Id.*

[154] *Id.* at 221.

[155] *Id.*

[156] Mil. R. Evid. 806 allows, when either a hearsay statement or a nonhearsay statement under Mil. R. Evid. 801(d)(2)(C), (D), or (E), are admitted into evidence, the credibility of the declarant to be attacked, and if attacked may "be supported by any evidence which would be admissible for those purposes if declarant had testified."

is cross-examination. Even though Professor John Wigmore has described cross-examination as the "greatest legal engine ever invented for the discovery of truth," [157] it is simply not the case that all hearsay is equally susceptible to testing by cross-examination. The *Quick*, *Simmons*, and *Inadi* cases demonstrate this fact. Furthermore, it is also clear from such cases as *Green* and *Hines* that the physical presence of the declarant in court does not necessarily equate to availability for cross-examination, although the reasons for this consequence are often compelling in terms of the reliability of the hearsay evidence. Consequently, a prosecutor must assess, and be prepared to demonstrate, that the nonavailability of the declarant *for cross-examination* at trial, notwithstanding the requirements of the hearsay rules themselves, would neither practically nor materially advance the goals of the confrontation clause within the *context* of the testimony. For example, accomplice testimony, which has been determined to be inherently suspect, may nevertheless aid the truth process even without cross-examination, particularly if *in context* with the facts it "interlocks" with other testimony that is subject to cross-examination. [158] Conversely, nothing, save the availability of the declarant for cross-examination in court, may permit the admissibility of such testimony even if it bears "indicia of reliability" if the context in which it is developed is itself suspect. The *Cordero* case typifies this fact. Under these circumstances, prosecutors must respond to their required burden of demonstrating a "good faith" effort to obtain the presence of the witness; not as a matter of obligatory concern but as a matter of dire necessity. It is in this regard, however, that the holdings in both *Cordero* and *Cokeley* should be understood to be limited to those factual settings in terms of the issue of availability. Both of the decisions are justified primarily because of the critical need for the presence of the declarants at trial. For prosecutors to be pressed to the outer limits of their "good faith" requirement in producing witnesses at trial to the point of near futility either by serving warrants of attachment, thereby risking inordinate delays in the trial, or at the behest of the ultimate desires of a witness to receive protection from prosecution, in the absence of a full consideration of the governmental interests regarding this issue without concomitant requirement on the part of the defense to demonstrate the substantial need for the personal presence of the witness is clearly beyond the Supreme Court's required burden of "good faith" as discussed in *Barber* and *Mancusi*.

Assessing the constitutional implications of hearsay evidence in this manner should provide prosecutors with ample advantage in satisfying not only an accused's sixth amendment right to confrontation but also compliance with the particular hearsay rule in issue. Admittedly, as indicated in *Hines*, establishing "equivalent guarantees of trustworthiness" as required by the residual hearsay rules (Mil. R. Evid. 803(24) and 804(b)(5)) may overlap the constitutional requirements of the sixth amendment. The process of analyzing hearsay evidence strictly from the standpoint of satisfying the hearsay rule is clearly dangerous, however, because the values contained in the hearsay rules and the accused's right to confrontation, while at times intersecting, do not in every instance necessarily overlap. By failing to recognize the gaps between these two aspects of law, prosecutors may win the battle but in the end lose the war and produce future battlefields.

[157] 5 J. Wigmore, Evidence § 1347, at 32 (rev. ed. 1974).

[158] United States v. Nutter, 22 M.J. 727 (A.C.M.R. 1986).

The Advocate for Military Defense Counsel

Forensic Reports and the Business Records Exception

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In the recent case of *United States v. Holman*, [1] the Army Court of Military Review was called upon to define the limits of the newly promulgated business records exception as applied to scientific and forensic reports. [2] In *Holman*, a forensic report that included the conclusions of a documents examiner was admitted as a business record exception to the rule against hearsay. The examiner concluded without comment that Holman authored the questioned documents. The defense objected to the admission of the forensic report, arguing the need to cross-examine the expert's qualifications, the procedures used, and whether the procedures were properly applied.

The government's success in having this forensic report admitted is a sign that prosecutors intend to use the new rule of evidence aggressively. The inclusion of forensic laboratory reports in Military Rule of Evidence 803(6) was probably intended to clarify the use of urinalysis and other chemical tests, but the rule as written creates the possibility that other forensic tests might be admitted using this procedure. This possibility was certainly underlying the advice

[1] CM 448359 (ACMR 23 Oct. 1986). In the case of United States v. Broadnax, SPCM 20956, Docket No. 52,700/AR, a petition was granted on the same issue at 21 M.J. 168 (C.M.A. 1985). The case was argued on 16 October 1986.

[2] Mil. R. Evid. 803(6).

given by the Trial Counsel Assistance Program (TCAP) concerning the new rule.[3] In their treatise on military evidence, Saltzburg, Schinasi, and Schlueter have noted that the rule will raise confrontation issues.[4] The *Holman* decision has not only confirmed their prediction but also has shown that, with TCAP guidance, this issue will become a source of active litigation.

In *Holman*, the military judge apparently relied upon *United States v. Porter*[5] for admission of the report of the handwriting examination as a business record. The use of the case was emphasized in the TCAP memo[6] and was offered as authority by the prosecutor in *Holman*. *Porter* permits judicial notice that a crime laboratory is a place where scientific methods are used, and the records of test results are recorded in the regular course of business.[7] The use of this authority in *Holman* expanded the scope of the term "scientific methods" and is not inconsistent with Mil. R. Evid. 803(6). *Porter* only involved chemical analysis of a substance suspected to be marijuana, however.[8] This limits its use to precedent for admission of similar test reports. This limitation is apparent in the *Porter* court's explicit reliance on *United States v. Vietor*.[9]

Vietor also involved chemical analysis of a substance suspected of being marijuana.[10] Chief Judge Everett wrote that the issue presented was not whether laboratory reports were admissible as *sui generis* business records, but that, "the real issue in the case concerns the possible violation of the accused's Sixth Amendment rights—the right to have compulsory process for obtaining witnesses."[11]

By its nature, any exception to the rule against hearsay will tend to infringe upon an accused's right to confrontation. The business record exception as applied in *Porter* and *Vietor* is consequently limited to those cases where the Court of Military Appeals was satisfied that the work of a chemist could be admitted without routinely being subjected to cross-examination. Under the facts of *Porter* and *Vietor* the court has determined that the conflict between an accused's right to confrontation and the admission of these specific types of hearsay reports was not so severe as to preclude their admission. This conclusion was explained in *United States v. Strangstalien*. "This Court has earlier expressed the view that a chemist—even one in a governmental laboratory—does not perform his duties principally with a view to prosecution. . . . He does no more than seek to establish an intrinsically neutral fact, the identity of the substance itself."[12]

The tests in *Porter*, *Vietor* and *Strangstalien*, chemical analyses of unknown substances, were approved as business record hearsay exceptions because they were judicially neutral. The objective quality of such chemical tests renders them neutral. The challenge is to determine what scientific methods produce results that are judicially neutral. In litigation, this means balancing an accused's right to confrontation against the objective or neutral quality of a specific test.

The new promulgation of Mil. R. Evid. 803(6) has expanded the range of scientific evidence that might be admitted, and has created the need for redefinition of the relationship between the sixth amendment and hearsay evidence. Litigating this relationship will require resolution of the conflict between an accused's right to confrontation with use of hearsay. This will be especially true when the government explores the leading edge of forensic science. New scientific methods or tests that do not consistently produce hard objective results are certain to be challenged by astute litigators. When resolving such controversies, it was apparently Congress' intention that an accused's right to confrontation be given deference.[13]

In analyzing Mil. R. Evid. 803(6), Saltzburg Schinasi & Schlueter cite *United States v. Oates*[14] for discussion of the confrontation issue. It was the opinion of the court in *Oates* that when there was conflict between hearsay exceptions under Fed. R. Evid. 803(6) and the sixth amendment, Congress intended to give deference to the accused's right of confrontation. After a careful and extensive reading of legislative materials and the drafter's analysis, the court concluded: "It was thus with great solicitude for a criminal defendant's right to confront his accusers that the current hearsay exceptions were drafted and adopted."[15]

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[3] Trial Counsel Assistance Memo #1, (1 Sep. 1985), at 8, 9 [hereinafter TCAP Memo], advocated the use of United States v. Porter, 12 M.J. 129 (C.M.A. 1981) for the admission of laboratory reports of urinalysis results. The letter concluded, "Since a prima facie case is made when the lab report is admitted into evidence, absent unusual circumstances, the government should reserve its expert testimony for rebuttal. Tactically, this approach simplifies the government's case [and] precludes the defense from leading the government expert into confusing areas on cross-examination." The prospect of simplifying the government case and precluding defense cross-examination has undoubtedly tempted prosecutors to use Mil. R. Evid. 803(6) and *Porter* to seek admission of other types of forensic reports, as was done in *Holman* and *Broadnax*.

[4] S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 647 (2d Ed. 1986) [hereinafter Saltzburg, Schinasi & Schlueter].

[5] 12 M.J. 129 (C.M.A. 1981)

[6] *Supra* note 3.

[7] 12 M.J. at 131.

[8] *Id.* at 130.

[9] 10 M.J. 69 (C.M.A. 1980). Note that Judge Cook, Chief Judge Everett, and Judge Fletcher wrote separate opinions.

[10] *Id.* at 70.

[11] *Id.* at 75 (citation omitted). An analysis of the accused's sixth amendment compulsory process right is outside the scope of this article. In a given case, however, the defense might be able to obtain the presence of a laboratory expert by relying on the compulsory process right. *See, e.g.*, United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

[12] 7 M.J. 225, 228 (C.M.A. 1979).

[13] Congressional intent in promulgation of Federal Rule of Evidence 803(6) is relevant to military practice. The Federal Rule is wholly contained by Mil. R. Evid. 803(6), which has grafted a specific list of admissible items onto the Federal Rule, including the generic category of forensic reports. The issue is constitutional in nature. Note the reliance upon Supreme Court and federal opinions in *Vietor* and other cited military cases. Saltzburg, Schinasi & Schlueter, *Supra* note 4, at 647 also note congressional influences in the development of Mil. R. Evid. 803(6).

[14] 560 F.2d 45 (2d Cir. 1977).

[15] *Id.* at 79.

The Court of Military Appeals also read the drafter's analysis to mean that conflicts with the right to confrontation limit the range of forensic reports that may be admitted at trial.[16] This is consistent with the Supreme Court's interpretation of the confrontation clause and hearsay. Deference to the right of confrontation is required because of its constitutional dimensions. In *California v. Green,*[17] Justice White said:

> It is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions. . . . [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.[18]

Trial defense counsel should be sensitive to this distinction. In a literal sense, Mil. R. Evid. 803(6) may authorize the admission of most forensic reports, but the existence of a recognized hearsay exception does not necessarily make the evidence constitutionally acceptable. Once the business records exception is applied, the evidence in question must still be subjected to scrutiny under the sixth amendment.[19] Practitioners should also be alert to the traditional foundational requirement for proof of trustworthiness.[20] The trier of fact must be given a satisfactory basis for evaluating the truth of the out-of-court statement.[21]

The requirement of trustworthiness, even though procedural in form, is the mechanism through which the constitutional right of confrontation is exercised. Military Rule of Evidence 803(6) can be limited through the requirement that results of a forensic test be proven trustworthy. The conflict between the right to confrontation and expanded use of the business records exception can be resolved by determining whether a specific scientific test is objective and reliable.

When the business records exception is applied to forensic reports, the requirement for trustworthiness must be strictly applied, and the determination made as a matter of law. The Army Court of Military Review noted, "Since most laboratory reports only state general conclusions, they may be given far more significance in court than they rightly deserve."[22] Potentially, forensic reports are the most damaging form of hearsay that could be admitted at trial. They must be subjected to close and careful scrutiny before being delivered into the hands of the fact finder. As one court stated, "Scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen."[23]

The great weight given to scientific opinion magnifies the risk that hearsay could unfairly prejudice the outcome of a trial. If expert opinion is insulated from cross-examination, it may even enhance the aura of infallibility.[24] When scientific methods provide crucial circumstantial evidence or prove an element of an offense, the use of a hearsay document constitutes trial by affidavit. Even if not literally unconstitutional, such practice is repugnant to American jurisprudence.[25]

In reaction to the risks and potential abuses in use of forensic reports as evidence, courts have consistently limited the practice. As mentioned above, this is done by requiring that the report or scientific method be proven trustworthy. *United States v. Otney,*[26] the court held that the business record exception did not apply to scientific reports that were based upon "controversial technical opinion." Stated positively, the business record exception is generally limited to statements of fact.[27] The Court of Military Appeals has approved forensic reports that state "intrinsically neutral facts."[28]

Of course, it is difficult to distinguish between fact and opinion. The result of any scientific test could validly be called an opinion. In practice, these distinctions will be a matter of common sense applied to practical litigation problems, and appellate courts will have to give guidance on a case-by-case basis. One court found the distinction between fact and opinion arose as a matter of expediency, to be applied when a scientific process is basic or very routine, leaving little room for error.[29] In *United States v. Evans* the Court of Military Appeals cited the Manual for Court-Martial[30] distinction of opinions that so closely approximate statements of fact that they are admissible without incurring appreciable risk of injustice.[31]

Courts have also looked closely at the circumstances surrounding the preparation of forensic reports and the motives of the author. Reports "made principally for the

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[16] United States v. Miller, 23 C.M.A. 247, 250, 49 C.M.R. 380, 383 (1974). The court referred to the Advisory Committee's notes reprinted at 56 F.R.D. 307–13 (1972). At the time of the decision, Rule 803(6) had been proposed but was not adopted.

[17] 399 U.S. 149 (1970).

[18] *Id.* at 155–56.

[19] State v. Henderson, 554 S.W.2d 117, 118 (Tenn. 1977).

[20] United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir. 1977).

[21] California v. Green, 399 U.S. at 161.

[22] United States v. Davis, 14 M.J. 847, 848, n.3 (A.C.M.R. 1982).

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

[24] *See* commonwealth v. McCloud, 457 Pa. 310, 311 322 A.2d 653, 655 (1974).

[25] Kay v. United States, 255 F.2d 476 (4th Cir. 1958); State v. Henderson, 554 S.W. 2d at 120.

[26] 340 F.2d 696, 699 (10th Cir. 1965), *cited with approval in* United States v. Miller, 23 C.M.A. at 249, 49 C.M.R. at 382.

[27] C. McCormick, Handbook on the Law of Evidence § 307 (2d ed. 1972).

[28] *See Vietor; Strangstalien;* United States v. Evans, 21 C.M.A. 579, 582 45 C.M.R. 353, 356 (1972).

[29] Commonwealth v. Campbell, 368 A.2d 1299, 1301 (Pa. Super. Ct. 1977).

[30] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 144*d*.

[31] 21 C.M.A. at 581, 45 C.M.R. at 355.

purpose of prosecution," have been regarded as less trustworthy.[32] As a consequence of this suspicion, police reports and investigators' evaluative reports have been denied admission under Rule 803(6).[33] Trial defense counsel attempting to resist the admission of a forensic report should use this characterization where applicable. To the extent that a forensic laboratory worker is a member of the prosecution team, his or her work product may not be admissible. His or her work may be more that of a police investigator rather than a detached scientist.

Litigation of these principles of trustworthiness will result in a case-by-case determination of which scientific procedures are sufficiently objective and neutral to qualify as business records exceptions. It is clear that in military practice, chemical analysis of suspected contraband is one such procedure.[34] Other tests and procedures will have to be examined for general scientific acceptance, just as would scientific evidence being directly offered in court. Scientific procedures and theories have traditionally been qualified under the test proposed in *United States v. Frye*.[35] The *Frye* test simply states that a scientific theory is admissible when it "is sufficiently established to have gained general acceptance in the particular field to which it belongs."[36]

Unfortunately, the *Frye* test is of little use when the scientific methods being questioned are novel or subject to a significant disagreement among experts. The *Frye* test states a desired result rather than offering guidance. If a scientific method is genuinely accepted by the scientific community, its use in court will not likely be subject to serious challenge. In cases where there is a serious issue over the acceptability of a procedure, the *Frye* case is not helpful.

Yet new scientific methods must have some avenue to the court room. Dissatisfaction with the *Frye* test has caused many courts to create standards that have practical application to the litigation of cases. In *United States v. Ferri*,[37] the court rejected "acceptance in the scientific community" as having any use as a standard of admissibility. It proposed instead to require the trial court to make a factual determination as to the soundness and reliability of the scientific process, and balance that against the risk of confusing the fact finder.[38]

The decision in *Ferri* to totally reject the *Frye* test is justified. Professor Gianelli explained how the illusion of a standard for admissibility operates.

> If the 'specialized field' is too narrow, the consensus judgment mandated by *Frye* becomes illusory; the judgment of the scientific community becomes, in reality, the opinion a few experts. . . . Incredibly, several courts have cited the absence of opposing experts to support their decision to admit voiceprints, inferring reliability from a lack of opposition.[39]

The Supreme Court of Michigan reached the same conclusion as Professor Gianelli. It found the acceptance among a limited group of specialists meaningless, and reliance upon their opinions to be illogical.[40] The Court commented on the acceptance of polygraph examinations by the other courts. "These courts, in order to find general acceptance, found it amongst polygraphers. Once finding general acceptance, the courts then found they did not have to rely on scientific testimony, but were able to rely on the testimony of polygraphers to establish reliability of the device."[41]

The court called such reasoning circular.[42] Defense counsel confronted with forensic reports based upon new or developing scientific methods should carefully determine what "field" of experts is validating the procedure. If the field is small enough, one can argue that the experts advocating the new procedure have a vested interest in seeing it accepted. This would be true both for the purpose of reputation and standing in the scientific community, and also for the lucrative purpose of qualifying as a recognized expert in legal proceedings.

In substance, litigation of this issue is no different than the issue of whether police investigator's evaluative reports should be admitted under the business records exception. The same policies for prohibiting those reports apply to the opinions of an expert with a vested interest.[43] Investigative reports from either source are subject to bias and are inherently untrustworthy.

Returning to the issue raised in *United States v. Holman*, it can be seen that the accused's right to confrontation and the requirement of trustworthiness are fully applicable to forensic handwriting identification. In the area of handwriting identification, the right to confrontation is important and meaningful. In *United States v. McFerren*, the Court of Military Appeals, referring to handwriting experts, stated, "we are not impressed with the argument that experts are infallible."[44] The fallibility of handwriting identification should be subjected to in-court examination just as would

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[32] *Id.* at 582, 45 C.M.R. at 356. Chief Judge Darden stated, "We have not yet accepted that criminal investigators always act with the degree of impartiality that would justify admitting their findings as unexamined evidence." *Id.*

[33] *Oates* 560 F.2d at 77 (using Fed. R. Evid. 803(8) by analogy).

[34] *Evans*, 21 C.M.A. at 581, 45 C.M.R. at 355; Kay v. United States, 255 F.2d at 481 (calling the results of such tests "objective facts"). *See also Porter; Vietor; Strangstalien.*

[35] 293 F. 1013 (D.C. Cir. 1923).

[36] *Id.*

[37] 778 F.2d 985 (3rd Cir. 1985).

[38] *Id.* at 989.

[39] Gianelli, *Admissibility of Novel Scientific Evidence*, 80 Colum. L. Rev. 1197, 1209–10, 1243 (1980).

[40] People v. Barbara, 255 N.W.2d 171 (Mich. 1977).

[41] *Id.* at 187.

[42] *Id.*

[43] *See Supra* notes 32, 33.

[44] 6 C.M.A. 486, 492, 20 C.M.R. 202, 208 (1955); *See* United States v. DeLeo, 5 C.M.A. 148, 154 n.1 17 C.M.R. 148, 154, n.1 (1954) (discussing a conviction based upon an erroneous identification made by a handwriting examiner).

any other scientific evidence. Military Rule of Evidence 803(6) was not intended to allow the unexamined admission of a handwriting examiner's subjective conclusions. The court in *McFerren* concluded that the defense should be given wide latitude in the cross-examination of handwriting experts.[45]

Other courts have also decided that the basis for handwriting identification should be given in court.[46] Factors in handwriting identification that should be subjected to cross-examination include, for example, the expert's qualifications, his apparent intelligence, the thoroughness of his investigation, the strength of his conclusion, and the points of comparison supporting his opinion.[47] One expert document examiner has listed several reasons why a document examination could be inconclusive.[48] Forensic experts have also placed much emphasis on the credentials of a handwriting expert, noting that many incompetent or poorly trained examiners profess to be expert.[49]

The specific questions of reliability and trustworthiness that apply to handwriting examination will generally apply to other forensic procedures as well. The right of confrontation and the specific examination of evidence that follows is a consistent process. Practitioners are called upon to tailor this process to the facts presented by a given case, but the process of admitting evidence does not change. Nonetheless, certain fact-specific issues bear discussion in order to approach the topic with confidence, and to avoid pitfalls.

In addition to handwriting identification, one other topic that deserves such treatment is blood identification. With respect to scientific topics, lawyers are laymen, as much as anyone else, and subject to the blinding effects of "mystic infallibility."[50] Defense practitioners must be careful to challenge blood identification that the government may seek to admit as a hearsay exception under Mil. R. Evid. 803(6).[51]

The only routine method for blood type identification depends upon the visual reaction of blood antigens to known antibodies.[52] Traditional classification into A, B, and O blood types often has little evidentiary value because the categories are so broad.[53] These two facts should alert defense practitioners that blood type identification in a given case may be in error, and that correlation of an accused's blood type with that of blood found at a crime scene does not amount to a positive identification. The issue of errors in forensic blood identification must be investigated in any case using this evidence. At a minimum, forensic blood identification should not be admitted as an unexamined hearsay conclusion in a written report.

The fact that blood identification is based upon subjective observation of a reaction between blood antigens and antibodies suggests the process has great potential for error. Professor Imwinkelreid reports that a Department of Justice study found "shockingly high error rates in forensic laboratory analyses."[54] It has been estimated the ten per cent of blood typing listed on servicemen's dog tags during World War II was erroneous.[55] Defense counsel should be aware that blood identification requires trained personnel using proper procedures, and that accuracy is further limited by the quality and condition of the sample.

Blood identification under controlled conditions is much more routine than forensic blood identification. A blood bank, for example, can positively identify the source of its samples and prevent contamination from interfering with test accuracy. Forensic identification, on the other hand, usually involves contaminated and deteriorated samples. Once the blood is outside the body it begins to deteriorate, making many tests unreliable.[56] If the possibility of contamination is not considered, false blood typing can occur.[57] Contamination with common substances such as mold, bacteria, dust, or detergent, can produce false positive test results.[58] More importantly to the practitioner,

[45] 6 C.M.A. at 491, 20 C.M.R. at 207.

[46] Fenelon v. State, 217 N.W. 711 (Wis. 1928).

[47] *See* United States v. Lutman, 37 C.M.R. 892, 902–03 (A.F.C.M.R. 1967).

[48] Schmitz, *Should Document Examiners Write Inconclusive Reports,* 69 J. Crim. L. & Criminology 444, 445 (1968). The reasons are: limited sample of questioned or known writing; span of years between known and questioned writing; questioned material not repeated in form by the known writing; use of different writing system; use of photocopies: major health changes in the suspect; and involvement of drugs or alcohol in one but not all samples. These items are a good starting point for cross-examination questions.

[49] A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 499 (1978) [hereinafter Moenssens & Inbau]. They suggest that a qualified handwriting expert will either be a member of the questioned documents section of the American Academy of Forensic Sciences or the American Board of Forensic Document Examiners. *Id.* at 501–02.

[50] *Addison,* 498 F.2d at 743.

[51] Specifically, blood identification procedures using a process known as electrophoresis should be strongly challenged. *See* Robinson v. State, 425 A.2d 211, 220 (Md. Ct. Spec. App. 1981). Parenthetically, defense advocates should also be wary of forensic reports that state conclusions about either firearm identification or ballistics. The qualifications of experts in either of these areas should be closely examined, and the basis for their opinions given in detail. *See* Joling & Stern, *Qualifying and Using the Firearms Examiner as a Witness,* 26 J. Forensic Sci. 166 (1980).

[52] Zajac, Handbook for Forensic Individualization of Human Blood and Bloodstains 160, 163 (B. Grunbaum ed. 1981) [hereinafter Zajac].

[53] Baird, *The Individuality of Blood and Bloodstains,* 11 J. Can. Forensic Sci. 83, 103 (1978).

[54] Imwinkelreid, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants,* 30 Hastings L.J. 621, 629 (1979). In test #3, only 60% of some 235 laboratories correctly identified the blood type of a known sample. In test #8, only 37% of laboratories correctly identified blood of common origin. *Id.* at 636.

[55] 2 Am. Jur. Proof of Facts *Blood Types* 608 (1959).

[56] State v. Washington, 622 P.2d 986, 989 (Kan. 1981) (quoting testimony of Dr. Grunbaum that antigens, proteins, and enzymes in blood are all subject to deterioration over time). *See also,* Zajac, *supra* note 52, at 160 n.17.

[57] K. Boorman, Dodd & Lincoln, Blood Group Serology 410 n.11 (1977); Culliford, The Examination and Typing of Blood Stains in the Crime Laboratory 75 n.3 (1971).

[58] Zajac, *supra* at note 52, 165.

other bodily fluids can carry blood type antigens[59] and when mixed with a blood sample, both blood types will be found.[60]

Problems of contamination and deterioration are not unique to identification of blood. When other substances are identified in a forensic report, questions about contamination and deterioration should be asked.

Conclusion

When a forensic report is offered as an exception to the rule against hearsay under Mil. R. Evid. 803(6), defense counsel should first be concerned with the issue of confrontation. Objections should be grounded on this foundation. The government must prove that the procedure is objective in character, and not an evaluative investigator's report prepared in anticipation of prosecution. The proponent of hearsay evidence resulting from new scientific procedures must still meet the constitutional requirement of reliability and trustworthiness as set out in *California v. Green.*[61]

Defense counsel should articulate why an accused needs to cross-examine the evidence being offered. Depending on the procedure in question, there are several foundational issues common to forensic investigations. The qualifications of the expert often shape the character of the evidence. The chain of custody and the actual laboratory procedures used is also a common issue. In the identification of an unknown substance, potential contamination and the purity of the sample should always be investigated at some stage in the proceedings. This issue leads directly to the question of what observed facts were used by the expert in reaching his or her conclusions.

Defense counsel must be persistent in asserting the right to confrontation at all stages of the proceedings. If a scientific procedure is regarded as routine and reliable, objection at trial may not be sufficient to prevent a hearsay report of results from being admitted.[62] If necessary, defense counsel should consider deposing government experts during pretrial proceedings.[63]

[59] Eighty percent of the population is known as "secretors," meaning that their blood type antigen occurs in other body fluids. Moenssens & Enbau, *Supra* at note 49, 308.

[60] Marsters & Schlein, *Factors Affecting the Deterioration of Dried Bloodstains,* 3 J. Forensic Sci. 288, 297–98 (1958).

[61] One court has proposed that if a scientific procedure is subject to expert disagreement, this will be sufficient to prevent conclusions based upon it from being admitted as hearsay. White v. Maggio, 556 F.2d 1352, 1358–59 (5th Cir. 1977).

[62] United States v. Miller 23 C.M.A. at 250, 49 C.M.R. at 383; United States v. Evans, 21 C.M.A. at 582, 45 C.M.R. at 356; United States v. Davis, 14 M.J. at 849.

[63] *See* discussions in cases *supra* note 62. *See also* Chief Judge Everett's comprehensive discussion of compulsory process in United States v. Vietor, 10 M.J. at 75–78 (Everett, C.J., concurring in the result). Defense counsel should analyze the compulsory process issue consistent with the methodology found in Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation,* 101 Mil. L. Rev. 1 (1983) and Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial,* 106 Mil. L. Rev. 77 (1984). Compulsory process is also addressed in Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law—Evidence, para. 33–7*e* (June 1986) (to be published as Dep't of Army, Pam No. 27–22).

DAD Notes

VEAP—A Source of Cash for Your Client

Defense counsel should make a conscientious effort to alert their clients to the administrative consequences of court-martial.[1] This includes advising them of their options to obtain a refund of their contributions to the Veterans Educational Assistance Program (VEAP)[2] or to take advantage of the educational benefits offered under the program if they did not receive a discharge under dishonorable conditions.[3]

If the court-martial results in substantial forfeitures, a fine, or a reduction in grade, the client may need the money he or she has previously contributed to VEAP. After trial, defense counsel can assist their clients in seeking refunds by explaining the refund application process. Trial defense counsel can also contact the nearest Veteran's Administration (VA) regional office and have Veteran's Administration Form 5281, a refund application, sent to the client. If the client is on excess leave pending completion of appellate review of his or her case or has been discharged from the Army, he or she should be advised by counsel to call or write the nearest VA Regional Office. That office will provide the soldier with the necessary refund application.

Trial defense counsel will also want to advise their clients that they are eligible to remain in the program and use their educational benefits as long as they have not been discharged under dishonorable conditions.[4] If a soldier is discharged under dishonorable conditions, he or she will be automatically disenrolled from the program and any contributions made by the soldier will be refunded on the date of discharge or within sixty days from receipt of notice of such discharge by the Program Administrator, whichever is later.[5]

If a client has made significant contributions to the program and desires to use his or her educational benefits, trial

[1] *See* Berkowitz, *Project: The Administrative Consequences of Court-Martial,* 14 The Advocate 214 (1982).

[2] 38 U.S.C. § 1623(b) (1982).

[3] *Id.* § 1602(1)(A).

[4] *Id.* § 1602(1)(A).

[5] *Id.* § 1625.

defense counsel should consider: having the military judge take judicial notice of the applicable statute; if the trial is before court members, asking the military judge to include this administrative consequence in his or her sentencing instructions on the punitive effect of a dishonorable discharge; and arguing this consequence as a reason to retain the client or to separate him or her from the service with a discharge under conditions other than dishonorable. Captain Stephanie C. Spahn.

Sex, Drugs, and Uncharged Misconduct[6]

Many a judge advocate has parroted the solemn litany of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"[7] to support a proffer of uncharged misconduct. Whether justified *in seriatim*, or applied severally, government counsel are inclined to enlarge the application of these objects of Military Rule of Evidence 404(b) to encompass all uncharged misconduct to the hazard of the accused soldier.

The Air Force Court of Military Review has responded to this tendency with its declaration that "(t)he mere incantation of these words will not cause evidence to be admissible under the Rule."[8] The Court of Military Appeals agreed with the Air Force in its 6 October 1986 opinion, *United States v. Rappaport*.[9] In affirming the findings of the Air Force Court of Military Review, the Court of Military Appeals limited the reach of Rule 404(b) to the boundaries erected by its drafters.[10] In *Rappaport*, the Court of Military Appeals expounds on the proper use of uncharged misconduct to show plan and intent, two of the objects of Military Rule of Evidence 404(b).

Appellant, an Air Force psychiatrist, was convicted of use of marijuana, and adultery and sodomy with patients, based in part on evidence that he had an affair with another patient.[11] His guilt of solicitation of patients to use marijuana was based, in part, on evidence that he previously had used marijuana socially with a colleague.[12] The Court of Military Appeals found that both uses of uncharged misconduct were offensive to the Military Rules of Evidence and that the admission of the evidence was prejudicial.[13]

The Court of Military Appeals embraced the position that the evidence of a prior unlawful sexual liaison was irrelevant to show a plan by appellant to commit the charged offenses of sexual misconduct.[14] The court determined that the evidence offerred by the government of sexual affairs between appellant and his patients did not amount to a plan or overall scheme, but was a "collection of disparate acts of the . . . [accused] having illicit sex and drug abuse in common."[15] The court concluded that such evidence established a propensity, not a plan, and was inadmissible under Military Rule of Evidence 404(b).[16] The court left the government with a difficult task to show that similar conduct "tends to establish a plan or overall scheme of which the charged offenses are a part."[17]

The Court of Military Appeals also declined to support the introduction of the uncharged social use of marijuana to prove intent in encouraging the use of marijuana by patients, apparently as treatment. In justifying its holding of inadmissibility, the Court of Military Appeals relied on the premise that uncharged misconduct is relevant to prove intent only where the state of mind is the same for both the charged and uncharged offenses.[18] The nature of intent generating social use does not equate to the state of mind assumed by a psychiatrist in counseling use of marijuana in treatment. Like the sexual misconduct offerred by the government, this evidence of social use of marijuana supported only propensity, not intent.

To support its holding, the Court of Military Appeals looked no further than the theory upon which the military judge submitted the evidence to the members of the court in his instructions.[19] The court declined to speculate as to alternative theories of admissibility under Military Rule of Evidence 404(b) for the evidence of prior sexual misconduct or drug use. This analysis is not limited to courts-martial with members, but would extend to courts-martial where

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[6] Uncharged misconduct is covered in Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law—Evidence, chapter 12 (June 1986) (to be published as Dep't of Army, Pam. No. 27–22).

[7] Mil. R. Evid. 404(b) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, of absence of mistake or accident.

[8] United States v. Rappaport, 19 M.J. 708, 713 (A.F.C.M.R. 1984).

[9] 22 M.J. 445 (C.M.A. 1986).

[10] Mil. R. Evid. 404(b) analysis.

[11] *Rappaport*, 22 M.J. at 446.

[12] *Id.* at 447.

[13] *Id.*

[14] The military judge allowed the evidence of the sexual affair to show plan, design, or *modus operandi;* however, he instructed the members only to its use to support plan or design. The court declined to base its decision on the faulty use of *modus operandi* (*See infra* text accompanying notes 19–20), because the factfinder did not consider the evidence on that theory of admissibility. In dicta, the Court of Military Appeals reminds the practitioner that evidence of *modus operandi* is useful to prove identity, but is otherwise of doubtful relevance. *Rappaport*, 22 M.J. at 446.

[15] *Id.* at 447 (quoting *Rappaport*, 19 M.J. at 713).

[16] *Id.*

[17] *Id.* The Air Force Court of Military Review in its decision, relying on federal cases, would have held the government to a burden of showing the incidents are more than similar: "they must be almost identical, with a concurrence of common features and so interconnected as to naturally suggest that all of the acts were the result of the same plan or design." *Rappaport*, 19 M.J. at 713 (citations omitted).

[18] *Rappaport*, 22 M.J. at 447.

[19] *Id.* at 446, 447. The Air Force court found that drug use by appellant could not be used to attack appellant's credibility. Although this may be the reason the government offerred the evidence in rebuttal of appellant's denials of drug use, the military judge admitted it to show intent to solicit. Therefore, the Court of Military Appeals considered the evidence only for its value in showing appellant's intent.

the military judge sat as the finder of fact. Fairness requires that appellate courts use evidence only for the purpose for which it was admitted at trial.[20]

Where uncharged misconduct exists, the natural urges of advocacy encourage the government to seek admission of known uncharged misconduct to the factfinder. *Rappaport* reinforces the necessity for trial defense counsel to know Military Rule of Evidence 404(b) and to be prepared to force a commitment by the government and the military judge to a *specific theory* of admissibility. Trial defense counsel cannot allow a mere recitation of the litany of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Captain Kathleen A. VanderBoom

Preventive Detention: The "He'll Do It Again" Basis for Pretrial Confinement

If you have stopped reading the commander's or the magistrate's pretrial confinement memoranda supporting confinement for your client, it is time to start reading them again. You may find that the sole basis for the pretrial confinement of your client is prevention of future criminal misconduct.

Prevention of foreseeable serious criminal misconduct is, for the first time, expressly authorized in the Manual for Courts-Martial as a basis for pretrial confinement in the military,[21] although it has been recognized by military appellate courts as a permissible basis for some time.[22] The drafters of the 1984 Manual for Courts-Martial cited *United States v. Edwards* for the proposition that the need for preventive detention has also been recognized and sanctioned in civilian jurisdictions.[23] The Bail Reform Act of 1984 contains statutory authorization for preventive detention at the federal level. It provides that pretrial detention may be ordered if "no condition or combination of conditions will reasonably assure the appearance of the person as required *and the safety of any other person and the community.*"[24]

The bottom line is that your client can be thrown into pretrial confinement to prevent him or her from committing future serious misconduct even though he or she has not yet been adjudged guilty or any crime. Why bother to study the commander's basis for imposing pretrial confinement or the magistrate's reasons for approving such confinement? The answer is provided by the Court of Appeals for the Second Circuit in *United States v. Melendez-Carrion.*[25]

In *Melendez-Carrion,* a divided panel of the court held that the provision of the Bail Reform Act of 1984 authorizing pretrial detention on the sole basis of dangerousness, *i.e.,* the propensity to engage in future serious misconduct, was unconstitutional as a violation of substantive due process on the facts presented. Although the majority opinion noted that the detention in question exceeded eight months, Judge Feinberg in his concurring opinion noted that in considering the length of the detention, "the general requirements of due process compel us to draw that line at some point well short of the eight months involved here."[26] Cases cited by Judge Feinberg indicate that periods as short as two to four months may constitute a due process violation if the sole basis for pretrial confinement is dangerousness.[27]

The decision in *Melendez-Carrion* is contrary to *Edwards,* which was cited by the drafters of R.C.M. 305(h) for the proposition that preventive detention is sanctioned in the civilian community. Therefore, the magistrate's pretrial confinement hearing may still be a real forum for zealous advocacy, particularly if the sole ground for pretrial confinement is prevention of future serious misconduct. As a trial defense counsel, you should carefully consider *Melendez-Carrion,* and then challenge the basis for pretrial confinement at the magistrate's review. Ensure that the magistrate articulates the specific grounds for continuing pretrial confinement and the specific facts that lead to his or her conclusion that pretrial confinement is appropriate. If the sole basis is prevention of serious criminal misconduct and the magistrate approves continuing pretrial confinement, challenge the magistrate's decision before the military judge as soon as the case is referred to trial. If your client is not released from pretrial confinement, move for administrative credit for illegal pretrial confinement at trial, using the analysis in *Melendez-Carrion* as a guide. Captain Keith W. Sickendick.

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[20] *See* United States v. Watkins, 21 M.J. 224 (C.M.A. 1986), *cited in Rappaport,* 22 M.J. at 447.

[21] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(h)(2)(B)(iii)(b) [hereinafter cited as R.C.M.]

[22] United States v. Heard, 3 M.J. 14 (C.M.A. 1977); United States v. Nixon, 21 C.M.A. 480, 45 C.M.R. 254 (1972); United States v. Gaskins, 5 M.J. 772 (A.C.M.R. 1978).

[23] R.C.M. 305(h)(2)(B) analysis (citing United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982)).

[24] 18 U.S.C. § 3142(e) (Supp. II 1984) (emphasis added).

[25] United States v. Melendez-Carrion, 790 F.2d 984 (2nd Cir. 1986).

[26] *Id.* at 1008 (Feinberg, J., concurring).

[27] The court's lead opinion in *Melendez-Carrion* by Judge Newman found that pretrial detention on the ground of dangerousness was a per se violation of substantive due process. *Id.* at 1004. Judge Feinberg concurred in the result, concluding that pretrial detention in excess of eight months constituted punishment and thus violated due process. Judge Timbers dissented, finding support for pretrial detention for dangerousness in Schall v. Martin, 467 U.S. 253 (1984), and Bell v. Wolfish, 441 U.S. 520 (1979). In *Schall,* the Supreme Court upheld a preventive detention statute for juvenile proceedings, reasoning that the statute was not punitive on its face and served a legitimate state objective of protecting both the juvenile and society from future criminal misconduct. In *Bell v. Wolfish,* the Supreme Court left open the question of whether pretrial detention could constitutionally be based on objectives other then ensuring presence at trial. *Id.* at 534 n.15. In considering the constitutionality of challenged conditions of pretrial confinement, the Court articulated this test: "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. Arguably, this test would also be applied to pretrial detention based on dangerousness.

Military Trial Lawyers: Some Observations

Lieutenant Colonel Thomas C. Lane
Military Judge, Fort Gordon, Georgia

As a trial judge, I have ample time to ruminate and my ruminations quite naturally concern matters that are part of my regular, day-to-day existence—my family, golf, whether the Red Sox will ever win the World Series, and why military trial lawyers do what they do. Golf and the Red Sox are bizarre things beyond my control, and my family is too personal a subject to write about. But I can record my ruminations about trial lawyers and that is what this is all about.

Because I hate articles that seem too negative, I will begin with a few brief observations about our young military attorneys. First, they are all intelligent, articulate and personally attractive or the Corps would not have recruited them. Second, most of the military attorneys I have observed are very competent trial lawyers. Having made those observations I can get to the point, stated in the form of some brief suggestions.

Style

Be yourself in the courtroom. Neither military judges nor military court members prize flamboyance. What they are looking for is a thorough, orderly presentation of your case, done as expeditiously as possible. A lawyer who is naturally forceful and dynamic has an additional asset, but that style does not work for everyone. Logic and brevity will inform the factfinders and ensure their attention. That is all you need to do.

Preparation of Legal Issues

Defense counsel, do not delay preparation and service of briefs/memoranda until the last minute. There is no tactical advantage to doing so. The result of this practice is that you do not see the government response until you come to court. Not knowing your opponent's position until you come to court is a disadvantage.

Do not feel compelled to indulge in oral argument just because you have been invited to do so. When counsel have presented briefs on a legal issue, I always ask if they have anything to add before I retire to consider the matter. Counsel nearly always elect to talk but very seldom have anything to add. You do not need to restate what is in your brief.

Be prepared to justify the receipt of evidence for which you are the proponent. Trial counsel, you know that hearsay evidence and uncharged misconduct will nearly always engender objections. Too often, such objections are met with blank looks or with theories conjured on the spot such as "Your Honor, we're not offering it for the truth." The claim that a statement is not hearsay works well at times. But as a spur-of-the-moment theory it sometimes sounds a little hollow.

> WIT: "So he told me that PVT Morris Karloff was an evil, sadistic killer and had murdered Gina Pepperoni by strangling her with the light cord."
>
> DC: "Objection, hearsay!"
>
> TC: (Pause) "Not offered for the truth, Your Honor."

C'mon, counsel! Analyze your evidence for legal issues *before* you offer it in court.

Factual Preparation

Know your facts. Know what the witnesses are supposed to say and be able to recognize it if they do not.

Be selective in deciding what evidence you should present. This is important for both sides but especially for defense counsel, because you have no obligation to present a comprehensive factual scenario. I recently spoke with a lieutenant colonel who often sits as a member of courts-martial. He expressed general satisfaction with the experience, but did confess that sometimes the members long for the return of vaudeville—and the opportunity to give counsel "the hook." That feeling is not likely to occur if you are selective in your presentation.

Be selective in your conduct of cross-examination. Do not dredge back through every line of the direct testimony. Picking at inconsequential matters makes you look like you are grasping at straws. "Isn't it true that at the Article 32 investigation you stated that the shoe was black but you now admit to the possibility that it could have been navy blue?" When you reprise direct testimony, you give witnesses an opportunity to articulate certain points better than they did on direct. Frequently, those are points you should have left alone. Even if no new damage is done to your case, those good points that you wanted to make have just been lost in the shuffle—and the panel members are thinking about "the hook."

Conclusion

What is the most important part of all this? You have to be selective in preparing and presenting your case. You have to have confidence in your ability to select those facts that should be part of your case. You can do it. You are intelligent, articulate, and personally attractive, or the Corps would not have recruited you.

Waivers of Withdrawals from Appellate Review

Someone at the annual JAG Conference asked the Clerk of Court for information concerning waiver of appellate review in Article 66 cases. Here is the information available:

Fiscal year	Cases received	Appeal waived	Appeal withdrawn
1985	2,121	7 cases	5 cases
1986	2,181	4 cases	7 cases

Accordingly, appeal is being waived or withdrawn in only about one-half of one percent of the cases. So far, the waivers were all in BCDSPCM cases. Of the appeals withdrawn, one was withdrawn after the briefs had been filed. Besides the Article 66 cases shown above, examination has been waived in one Article 69 case.

We are finding that the accused and counsel often overlook the need to choose the appropriate terms near the end of the text on the front and back of DD Form 2330 and to strike out the rest. More discouragingly, we find that R.C.M. 1112 is sometimes overlooked and the record forwarded without the required review by a judge advocate and, when necessary, additional action by the convening authority.

Occasionally, the Clerk receives a withdrawal (as distinguished from waiver) of appellate review bearing the signature of an attorney other than the accused's appellate defense attorney. In such cases, the purported withdrawal is transmitted to the appellate lawyer for appropriate action instead of being referred directly to the Army Court of Military Review.

Correcting Initial Promulgating Orders

In July, August, and September, the Army Court of Military Review decided 612 cases. Its decisions were accompanied by 84 Notices of Court-Martial Order Correction intended to cure 112 errors in the initial court-martial promulgating orders. In other words, more than one promulgating order in seven, 13.7%, needed correction. In order of frequency, the errors involved:

Wording of summarized specification incorrect or lacking sufficient detail (23% of errors);

Accused's name, grade or service number incorrect (16% of errors);

Finding or other disposition of charge or specification not correctly shown (13% of errors);

Court-Martial Convening Orders and amendments not fully cited (11% of errors);

Designation of charge or specification incorrect (10% of errors);

Plea incorrect or improperly shown (10% of errors);

Sentence not accurately reflected (5% of errors);

Convening authority action undated or dated incorrectly (5% of errors);

When or by whom sentence adjudged not indicated or incorrect (4% of errors); and

Action of convening authority not stated verbatim (3% of errors).

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Third Quarter Fiscal Year 1986; April–June 1986

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	0.49 (1.96)	0.39 (1.57)	0.68 (2.70)	0.58 (2.32)	0.60 (2.40)
BCDSPCM	0.42 (1.67)	0.42 (1.66)	0.48 (1.93)	0.24 (0.97)	0.20 (0.80)
SPCM	0.09 (0.35)	0.09 (0.34)	0.09 (0.36)	0.09 (0.37)	0.07 (0.27)
SCM	0.39 (1.56)	0.41 (1.62)	0.40 (1.61)	0.17 (0.67)	0.47 (1.86)
NJP	36.65(146.61)	37.16(148.66)	36.04(144.17)	34.50(138.02)	39.34(157.36)

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

The Lawfulness of Military Orders

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Introduction

A defense counsel often must defend a client who is charged with disobeying the lawful order of a superior officer, non-commissioned officer, or soldier with a special duty status (such as a sentinel or member of the armed forces police). Usually, at trial, the defense centers on the specific facts of the case, such as, the soldier had no knowledge of the order, he or she misunderstood the order, or he or she did not know the giver of the order was entitled to be obeyed. Yet, where the client informs the defense counsel that he or she willfully disobeyed the order or that he or she understood the order and tried but was not able to obey it, a challenge to the lawfulness of the order may be the only defense. An attack on the lawfulness of an order can and usually will be made using the constitutional principles of vagueness and overbreadth. A defense counsel who contests the issue of lawfulness on constitutional grounds and loses at interlocutory proceedings under Article 39a,[1] however, may also be able to present evidence on this same issue of lawfulness to the court members on the merits. In other words, the lawfulness of an order can be an issue for both judge and jury. This article focuses on the question: What makes a command or an order lawful? It also offers practical guidance to defense counsel who seek to challenge an order's legality at trial.

Manual For Courts-Martial: Definitions

A member of the armed forces who disobeys a lawful order to do or cease doing a particular thing at once by deliberately refusing or deliberately omitting to do what is ordered may be punished under Articles 90, 91, or 92.[2]

The Manual for Courts-Martial, United States, 1984, explains that a command or an order, to be lawful, must relate to military duty. This includes all activities reasonably necessary to accomplish the military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order and discipline. Furthermore, an order that has such a valid military purpose is lawful, *even if* it interferes with private rights or personal affairs; the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.[3] Accordingly, an order is lawful whenever connected with the morale, discipline and usefulness of military service. Almost any order, however, can be justified by the giver of the order as in furtherance of a service's duty to protect the morale, discipline, and usefulness of its members. Therefore, to say that an order is lawful if it relates to a valid military purpose is not very helpful in arriving at a formula to test for an order's lawfulness.

Implicit in the Manual's discussion of lawfulness is the principle that an order can be lawful only if it does not violate already existing law or regulation.[4] Thus, an order that directs the commission of a crime is "patently illegal."[5] This is true even if the order arguably is in furtherance of the needs of the service. By way of example, an order to execute enemy prisoners of war cannot be a lawful order because it violates the law of war as embodied in the Hague and Geneva Conventions.[6] Similarly, an order by a commander to his driver to exceed the posted speed limit in order to arrive on schedule at the commander's own change of command ceremony is an illegal order because its obedience requires the violation of a traffic law. An order from a superior to perform a task which, if done, would violate a general order or regulation likewise would not be a lawful order. Furthermore, an order that conflicts with certain rights guaranteed to a soldier under the UCMJ and the Constitution would not be lawful. Thus, an order compelling a soldier to disclose information that might incriminate him or her will be illegal if its obedience violates the privilege against compelled self-incrimination.[7]

Unfortunately, the Manual's definitions relating to an order's "lawfulness" are more conclusory than explanatory. As a result, the test for lawfulness must come from an examination of case law.

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[1] Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839(a) (1982) [hereinafter UCMJ].

[2] This article deals only with personal orders directed specifically to individuals, punishable under Articles 90(2), 91(2) or 92(2), UCMJ, and not general orders or regulations.

[3] Manual for Courts-Martial, United States, 1984, Part IV, para. 14c(2) [hereinafter MCM, 1984].

[4] *See* United States v. Garcia, 21 M.J. 127 (C.M.A. 1985), where the court held that those portions of a General Order that conflicted with a Department of the Navy Regulation were displaced as a matter of law. It follows that an order is not lawful if it is in conflict with or detracts from the scope or effectiveness of a regulation issued by a higher headquarters. *See also* United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).

[5] MCM, 1984, para. 14c(2). *See* United States v. Cherry, 22 M.J. 284 (C.M.A. 1986) (order to drive a heavy vehicle with defective brakes held to be patently illegal).

[6] *See* United States v. Calley, 22 C.M.A. 534, 48 C.M.R. 19 (1973).

[7] *See* United States v. Heyward, 22 M.J. 35 (C.M.A. 1986). The court (discussing the validity of an Air Force regulation requiring the reporting of illegal drug use to police authorities) held that "the important governmental purpose in securing the information" about a crime cannot be the basis of an order to report that crime if it would compel a soldier to incriminate himself as a principal or accessory to the illegal activity he is to report. Non-compliance with the order will be excused because it contravenes the privilege against self-incrimination. *See also* United States v. Thompson, 22 M.J. 40 (C.M.A. 1986).

Examining Case Law

Because the Manual emphasizes that an order is lawful even if it interferes with private rights and personal affairs, constitutional issues are central to any discussion of the legality of an order.

The Supreme Court addressed several of these issues directly in the benchmark case of *Parker v. Levy*.[8] Captain Howard B. Levy was ordered by his superior commissioned officer to conduct certain medical training for special forces aidmen going to Vietnam. He refused to obey that order because of his opposition to U.S. involvement in Vietnam and his own concept of medical ethics which prohibited him from teaching the art of medicine to those who would use it for a military purpose. He was convicted of violating Article 90(2), UCMJ. Levy sought relief in the civilian courts. The district court denied relief, but the Court of Appeals for the Third Circuit reversed, holding that Articles 133 and 134 of the UCMJ were void for vagueness.[9] On appeal, the Supreme Court decided the constitutional validity of these same Articles. Although principally concerned with Articles 133 and 134, Mr. Justice Rehnquist's majority opinion is important to an analysis of an order's legality. Because the obedience required to a lawful order is no different from that obedience demanded by the UCMJ, and an order's effect in requiring or proscribing a certain act or acts is no different from the conduct regulating provisions of the UCMJ, it follows that where the Court's opinion refers to Articles 133 and 134, it can just as easily refer to an order. Accordingly, *Parker v. Levy* stands for the principle that the fundamental necessity for obedience, and the consequent necessity for discipline within the military, allows that which would be constitutionally impermissible outside it,[10] and, therefore, an order indeed can restrict constitutionally guaranteed rights. Such a restriction, however, must be related to a military purpose, and must not be "void for vagueness" or "overbroad" in violation of a constitutional right.[11]

Vagueness is the doctrine that requires a minimum degree of definiteness in a statute's language, so that there is "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[12] In the words of Mr. Justice Brennan in *Zwickler v. Koota*, a statute is void for vagueness where it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[13]

It follows from a reading of *Parker v. Levy* that an order, too, is void for vagueness, and hence unlawful, if it contains "no standard by which criminality [can] be ascertained"[14] or where the soldier to whom the order is directed "could not reasonably understand that his contemplated conduct is proscribed."[15] An order that is not specific in time, or place, or in describing the conduct to be done or omitted, is unlawful.

The constitutional principle of overbreadth prohibits an otherwise valid statute from furthering a government purpose "by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved."[16] As stated by Mr. Justice Harlan in *NAACP v. Alabama ex rel. Flowers*, a statute cannot restrict a private right by "means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[17] Accordingly, although *Parker v. Levy* clearly states that an attack on an order's "overbreadth" will be accorded a good deal less weight in the military (as opposed to an overbreadth challenge to a civilian law or regulation),[18] an order is unconstitutionally overbroad if it is so restrictive of a private constitutionally protected right as to be arbitrary. Thus, an order, which, by its own clear and precise terms, *might* restrict a clearly protected right would be unconstitutionally overbroad. Furthermore, it seems to follow that an order can also be unlawful because it is beyond the authority of the giver of the order to make it.

Military appellate judges apparently have been unwilling to analyze the lawfulness of an order on purely constitutional grounds. Thus, it is rare that the reported cases use the phrases "void for vagueness" or "unlawful because overbroad." Rather, the cases appear to be decided on the facts and circumstances developed in the record of trial, and the lawfulness of an order is determined by using a fairly broad test which examines the order's specificity, definiteness and nexus to a military purpose. In many cases, however, this test looks as if it is shorthand for vagueness and overbreadth.

In *United States v. Trani*,[19] an early decision of the Court of Military Appeals, Private Patrick Trani was convicted of willfully disobeying the command of a superior commissioned officer to perform close order drill. Private Trani was ordered to do drill "indefinitely" until he "shaped up and got a little better discipline, better control of himself."

On appeal, the court concluded that "it is a familiar and long-standing principle of military law that the command

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[8] 417 U.S. 733 (1974). The initial trial of Captain Levy is found in United States v. Levy, 39 C.M.R. 672 (A.B.R. 1968), *petition denied*, 18 C.M.A. 627 (1969).

[9] 478 F.2d 772 (3d Cir. 1973).

[10] 417 U.S. at 757.

[11] *Id.* at 752. *See also* United States v. Green, 22 M.J. 711, 713 (A.C.M.R. 1986) (post regulation that was "standardless and unreasonable" will not be enforced).

[12] Jordan v. DeGeorge, 341 U.S. 223, 232 (1951).

[13] 389 U.S. 241, 249 (1967).

[14] 417 U.S. at 755.

[15] *Id.* at 757 (citing United States v. National Dairy Corp., 372 U.S. 29, 32–33 (1963)).

[16] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[17] 377 U.S. 288, 307 (1964).

[18] 417 U.S. at 760.

[19] 1 C.M.A. 293, 3 C.M.R. 27 (1952).

of a superior officer is clothed with a presumption of legality."[20] The court reasoned further that "the unlawfulness of the command [or order] must thus be a fact . . . and the onus of establishing this fact will, in all cases . . . except where the order is palpably illegal on its face . . . devolve upon the defense, and clear and convincing evidence will be required to rebut the presumption."[21] The court upheld Private Trani's conviction for willfully disobeying the order on the grounds that the command "did not appear unlawful on its face"[22] and that the defense had failed to overcome this presumption of legality which attached to all military orders.

In *United States v. Wartsbaugh*,[23] the court, relying heavily on its earlier decision in *Trani*, upheld Sergeant Wartsbaugh's conviction for disobeying an order of his company commander to remove a silver bracelet he was wearing on his arm. Again, because the defense at trial failed "to produce some evidence that the order was beyond the scope of authority" and "overcome the presumption of the legality of the order,"[24] the order was lawful as given.

In *United States v. Milldebrandt*,[25] the accused obtained a thirty day leave from his unit in order to clear up personal financial problems. Milldebrandt was also ordered by his commander to make written reports "concerning his . . . indebtedness." When Milldebrandt failed to make these reports, he was charged with and convicted of willfully disobeying the command of his superior commissioned officer. In examining the lawfulness of the order, the court was concerned with all-inclusive nature of the command. "[F]or aught that appears, the accused might have been required to give a detailed statement of every financial transition engaged in by him while off duty. . . . [I]f the order was as broad as that, the accused might be prosecuted for failure to disclose information of a confidential or incriminating nature."[26] The court concluded that the order to Milldebrandt was so broad as to be unenforceable. It emphasized that "unless an order of this type is so worded as to make it specific, definite, and certain as to the information to be supplied,"[27] it will be held to be illegal.

In *United States v. Wysong*,[28] the accused, Sergeant First Class Charles Wysong, tried to hinder an official investigation by threatening persons in his unit who were called to appear as witnesses. As a result, his company commander ordered him "not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty."[29] The accused subsequently spoke with several soldiers who he knew were witnesses about their testimony and went so far as to solicit one soldier to testify wrongfully. Upon these facts, he was convicted of failing to obey the lawful order of his company commander.

The Court of Military Appeals, in analyzing the lawfulness of the command, recognized at the outset that the order "severely restricted the accused's freedom of speech." But the court implied that this curtailing of a fundamental right was not central to a test of lawfulness. Instead, the court stressed that the order, which restrained Wysong from communicating with certain persons *both* on and off duty, could be interpreted literally to prohibit the simple exchange of pleasantries, and failed to identify the particular persons "concerned" with the investigation. In short, the order was "so broad in nature and all inclusive in scope as to render it illegal."[30] The order might well have been sufficient to support a conviction if it "had been narrowly and tightly drawn and was so worded as to make it specific, definite and certain."[31] As this order was illegal, however, the court set aside the finding of guilty.

In *United States v. Wilson*,[32] the Court of Military Appeals examined the legality of an order not to drink liquor. The accused had been ordered by his squadron commander "not to indulge in alcoholic beverages" because this commander believed Wilson's use of alcohol caused him to commit acts of misconduct. The court concluded that every order was presumed to be legal, but that if an order limits the personal rights of a soldier, it must be connected with the "morale, discipline and usefulness of military service."[33] The order given Wilson, however, "was to apply in all places and on all occasions" and by its terms made no exceptions, so that "a single drink of beer would violate the order as definitely as the consumption of a fifth of whiskey; and a drink to toast the health or welfare of a friend in the privacy of his quarters was as much prohibited as a drinking spree in a public tavern."[34] As a result, because there were no circumstances tending to show its connection to military needs and the order was so broadly restrictive of a private right of an individual, it was arbitrary and illegal.[35]

A more recent case continues this same analytical approach. In *United States v. Dykes*,[36] the Navy Court of Military Review stressed that an order was lawful if it was

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[20] *Id.* at 296, 3 C.M.R. at 30.

[21] *Id.* (citing W. Winthrop, Military Law and Precedents para. 888 (2d ed. 1920). *See also* United States v. Cherry, 22 M.J. 284 (C.M.A. 1986).

[22] 1 C.M.A. at 297, 3 C.M.R. at 31.

[23] 21 C.M.A. 535, 45 C.M.R. 309 (1972).

[24] *Id.* at 540, 45 C.M.R. at 314.

[25] 8 C.M.A. 635, 25 C.M.R. 139 (1958).

[26] *Id.* at 637, 25 C.M.R. at 141.

[27] *Id.* at 638, 25 C.M.R. at 142.

[28] 9 C.M.A. 249, 26 C.M.R. 29 (1958).

[29] *Id.* at 250, 26 C.M.R. at 30.

[30] *Id.*

[31] *Id.* at 251, 26 C.M.R. at 31.

[32] 12 C.M.A. 165, 30 C.M.R. 165 (1961).

[33] *Id.* at 166, 30 C.M.R. at 166.

[34] *Id.*

[35] *See also* United States v. Green, 22 M.J. 711 (A.C.M.R. 1986), discussed *infra* notes 40–45 and accompanying text.

[36] 6 M.J. 744 (N.C.M.R. 1978).

"reasonably in furtherance of a service's duty to protect the morale, discipline, and usefulness of its members" even though it may deprive an individual of an established private right or interest. The court acknowledged, however, that "where such a connection is lacking and the order is broadly restrictive of a private right unrelated to a military need, the order is arbitrary and illegal and perforce will be struck down."[37]

The legality of an order curtailing a soldier's freedom of association was at issue in *United States v. Lloyd*.[38] The accused was given the command by his unit commander "to stay away from Mrs. Coleman." She was the estranged wife of another soldier in the accused's unit. The unit commander testified at trial that he gave the command to avoid further trouble between the accused and Mrs. Coleman's husband, and thereby protect discipline and increase morale in the unit. The commander stated at trial that he intended the order to remain in effect until he rescinded it and that he intended it to apply at all times and in all places. He related that he had told the accused that "if he were to see Mrs. Coleman walking down the street, he, the accused, was to turn around and go the opposite way." The military judge granted a motion to dismiss the charge alleging a violation of the order on the grounds that the order was unrelated to a military duty, so broadly restrictive of the accused's private right to associate freely with others as to be overbroad, and void for vagueness because of its unlimited time and scope. First, the defense counsel argued that the curtailment of the accused's first amendment right was unrelated to a military duty as the Coleman marriage was at an end. A written separation agreement had been executed by the parties in which each contracted to conduct their personal lives as if they were single, and Mrs. Coleman had rented and lived in her own quarters, separate from her husband. It was thus unreasonable for the unit commander to believe his order would further discipline or morale where there was no longer a marital relationship. Second, the order, by its terms, was to apply in all places and on all occasions. It made no exceptions. A prearranged rendezvous between the accused and Mrs. Coleman in the privacy of her apartment would violate the order as definitely as an unintended meeting at the commissary while purchasing groceries. The open-ended nature of the order as to time and place made it arbitrary, incapable of being obeyed, and hence void for vagueness.[39]

Finally, although specifically dealing with the lawfulness of a regulation, the recent case of *United States v. Green*[40] is clearly important to a discussion of what makes a command or order lawful. In *Green*, the accused was convicted of violating a local regulation that prohibited a soldier from "having any alcohol in [his] system or on [his] breath during duty hours."[41] The Army Court of Military Review stated at the outset that regulations that "only tangentially further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right are subject to close judicial scrutiny and may be invalid and unenforceable."[42] Applying this standard to the regulation in question, the court concluded that it was "so broad as to encompass otherwise innocent conduct"[43] because the regulation purported to "make criminally punishable the fact of alcohol in the 'system' of the soldier, irrespective of whether the quantity involved is so great that intoxication or impairment is practically certain to result or so small that its physical presence can scarcely be detected."[44] The court concluded that the local regulation was "essentially standardless, arbitrary, and unreasonable"[45] and thus illegal. By analogy, the discussion in *Green* applies with equal force to any test for the lawfulness of an order.

Attacking the Lawfulness of an Order

A synthesis of case law results in a three-part test for the lawfulness of an order. To be lawful, an order must be: reasonably in furtherance of or connected to military needs (promotes morale, discipline and usefulness of command); specific as to time and place and definite and certain in describing the act or thing to be done or omitted; and not otherwise contrary to established law or regulation.

Understanding this test, the innovative defense counsel will attack an order's lawfulness on constitutional grounds as void for vagueness and overbroad. If an order is so unclear that it cannot be followed as it contains "no standard whatever by which criminality [can] be ascertained,"[46] then it is void for vagueness. Together with this argument of vagueness and imprecision, a defense counsel should argue

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[37] *Id.* at 748.

[38] General Court-Martial (U.S. Army Southern European Task Force and 5th Support Command, Vicenza, Italy, 27–30 Aug. 1985).

[39] Other military cases discussing the lawfulness of an order include United States v. Landwehr, 18 M.J. 355 (C.M.A. 1984) (order to return to appointed place of duty); United States v. Pettersen, 17 M.J. 69 (C.M.A. 1983) (order to return to duty station while in AWOL status); United States v. Bratcher, 18 C.M.A. 125, 39 C.M.R. 125 (1969) (order to work as a soldier and perform assigned duties); United States v. Aycock, 15 C.M.A. 158, 35 C.M.R. 130 (1964) (accused ordered not to contact witnesses in trial); United States v. Martin, 1 C.M.A. 674, 5 C.M.R. 102 (1952) (order not use cigarettes for bartering purposes); United States v. Miller, 16 M.J. 858 (N.M.C.M.R. 1983) (order not to consume alcohol while on restriction); United States v. Chronister, 8 M.J. 533 (N.C.M.R. 1979) (AWOL sailor ordered to return to ship); United States v. Taylor, 32 C.M.R. 851 (A.F.B.R. 1962) (order to report to charge of quarters every two hours); United States v. Wahl, 4 C.M.R. 767 (A.F.B.R. 1952) (order not to indulge in alcoholic beverages).

[40] 22 M.J. 711 (A.C.M.R. 1986).

[41] *Id.* at 714.

[42] *Id.* at 716.

[43] *Id.*

[44] *Id.* at 718.

[45] *Id.* at 719. In addition to being arbitrary and unreasonable, the court found the local regulation conflicted with Dep't of Army, Reg. No. 600–85, Personnel-General-Alcohol and Drug Abuse Prevention and Control Program (1 Dec. 1981) (IO3 29 Apr. 1983) (revised 3 Dec. 1986) [hereinafter AR 600–85], in that the latter's provisions dealing with alcohol impairment implied a general policy condoning a modest blood alcohol level if duty performance was otherwise unaffected. As the regulation in issue was "virtually irreconcilable" with AR 600–85, it could not be judicially enforceable. *See* United States v. Garcia, 21 M.J. 127 (C.M.A. 1985) discussed *supra* note 4; United States v. Rodriguez, SPCM 20492 (A.C.M.R. 30 May 1986); United States v. Mason, SPCM 18559 (A.C.M.R. 30 May 1986). In these latter two cases, the Army court held invalid local regulations similar to that in *Green*, as the regulations were "standardless, arbitrary, unreasonable, and fail[ed] to serve a corresponding military purpose."

[46] Parker v. Levy, 417 U.S. at 755.

that the order as given unduly restricts the accused's clearly protected private rights and therefore is overbroad, and beyond the scope of the giver's authority. Finally, counsel should consider whether the order is related to a military purpose.

Military orders must be lawful. Lawfulness is inferred unless the order is contrary to the Constitution, the laws of the United States or other lawful orders, or is beyond the authority of the issuing official. Consequently, an order is disobeyed at the peril of the subordinate. The inference of lawfulness does not apply to patently illegal orders, such as ones that direct the commission of a crime.[47] After "some" evidence by the party challenging the order is shown, the government must establish the lawfulness of the order beyond a reasonable doubt.[48] This burden is on the government because the order's lawfulness is attacked on constitutional grounds, much as the government has a similar burden under Military Rules of Evidence 304, 311, and 321. The military judge resolves the issue as an interlocutory question, and will decide whether the order in question is a lawful order as a matter of law. A determination by the judge that the order is not lawful should result in dismissal of the affected specification. If the judge decides the order is lawful, he or she will instruct the jury that the order is lawful as a matter of law.[49]

Even if the judge rules that an order is lawful, some factual situations may permit a defense counsel to present the lawfulness of an order as an issue of fact for the court members. The Military Judges' Benchbook states that if there is a factual dispute as to whether the order was lawful, "that dispute must be resolved by the members in connection with their determination of guilt or innocence."[50] The following instruction from the Benchbook indicates the fact pattern required for the lawfulness of an order to present an issue of fact for determination by the jury:

> (An order) (a regulation), to be lawful, must relate to a specific military duty and be one which is authorized under the circumstances. (An order) (a regulation) is lawful if it is reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the service. (It is illegal if (unrelated to military duty) (its sole purpose is to accomplish some private end) (arbitrary and unreasonable) (given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit) (_____).)
>
> You may find the accused guilty of violating (an order) (a regulation) only if you are satisfied beyond a reasonable doubt that the (order) (regulation) was lawful.[51]

For example, assume that the accused is charged with failing to obey the order of his commander to wash the commander's military sedan. The accused maintains that he disobeyed the order because the order *in fact* was to wash the commander's personal automobile. At an Article 39*a* proceeding, the defense counsel argues that the order to the accused was to wash the personal automobile, but the judge denies the defense motion to dismiss the order as not relating to a military purpose. Notwithstanding the judge's ruling, the defense counsel can argue on the merits that the lawfulness of the order depends on whose recollection of its giving is correct, and that this factual determination of lawfulness is an issue for the jury to resolve. The jury then will have to be convinced as to the lawfulness of the order beyond a reasonable doubt before it can find the accused guilty.

This ability to have "two bites" on the issue of lawfulness—first as an interlocutory question of fact and law, second as an issue requiring proof beyond a reasonable doubt—is similar to the issue of the voluntariness of statements made by an accused. Accordingly, just as a defense counsel can contest the voluntariness of a statement at an Article 39*a* session, lose, and yet go on to require the voluntariness of a statement to be decided by the court-members beyond a reasonable doubt, so can a defense counsel similarly attack the lawfulness of an order under certain factual situations.

Conclusion

Determining the lawfulness of a military order is not a simple task. Nor is attacking that lawfulness. Nonetheless, the innovative defense counsel who uses both constitutional arguments and case law and who recognizes that an order's lawfulness can be *both* a legal question for a judge and a factual determination for a trier of fact will be able to more successfully defend a client at trial.

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[47] United States v. Dykes, 6 M.J. 744, 746 (N.M.C.M.R. 1978); MCM, 1984, Part IV, para 14c(2)(a)(1). *See also* United States v. Cherry, 22 M.J. 284, 286 (C.M.A. 1986), where the Court of Military Appeals stated that lawfulness is presumed.

[48] *See* United States v. Tiggs, 40 C.M.R. 352 (A.B.R. 1968).

[49] Dep't of Army, Pam. No. 27-9, Military Judge's Benchbook, para. 3-28 (1 May 1982) (Cl 15 Feb. 1985) [hereinafter Military Judges' Benchbook].

[50] *Id.*

[51] *Id.*

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Captain Robert F. Altherr, Jr.
Patents, Copyrights, and Trademarks Division

The practice of military law, although unique in many respects, has several areas that parallel the practice of our civilian counterparts. Although unknown to many judge advocates, one of these areas is trademark law. Army lawyers regularly practice trademark law in a manner identical in most respects to civilian practitioners. If you find that hard to believe, just ask yourself, where would the all-volunteer Army be if the slogan "Be All That You Can Be" was used to advertise laundry starch or The Army Mule identified an Alabama sporting goods and military surplus store instead of the mascot of the United States Military Academy. These and many other issues involving the practice of trademark law have been dealt with by Army lawyers.

A trademark is merely a symbol that allows a purchaser to identify the source of particular goods. Closely allied with trademarks are service marks, certification marks, and collective membership marks. These marks are symbols that respectively identify the source of particular services, a particular characteristic of goods or services, and membership in an organization. Such marks are used extensively by commercial entities and are adopted and maintained to protect business good will. Millions of dollars are spent each year by private sector commercial concerns to acquire and maintain legal rights in such marks.

Although protectible rights in a trade or service mark arise at common law through the adoption and use of such marks, most commercial entities rely upon the system of federal registration in the United States Patent and Trademark Office to acquire adequate legal protection. Registration of a mark on the federal Principle Register provides several advantages over state common law rights. These include: federal jurisdiction of infringement actions regardless of the amount in controversy; the right to assert in federal court a claim of unfair competition along with a claim of infringement; in federal court, in addition to profits, damages and costs being recoverable, triple damages and attorneys's fees are available; as federal registration on the Principle Register is prima facie evidence of ownership and exclusive right to use the mark, it places a heavy burden of going forward on an alleged infringer; registration is constructive notice of ownership and thus eliminates an infringer's defense that the mark was adopted in good faith; and registration may be used to stop importation of articles bearing an infringing mark into the United States. Because of these and other advantages of federal registration, many would-be infringers who might adopt and use another's common law trade or service mark will not adopt another's federally registered mark.

The Army, although not a commercial entity, has many commercial activities, which have generated good will associated with a particular symbol or words. The most readily apparent example is the Army Air Force Exchange Service. The terms AAFES®, PX®, BX®, Post Exchange®, Base Exchange®, as well as the AAFES® Shield logo and the Running Chef Logo, are all federally registered trade and service marks. In addition to these well known marks, AAFES® is expanding its use of trade and service marks to cover some of the product lines it sells. Currently, there are several pending applications for federal registration of trademarks on various lines of clothing sold exclusively by AAFES®. Although AAFES® has more registered marks than any separate Department of Army activity, it is by no means the only activity with registered marks. The West Point crest is registered as both a trademark for goods and a service mark for educational services. The Judge Advocate General's School insignia (Reverentia Legum) is a registered service mark for educational services, and the logo of the Uniformed Services University of the Health Sciences (DOD Medical School) is the subject of a pending service mark registration for educational services. The trademarks General Abrams® and Abrams® are both registered trademarks for the M–1 tank and Patriot® is registered for the Patriot® Missile System. The names of Department of the Army publications, such as the Pentagram News® have been registered. The Military Traffic Management Command currently has five applications pending for registration of the names of newspaper and magazine publications. Obtaining trademark protection for the names of command and installation newspapers is expressly authorized and encouraged by Dep't of Defense Instruction No. 5120.4, and Dep't of Army, Reg. No. 360–81, Army Public Affairs—DOD Newspapers and Civilian Enterprise Newspapers (Nov. 14, 1984). Command Information Program (21 Jan. 1986). Paragraph 3–5*j* of AR 360–81 states:

> Commanders are encouraged to trademark the name of publications produced under authority of this regulation. Except in those cases where the name of a CE [Commercial Enterprise] newspaper is already owned by the CE publisher, all appropriate steps should be taken to ensure that the name of the publication is owned by the Army.

As illustrated by these examples, the Army actively pursues trademark protection for many activities. The purpose for such action is to protect the goodwill that has been developed by the activities. This is necessary for several reasons. The first reason is to protect the public, especially members of the Army community, from those who might seek to use trademarks and service marks closely associated with the Army, in order to falsely suggest that their goods or services are sponsored by or connected with authorized Department of Army activities. The second reason, which is equally important, is to protect the Army's investment in marks closely associated with the Army from being debased and devalued. The Recruiting Command has heavily advertised Be All You Can Be® and thereby created a mark of

great value, in view of its close association to the Army. When people hear the words Be All You Can Be®, they think Army. That would probably not be the case if the public also heard Be All That You Can Be used on commercials and in advertisements to identify laundry starch.

A third reason for obtaining trademark protection is to avoid being placed in a position where the Army is using and potentially infringing a mark that has been registered by someone else. Many installations and major commands within the Department of Defense have commercial enterprise newspapers. Generally, the command or installation has one authorized newspaper that provides information of interest to the military community assigned to that command or installation. Such newspapers typically are printed by a contractor at no cost to the government (often on a concession basis), as the contractor derives its revenues from the sale of advertising space in the newspaper. The names of such newspapers become well known and are closely associated with the command or installation as the source of the newspaper. In at least one case, a contractor, without the knowledge or consent of the installation involved, obtained a federal trademark registration for the name of the particular installation newspaper that it printed. That posed no problem as long as that contractor continued to be awarded the printing contract. When the installation decided to award the contract to another printer, however, the government was advised by the previous contractor that the installation could not use the federally registered trademark and would have to change the name of the installation newspaper. This situation could have been avoided had the installation taken action to have the newspaper's name registered as a trademark in the first instance as encouraged by DOD Instruction 5120.4 and AR 360–81.

Applications to register marks are reviewed in the United States Patent and Trademark Office (PTO) by a trademark examining attorney. When a PTO trademark examining attorney determines that the statutory requirements of the Lanham Act (15 U.S.C. § 1051 (1982)) concerning registration have been met, the mark is published in the PTO Official Gazette (OG). Any person who believes that he or she would be damaged by the registration of a published mark has thirty days from the date of publication to submit to the PTO a Notice of Opposition to the mark's registration. Filing a Notice of Opposition initiates an interparties action before the PTO. In that action, the applicant and the opposer respectively present their case as to why registration should or should not be granted. An opposition proceeding involves the submission of pleadings, motions practice, and discovery. Except for a few modifications, procedure and practice is governed by the Federal Rules of Civil Procedure. Testimony may be taken by deposition upon oral examination or upon written questions during scheduled testimony periods. Final briefs are submitted by each party after the close of the testimony periods. Oral argument is permitted if either party desires, or the case may be decided on the basis of the evidence of record and the briefs submitted. It was in an opposition proceeding before the PTO that Army lawyers successfully prevented the Faultless Starch/Bon Ami Company from registering Be All That You Can Be as a trademark for laundry starch. In another opposition filed by Army lawyers, the Army successfully prevented a sporting goods and military surplus store from registering The Army Mule as a service mark for retail store services. The opposition in that case was not undertaken to attempt to assert an exclusive right of the Military Academy to use the term The Army Mule because of its well known mascot. It was undertaken, however, to protect the valuable commercial goodwill that is associated with the Military Academy's athletic programs. The Army had already registered as trade and service marks, the Army Athletic Association Logo (the letter "A" with a picture of the Army Mule superimposed on it) and was conducting negotiations with several vendors with a view toward licensing the trademark. (The trademark is used on items such as jewelry, sport event programs, cloth pennants, T-shirts, and jackets). Had the store's attempt to register The Army Mule been successful, it could have seriously jeopardized the licensing negotiations.

The Patents, Copyrights, and Trademarks Division of the United States Army Legal Services Agency actively monitors the marks published in the OG to identify those marks that may affect the Army. When such a mark appears, the division contacts the command that is directly affected (*e.g.*, the Recruiting Command or the Military Academy) to ascertain the command's view on opposing the registration. In those cases where it is determined that an opposition will be filed, the assistance of the local staff judge advocate is solicited to obtain the factual information and evidence required to support the government's case before the PTO.

Any attorney may represent a client before the PTO in a trademark case. Unlike patent cases, there is no register of attorneys and agents recognized as entitled to represent clients before the PTO. Trademark law, however, remains an area of law that is not practiced widely by general practitioners, as it does require a degree of specialization that can only be obtained by studying the Lanham Act, Title 37 Code of Federal Regulations, and the case law interpreting the provisions of each. Unfortunately, most judge advocates and Department of Army civilian attorneys in the field do not have ready access to many of the references and treatises that are essential to a practice involving trademark cases. As such, trademark issues are often overlooked or not considered at the installation SJA level. For those judge advocates and Department of the Army civilian attorneys who regularly provide legal advice on commercial type activities, it is recommended that you consider whether particular words or symbols used in connection with those activities may be functioning as a trade or service mark that merits protection. In addition to providing an opportunity to learn a new and interesting area of law, you may be protecting a valuable Army asset. Questions concerning trademarks and whether registration is appropriate can be directed to the Patents, Copyrights, and Trademarks Division, United States Army Legal Services Agency (AUTOVON 289–2430/2431).

The Regulatory Law Office has filed a complaint and supporting pretrial brief before the Federal Maritime Commission against the Port of Seattle, WA (POS). The complaint and brief are on behalf of the Secretary of the Army and the Military Traffic Management Command (MTMC). The complaint involves Army and Air Force Exchange Service flour shipments transported by rail from Oregon to Seattle, and then by water to overseas destinations. POS transferred these shipments from rail cars to marine containers using forklift operators at its Container Freight Station.

The complaint alleges that POS violated the Shipping Act of 1984, 46 U.S.C. app. §§ 1701–1720 (Supp. II 1984), by charging MTMC under a military tariff with a rate that was 434% higher than the rate of a commercial tariff that could have been applied to MTMC's shipments. The pretrial brief demands reparations of $304,776.59, which represents the difference between what was charged to MTMC as opposed to what should have been charged. The brief alternatively alleges that if MTMC's shipments were covered solely by the military tariff, then it was applied incorrectly, because MTMC was concurrently charged two separate rates for the same service. This alternative argument demands reparations of $86,368.29.

The essential factual issues are whether the commercial tariff covered the services performed for MTMC or, alternatively, whether the services performed were chargeable solely under one item of the military tariff as opposed to the two separate items under which the services were charged. There are several essential legal issues.

One legal issue is whether POS engaged in an unreasonable practice under section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(d)(1) (Supp. II 1984), by charging MTMC under the military tariff rather than the commercial tariff. Another legal issue is whether POS subjected MTMC to an unreasonable prejudice or disadvantage vis-a-vis the commercial shippers in violation of section 10(b)(12) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(12) (Supp. II 1984), when it applied the military as opposed to the commercial tariff to MTMC's shipments.

Because many of MTMC's shipments occurred before the effective date of the 1984 Act, another important legal issue is whether the proceeding is governed by the relevant provisions of that Act or its predecessor, the Shipping Act of 1914, 46 U.S.C. § 801–842 (1982), which it amended. The Federal Maritime Commission has ruled that the provisions of the 1984 Act apply to proceedings pending on its effective date unless this would result in manifest injustice under the test set out by the Supreme Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 79 Fed. Reg. 21,798 (1984).

The brief of the Regulatory Law Office argues that there is no manifest injustice in applying the relevant prohibitory provisions of the 1984 Act because the 1914 Act had identical provisions. *Compare* 46 U.S.C. §§ 815, 816 (1982) *with* 46 U.S.C. app. § 1709(b)(12) and (d)(1) (Supp. II 1984). Thus the brief argues there is no manifest injustice in applying these provisions of the 1984 Act because assumedly the same result would ensue if the 1914 Act were applied.

The most important difference between the two Acts is that the 1914 Act has a two year statute of limitations while the 1984 Act has a three year limit. *Compare* 46 U.S.C. § 821 (1982) *with* 46 U.S.C. app. § 1710(g) (Supp. II 1984). The two year limit, if applicable, would bar much of the claim. The Regulatory Law Office makes two alternative arguments on this issue.

It first argues that neither limit is applicable to the Department of Defense because it is a federal executive agency and Congress has not explicitly made either limit applicable to the United States. *See United States v. P/B STCO, 213, ON 527 979*, 756 F.2d 364, 368 (1985), and authorities cited. It next argues that the three year limit is applicable because this would not result in manifest injustice under the reasoning of *Compagnie Generale Maritime v. S.E.L. Madura (Florida), Inc.*, 23 Shipping Reg. (P&F) 1085 (Adm. L.J. 1986), a case with substantially similar facts where it was held that the three year limit should apply.

The proceeding was originally set to be heard on October 7, 1986, but has since been postponed until later in the year. MTMC now bypasses the Port of Seattle's services by having its shippers source load the flour into containers and dray it by motor carrier directly to shipside.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Contract Law Note

Changes in Publication Requirements for Contract Actions

Federal Acquisition Reg. § 5.002 (1 Apr. 1984) [hereinafter FAR] states that contracting officers shall publicize contract actions to increase competition, broaden industry participation in government contracting, and help small businesses and others obtain government contracts. The three required methods of publication (synopsizing in the *Commerce Business Daily,* solicitation mailing lists, and posting in a public place) are designed to further this policy, and specific guidelines for each have been and continue to be the subject of extensive regulation. *See* FAR Part 5 and Subpart 14.2; Defense FAR Supplement Part 5 and Subpart 14.2 (1 Apr. 1984) [hereinafter DFARS]; Army FAR Supplement § 5.203 (1 Dec. 1984). The Competition in Contracting Act of 1984, Pub. L. No. 98–369 98 Stat. 1175, was one of Congress's first efforts to make some of these requirements statutory. The Defense Acquisition Improvement Act of 1986, which Congress passed on 15 October 1986 as part of the National Defense Authorization Act for Fiscal Year 1987, continues the trend toward congressional "regulation" by statute of these publication requirements.

The first of the two changes made by the Defense Acquisition Improvement Act of 1986 in this area concerns the dollar threshold for synopsizing in the *Commerce Business Daily.* Previously, every proposed contract action, with certain exceptions not relevant here, that was expected to exceed $10,000 had to be furnished to the Department of Commerce for publication in the *Commerce Business Daily.* The new requirement increases the dollar threshold to $25,000, which brings the requirement to synopsize in line with the small purchase procedures of FAR Part 13. This should result in significant savings of effort in the administration of small purchases, which account for ninety-eight percent of all contract actions but only eight percent of all dollars spent on Department of Defense contracts. Furthermore, the lead time required to process small purchases between $10,000 and $25,000 has been cut down considerably, because the Competition in Contracting Act requirement to wait, after issuing the solicitation, a minimum of thirty days before opening bids or proposals is no longer applicable. 41 U.S.C. § 416(a)(3)(B) (Supp. II 1984). The change may, however, adversely affect competition by small businesses that normally bid on small purchases and that previously relied upon the *Commerce Business Daily* to learn of new government contract actions.

The Defense Acquisition Improvement Act of 1986 also attempts to make statutory the requirement in DFARS § 5.101 to post in a public place in the contracting office a notice of all solicitations expected to exceed $5,000. Section 922, Defense Acquisition Improvement Act of 1986. Poor draftsmanship of the statute, however, has resulted in some significant differences between the statute and the existing regulation and will create some confusion in contracting offices attempting to follow them. First, the statute applies only to contract actions expected to exceed $5,000 but not $25,000. Because it is silent as to contract actions expected to exceed $25,000, DFARS § 5.101 presumably applies to them and posting is still required.

The more difficult question concerns to what solicitations this posting requirement applies. Under the regulation, posting is required for "each solicitation for an *unclassified* contract action . . . *which provides at least 10 calendar days for submission of offers* (emphasis added). DFARS § 5.101(a)(2). The new statute, however, states that solicitations for bids or proposals "for a contract for property or services" shall be posted "for a period not less than ten days." Section 922, Defense Acquisition Improvement Act of 1986. On its face, then, the statute is applicable even to classified procurements, but not to contracts for other than property or services. Arguably, it does not cover contracts for such things as research and development, technical data, and possibly construction.

Also, the new statute seems to distort the posting requirement by ignoring those situations where posting was not previously required due to time constraints, *i.e.,* urgent requirements. Under the statute, if it meets the dollar thresholds it must be posted for at least ten days, regardless of the urgency of the contract action. Did Congress intend to prevent the Department of Defense from fulfilling its urgent requirements that happen to fall within the $5,000 to $25,000 range? Unfortunately, that is what the statute now says, and still more legislation will be needed to correct the flaws in the latest attempt by Congress to improve the procurement process.

Until further guidance or implementation from Congress or the FAR or DAR Councils is received, field offices should follow the dollar change in the requirement to synopsize, but should continue to follow the posting requirements in DFARS § 5.101. Watch this space for further developments in this area. Major McCann.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, Army, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Notes

Door-to-Door Sales

According to the Texas Attorney General's office, several door-to-door sales operations headquartered in Irving, Texas, have hired young people to solicit sales door-to-door in other states. Several complaints have been registered in Texas by consumers who have not received the products they purchased. The Texas office is seeking information regarding these transactions so that it can assist the states in which consumers reside in maintaining litigation brought in Texas, the seller's state. The companies involved apparently include: Hy-Pro Chemical (household cleaner), Mecca (magazines), and Circulation Builders (magazines). Those who have information about these companies or others should contact their local state attorney general's office, who will work with the Texas Attorney General in pursuing complaints.

Effective 1 October 1986, Florida law expanded its door-to-door sales provision to include leases and rentals of consumer goods and services, whereas the former law included only sales of such goods and services. In addition, the new law requires that those who want to make home solicitations first obtain permits from the clerk of the circuit court for the county in which such sales are to be conducted. Violations of the home solicitations sales provisions, which were formerly first degree misdemeanors, are now second degree misdemeanors under Florida law. 1986 Fla. Laws 501.021, 501.022, and 501.055.

Health Clubs

The Consumer Protection Division of the Maryland Attorney General's Office has issued a pamphlet entitled, "Consumer Tips on Health Spas." The pamphlet includes information on a new state law that is designed to protect club members and provides consumer advice on health clubs, which include health spas, figure salons, sports centers, diet centers, and self-defense schools. For example, the pamphlet notes that all health club membership contracts must now contain a "notice of consumer rights," advising customers of their right to cancel the agreement during a cooling-off period of three business days and must inform consumers of their rights if the club closes or if they are disabled and cannot use the facility. Copies of the pamphlet may be obtained by writing the Consumer Protection Division at 7 North Calvert Street, Third Floor, Baltimore, Maryland 21202.

In Colorado, a preliminary injunction prohibits Peoples Financial Services of Arvada, Colorado, from pursuing collection efforts against former members of a now defunct health club, Cosmopolitan Lady, Inc. (which has done business under the trade name of American Man, Confident Lady). The state has alleged that the continuing collection efforts violate the Colorado Consumer Protection Act, which allows health club members to cancel their contracts upon the permanent discontinuance of the health club.

Credit Card Surcharges

A New York city retail store, East 33 Street Typewriters and Electronics, has entered into a consent agreement with the state attorney general's office pursuant to which the store agrees to stop imposing a surcharge on credit card purchases. The store, whose advertisements failed to disclose that the quoted prices were available only to cash customers, had been charging credit card customers an additional fee over the quoted price of merchandise: 5% for American Express and 3% for Visa and Mastercard. The store has also agreed to refund the surcharges to all customers who paid them between June 1984 and June 1985.

Work at Home Plans

Consumers are again reminded of the potential problems inherent in "work at home" schemes. The Iowa Attorney General has obtained a consent judgment (applicable to Iowa residents) that provides restitution to those recruited by Marks Elan Vital, Inc., a Florida business, to assemble toy clowns in their homes. Although advertisements indicated "Easy assembly work. $600 per 100. Guaranteed Payment. No experience/No sales.," prospective assemblers were asked to pay a $45 registration fee and a $60 deposit for materials that were often insufficient to complete the clowns. In addition, assemblers were only paid for work that "passed inspection," and inconsistent inspection standards often forced assemblers to keep the clowns or to accept reduced prices for the clowns they had made because they were unable to understand or to meet the purported standards.

"Lemon Law"

The New Jersey Attorney General has announced that New Jersey consumers who own irreparable new cars may now sue auto makers directly under the "Lemon Law" because manufacturers' arbitration programs under the law do not comply with federal requirements. This determination was based on the 1983 "Lemon Law," which required consumers to first use manufacturer-sponsored arbitration programs before suing the manufacturer as long as the programs complied with the Federal Trade Commission's (FTC) requirements. In April 1986, questionnaires were sent to auto manufacturers doing business in New Jersey to determine whether the manufacturers' arbitration programs were in compliance with FTC requirements. Because no manufacturer responded fully to the questionnaire, the New Jersey Attorney General declared the programs ineffective for purposes of the "Lemon Law." Based on this finding, the Attorney General intends to introduce amendments to the state "lemon law" designed to protect consumers better.

Minnesota, which was the third state to pass a "Lemon Law" when it passed its original law in 1983, has become the first state to guarantee procedural protection to consumers who attempt to resolve complaints through the arbitration process. Under the new Minnesota law, effective 1 August 1986, automobile manufacturers must provide consumers with procedural protections during manufacturer-sponsored arbitration of new and leased car consumer

complaints. Among other protections, manufacturer-sponsored arbitration panels will be required to: give "lemon" owners a choice between a replacement vehicle or a full refund when it is determined that the consumer is eligible for such a replacement or refund; give "lemon" owners full refunds for their consequential damages resulting from the defective car, such as sales tax, license fees, and towing and rental fees incurred due to car repairs; prohibit manufacturers from making presentations during arbitration proceedings unless the consumer is also given a chance to be present and heard during the proceeding; and review any manufacturer's service bulletins that show the history of repair problems with a particular vehicle model.

Home Repairs

Oregon law enforcement officials are warning consumers to be especially aware of home repair scams based on reports that members of the Williamson Gang, a highly organized nation-wide network of home repair workers, have been soliciting in the Eugene and Portland areas. Oregon officials warn that the Williamson Gang has several thousand members and visits almost every state, concentrating their efforts in the Northwest, offering to repair roofs, resurface driveways (often with a "sealant" composed of a tar-like substance cut with used crankcase oil), pump septic tanks, exterminate termites, polish silver, and sell used trailers. Officials warn that the work is typically extremely expensive and very shoddy or not performed at all.

Official note that Gang members often drive late-model cars, trucks, and vans, use magnetic signs to advertise their businesses, have children make the first contact with the consumer, target older neighborhoods, and typically ask for cash or check payments, depositing any checks received immediately. Law enforcement officials and consumer protection agencies have difficulty catching Gang members because they often leave the area within a few hours.

Credit Card Liability

In an action brought under the Truth in Lending Act, the Oregon Court of Appeals held in *Vaughn v. United States National Bank of Oregon,* 718 P.2d 769 (Or. App. 1986), that a credit card holder could recover the amount charged against his account by a third party to whom he had given authority to use the account on two or three occasions where the individual had no authority to use the card on subsequent occasions. In that case, Vaughn had allowed his brother's girlfriend to use his Visa card and personal identification code number to obtain cash from the bank's automatic teller machine in order to make purchases on Vaughn's behalf. Several months later, the girlfriend took the card without permission and used it to obtain cash from the bank's machine for her own use. The bank argued that it should be permitted to rely on the girlfriend's apparent authority and that Vaughn should be liable for these subsequent transactions in full, rather than being limited to the $50 provided in 15 U.S.C. § 1643 (1982), because Vaughn had not informed the bank that the girlfriend's actual authority had been revoked. The court disagreed and permitted Vaughn to recover the amounts withdrawn without his permission, concluding that the girlfriend had no more apparent authority to use Vaughn's card then would a thief.

Debt Collection Law

Effective 9 July 1986, attorneys are no longer excluded from the definition of "debt collectors" contained in 15 U.S.C. § 1692a(6). Public Law 99–361 removes the exemption formerly applied to attorneys-at-law collecting debts as attorneys on behalf of and in the name of clients.

Effective 26 June 1986, the penalty provisions of the North Carolina debt collection law have been amended to provide that the civil damages that can be awarded may be the result of either private actions or actions instituted by the state attorney general. N.C. Gen. Stat. § 75–56.

Limitation on Credit Finance Charges

Effective 31 August 1986, the Rhode Island legislature has lowered the maximum finance charges on both retail sales and under revolving or open-end consumer credit plans from 21% to 18%. R.I. Gen. Laws § 6–27–4 (1986).

Under the South Carolina Consumer Protection Code, a credit-seller's failure to file a timely interest rate schedule with the state Department of Consumer Affairs effectively limits the lender to an eighteen percent annual interest rate ceiling on its contracts. S.C. Code Ann. § 37–2–305.

Misrepresentations Regarding Business Opportunities

New York has filed its first consumer protection lawsuit under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. The suit, which involves at least a million dollars and six corporations using at least twenty-two corporate names, was asserted for a series of fraudulent schemes intended to entice consumers to invest in retail businesses. Under the schemes, consumers were promised huge profits for part-time work and were told that their investments would be refunded in full if the business were not profitable. The suit alleges that in each case the promises were not kept and the consumers' money was not returned. The retail businesses involved in the scheme included coin-operated video games, video cassettes, popcorn, and gourmet ice cream. Typically, the corporations would advertise in major daily newspapers in New York and New Jersey offering high earnings, prime locations, substantial financing and assistance, and guaranteed refunds or buy-backs for dissatisfied customers. These and other oral promises were rarely kept and individual consumers frequently lost thousands of dollars. The state's lawsuit seeks to end these fraudulent practices and to obtain full refunds and treble damages for defrauded consumers. Captain Hayn.

Tax News

Standard Auto Mileage Rates for 1986

The standard automobile mileage rates which may be used in computing tax deductions for 1986 will remain unchanged from 1985 rates. For automobiles that are not fully depreciated, the rate will be 21¢ per mile for the first 15,000 miles of business use and 11¢ per mile for each business mile driven over 15,000 miles. The rate for automobile mileage in connection with charitable activities is twelve cents per mile. The rated for mileage for moving expense purposes and for medical purposes will be eight cents per mile.

Taxpayers are entitled to deduct either their actual automobile expenses or use the standard mileage amounts.

Those who use the standard mileage may also deduct the related parking expenses and tolls. Major Mulliken.

Social Security Numbers for Children

The Tax Reform Act of 1986 will require that children over the age of five have social security numbers to be claimed as an exemption on 1988 tax returns. Though this requirement is not immediate, installations, as part of their preventive law program, should organize to inform families of this requirement and assist them in obtaining social security numbers. An excellent program has been developed by Patricia F. Halsey, the Chief of Client Services at the Presidio of San Francisco, California. Printed below is a copy of the letter she developed announcing the program.

Protect Your Most Valuable Tax Exemption: Apply for a Social Security Number for Your Children

The "Tax Reform Act of 1986" requires that all children over the age of five years must have a taxpayer identification number (TIN) from the Social Security Administration to be claimed as an exemption on your 1988 tax return. To avoid the delay that may occur when the entire nation begins applying for Social Security numbers for children, the Social Security Administration has agreed to come on post for two days during "Army Family Week" and process applications. Legal Assistance is hosting the Social Security Administration and is making appointments for the application service which will be available two days, November 25 and November 28, from 9:00 A.M. to 3:00 P.M. at the Legal Assistance Office. To take advantage of this service you will need to call 561–4273 and make an appointment and you should also gather proper documentation as listed below prior to attending your appointment.

The Social Security law requires that you furnish documentary evidence of your child's date of birth, U.S. citizenship or legal immigrant status, and identity. You must also furnish copies of the court orders for either a legal guardianship or appointment as a legal custodian of a child. Lastly, you must furnish documentary evidence as to your own identity. The following is a list of the types of documents accepted by the Social Security Administration.

Evidence of Birth Date and Citizenship for Children Born in the U.S.A.

1. Public record of birth established before age five is preferred and should be submitted if at all possible.
2. Religious record of birth or baptism established before age five.
3. Hospital record of birth established before age five.

Evidence of Birth Date and Citizenship for Children Born Outside the U.S.A.

1. U.S. consular report of birth.
2. Child's foreign birth certificate, and one of the following:
   A) U.S. citizen ID card; or
   B) Certificate of citizenship; or
   C) U.S. passport; or
   D) Naturalization certificate.

Evidence of Identity for all Children

One or more of the following for the child:

1. Military ID card;
2. School record;
3. School ID card;
4. School report card;
5. U.S. passport;
6. U.S. citizen's ID card;
7. Adoption record;
8. Church membership or confirmation record;
9. Medical records;
10. Vaccination certificate;
11. Insurance policy;
12. Day care or nursery school record;
13. Child's membership in Boy Scouts, Girl Scouts, or other youth organization; or
14. Any other document providing identifying data sufficient to establish proper identification

Evidence of Legal Guardianship or Legal Custodian

1. Court documents awarding guardianship; or
2. Court documents appointing legal custodian.

Evidence of Parent's, Legal Guardian's, or Legal Custodian's Identity

1. Military ID card;
2. Driver's license;
3. State ID card;
4. Voter's registration card;
5. Marriage record;
6. Divorce decree;
7. U.S. passport;
8. Medical records; or
9. Insurance policy.

Do not submit photocopies of documents. You must provide the original document or a copy certified BY THE AGENCY THAT ISSUED IT. The Social Security Administration will return any document you provide. It takes approximately two weeks to process applications. If you need assistance in obtaining any document, the legal assistance office has a complete listing of where you may write for these documents.

Model Rules of Professional Conduct

The number of states that have adopted a version of the American Bar Association's Model Rules of Professional Conduct has recently increased to sixteen with the adoption of those rules by the State of Florida. The states that have adopted a version of the Model Rules are Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, and Washington. Additionally, a number of other states are in the process of studying the Model Rules in consideration of possible adoption. The Model Rules have been under study by the Army as well as by a Joint Services Committee made up of representatives of each military department. Currently, however, the Army has, in Army Regulation 27–1 and Army Regulation 27–3, adopted the Model Code of Professional Responsibility.

Legal Assistance to Survivors of Gander

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

Air Crash Legal Assistance Update No. 16

1. Legal assistance officers are required to notify this office if the family they are assisting has not retained civilian counsel. This report should indicate whether the family is in the process of retaining such counsel. Advise if the family is requesting JAG assistance in settling claims against Arrow. Suspense is 4 June 86.

2. One additional firm has been added to the aviation accident lawyer referral list. It is: Smiley, Olsen, Gilman, and Pangia of Washington, D.C.; (202) 466–5100; Mr. Nicholas Gilman, fee of 15–20 percent.

3. The Canadian Safety Board hearings have been completed. They have not yet determined the cause of the crash,

and have ordered a number of additional tests be performed. Preliminary indications are that the crash was likely caused by the concurrence of a number of factors, no one of which alone would have caused the crash. These factors are:

a. Overloading the plane. While the load factor was within the FAA-approved specification for a DC–8, it was heavier than the crew had calculated, thereby affecting the weight and balance of the aircraft. This would have had an effect on the flight characteristics of the aircraft on take-off.

b. Icing. The indications are that there was some frost on the wing surfaces. This would have decreased slightly the lift wing characteristics of the wings. While other aircraft took off without deicing, this plane was very heavily loaded and historically used all available runway to take off.

c. Crew fatigue. This crew had taken the flight from Ft. Lewis to Gander and on to Koln, Germany. There another crew took the flight into Cairo and back to Koln. The original crew then took over and continued on to Gander and the crash. The original crew had a rest stop of 10 hours.

d. Mechanical problems. The right outboard engine was running 40–50 degrees hotter than the other engines. It appears that the crews were throttling back on this engine to prevent it from overheating at take-off. Thus this engine was not operating at full thrust. (There was evidence that the fault was a defective temperature gauge and that the engine was running properly. While Arrow knew this, they never told the crew who continued throttling back in the belief that the engine was running hot.)

e. Failure of the crews to communicate. When the crew returned from Cairo, it appears that they did not inform the new crew of anything relating to the flight or the aircraft. Thus the crew was not informed of any of the weight and balance matters, problems encountered, or the flight characteristics of the aircraft with that particular load.

4. The safety board has determined that additional inquiry is warranted into a number of areas. These include: Hydraulics (the aircraft had a recent history of requiring large amounts of hydraulic fluid. The mechanic in Koln reported adding 7 quarts); ratcheting in the steering column (the crew from Cairo to Koln reported a ratcheting in the steering column. This could have affected the trim adjustments in setting the balance of the plane. This was not reported in Koln; if it had been the plane would have been grounded); the amount and effect of icing.

5. During the hearing, the representatives of Arrow and the estates of the crew tried to raise the possibility of an onboard explosion as the cause of the crash. While the safety board concluded that there were a number of areas needing further inquiry, one conclusion was announced: "Simply stated, and although an extremely thorough wreckage search was carried out, no evidence was found of any explosive action resulting from criminal act, and no evidence was found of any military explosive devices being carried on board the aircraft aside from limited revolver ammunition."

6. Copies of the transcript of the Canadian safety board hearings may be obtained by contacting: Steno Tran Services, Inc.; 1376 Kilborn Avenue; Ottawa, Ontario, Canada K1H6L8; telephone (613) 521–0703. The cost for a complete transcript is about $3,200 depending on the exchange rate. The findings and a summary will be released at a later date. Further information about these will be released when available.

7. If a legal assistance attorney is pending reassignment while still assisting a family, arrangements for substitute counsel must be made before departing. This includes arranging for appointment of a substitute, and where possible, personally introducing the new attorney to the family. An after-action report is required upon reassignment. The report format will be announced shortly.

Air Crash Legal Assistance Update No. 17

1. An after-action report is required of each attorney assigned to this mission. The report should include:
   a. Name of attorney.
   b. Name of deceased.
   c. Name and relationship of client to deceased.
   d. Did you attend the special TJAGSA course?
   e. If you attended the course, was it helpful? How could it have been improved?
   f. Approximate number of hours spent providing assistance.
   g. Brief outline of assistance rendered.
   h. Brief outline of significant problems encountered.
   i. Has the assistance from the office been adequate? If not, how could it have been improved?
   j. If a reservist, or if the information is available, what would the cost of the services have been if you were to charge a fee?
   k. How can the legal assistance and casualty assistance program be improved?

2. This report is to be filed upon:
   a. Reassignment of the LAO;
   b. Retention of civilian counsel, and substantial completion of all other duties; or
   c. In any case NLT 15 June. In those cases which are not completed the report will also include:
   (a) What remains to be done, and
   (b) Expected termination date.

3. The judicial panel on multidistrict litigation has ruled that all U.S. district court cases against Arrow as a result of the Gander crash will be consolidated for purposes of determining liability in the U.S. District Court for the Western District of Kentucky, Paduca, Kentucky. Judge Edward H. Johnstone is the presiding judge. His first ruling contained a strong prohibition against any ex parte communications with the judge.

4. Some attorneys are apparently claiming to be on the plaintiff's steering committee in the multidistrict litigation (MDL). This is false, and clients should not be misled by this misrepresentation. The clerk of court for Judge Johnstone has confirmed that the plaintiff's committee has not been formed. Argument on this issue has been set for 10 June. No decision will be made prior to that date. If a client feels that it is important to retain counsel who is on the committee, they should be advised to await the court's decision. This office will be furnished a copy of all court orders and will keep LAO's informed of the designation of the committee.

Air Crash Legal Assistance Update No. 20

This message, dispatched 29 August 1986, has the following date-time group: 291200Z Aug 86.

1. The plaintiffs' steering committee recently moved for summary judgement against Arrow. Arrow did not contest

this motion as to compensatory damages. It has filed pleading contesting the applicability to punitive damages. On 27 August 1986, Judge Johnstone granted plaintiff's motion in part. In all federal cases, liability against Arrow has been established for compensatory damages. The issue of liability for punitive damages has not been resolved. The amount of the compensatory damages remains to be resolved on an individual basis.

2. This office is aware of eight completed settlements. These are: one at $145,000; four at $150,000; one at $157,654; one at $350,000; and one at $443,014. To date AAU has used the $150,000 as a benchmark in settling single nondependent cases. However, it appears that they are starting to move to a higher value. This office will attempt to follow settlements in all cases. It is imperative that you keep us informed as you become aware of settlement offers and other information that will be helpful.

Claims Report

United States Army Claims Service

Handling Overflight and Artillery Firing Claims

Mr. Joseph Rouse
Chief, General Claims Division

Introduction

It would seem that the volume of claims arising from the noise and air blast of aircraft and large caliber weapons by persons living in the vicinity of military installations should be directly related to the number of overflights and the amount of firing originating on such installations. In some situations, however, it is not true that installations with numerous flight operations or frequent heavy firing get the most claims. The manner in which complaints concerning such activities are handled plays a large part in both community relations and the filing of claims. Where a good system for receiving and investigating complaints is in effect, claims do not increase, but actually decrease. Further, when claims are disposed of fairly and promptly, good community relations will flourish.

Prior to World War II, there was authority to pay for property damage up to $1,000 as a result of firing activities, regardless of fault.[1] In 1942, the Military Claims Act (MCA) was enacted and incorporated such authority.[2] Generally, such claims are considered under the noncombat activities provision of the MCA[3] rather than a negligence theory. As a result, these claims do not entail the difficulty of investigating and determining whether there was, in fact, a negligent act, but entail only the need to determine causation and damages. Even this is sometimes difficult, however, particularly when a complaint is not promptly and thoroughly investigated.

The remedy under the MCA is administrative in nature, subject to an appeal procedure, and does not allow recourse to a judicial remedy. Processing these claims under the MCA is not often challenged judicially, e.g., by filing suit alleging a negligent act or omission compensable under the Federal Tort Claims Act (FTCA).[4] Most such claims are so small monetarily that the expense is not warranted, and claims based on strict or absolute liability are not payable under the FTCA.[5] Additionally, negligence in such cases is difficult for the plaintiff to investigate and prove. The questioned activity usually consists of a normal military activity or operation that is properly conducted and based on military needs not comportable with any civilian standards. Nevertheless, a basic understanding of the law as applied to efforts to obtain judicial relief is essential if judge advocates are to provide the necessary guidance to commanders and their staff. The cases of *Barroll v. United States*,[6] *Leavell v. United States*,[7] and *Peterson v. United States*[8] are recommended reading. An examination of reported cases in this area follows.

Examples of Damage Claims

In the case of overflight cases, one method of attack has been to attempt to prove a taking of property under the fifth amendment to the Constitution, *i.e.*, an aerial easement. This was successful in two Supreme Court cases where there were repeated low level flights over a period of

[1] Act of Aug. 24, 1912, ch. 391, 37 Stat. 586.

[2] 49 Stat. 1138, 31 U.S.C. § 224a (1952).

[3] Dep't of Army, Reg. No. 27-20, Legal Services—Claims, para. 3-4*e* (18 Sept. 1970) [hereinafter AR 27-20].

[4] 28 U.S.C. §§ 2671-2680 (1982).

[5] *See* Laird v. Nelms, 406 U.S. 797 (1972) (sonic boom by military aircraft); Dalehite v. United States, 346 U.S. 15 (1953) (explosion of surplus fertilizer).

[6] 135 F. Supp. 441 (D. Md. 1955).

[7] 234 F. Supp. 734 (D. S.C. 1964).

[8] 673 F. 2d 237 (8th Cir. 1982).

time, the rationale being a physical invasion of the immediate airspace. In *United States v. Causby,*[9] the damage consisted of frightening both chickens and people by such flights. In *Griggs v. Allegehany County,*[10] the flights were at the end of a runway.[11] Such claims do not fall under the FTCA but solely under the Tucker Act[12] which allows suits in the United States Claims Court. Where the demand is less than $10,000, suit can be filed in a United States district court.

The principle illustrated is of particular interest at an installation where there are flights over certain types of terrain. Routes for such training should be selected after an aerial reconnaissance and, where indicated, a ground reconnaissance to ensure that, whenever feasible, the flights are not over an activity that is particularly susceptible to damage by loud noise, *e.g.,* livestock or poultry operations or civilian communities. If such cannot be avoided, the decision to carry out the activity should be made by the installation commander.[13] The reason for requiring a decision at this level is the policy consideration that such decisions may be defensible under 28, U.S.C. § 2680(a) (1982), which states in pertinent part "or based upon the exercise, function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This does not mean that the rubber stamping by a senior commander of what is actually a low level decision will suffice. All alternatives for carrying out the assigned mission must be presented to the decisionmaker. If this smacks of a federal judge telling the Army how to operate, it must be remembered that it is the judge's responsibility to determine whether the Army can carry out its mission without infringing on the rights of others. If the commander uses the same guiding principle, many problems would be solved or abated.

A number of reported cases illustrate the foregoing. In *Barroll v. United States,* there is an exhaustive discussion concerning the selection of a test site for a large caliber (280mm) weapon, resulting in a decision in favor of the United States based on the discretionary exception. Judge Thomson's rationale consisted of balancing the risk to the community against the utility of the Army's mission. Today such a decision might well involve not only an installation commander but also whether consideration was given at a higher level as to whether the weapons could be fired at another installation.[14] In *Maynard v. United States,*[15] the decision to conduct training flights in supersonic aircraft and the route selection was similarly excluded from FTCA coverage. In *Leavell v. United States,* the testing of jet engines at Shaw Air Force Base was justified in considerable detail, to include the exact location of the test site and the direction in which the engines were pointed.[16] While in these cases the decision concerned a taking, they illustrate that the courts are not reluctant to review command decisions carefully, even when deciding in favor of the United States.[17]

While proof that the type and nature of the activity is properly planned and approved avoids a payable claim under the FTCA, a successful claim can be brought if the activity itself is carried out in a negligent manner. How is negligence determined if the activity is peculiar to the military, *e.g.,* a noncombat activity? What standards apply? In flying activities, altitude levels established by state law or Federal Aviation Administration regulations should be followed unless a high level decision has been made that training requirements dictate that such altitude levels be violated.

In *Peterson v. United States,* fifteen obsolete B–52s took off fifteen minutes apart to make simulated bomb drops in an eight mile wide corridor at an altitude of 550 feet. The United States was held liable for frightening milk cows based on testimony from eyewitnesses on the ground that the planes were lower than 550 feet; the court discounted the pilot's testimony that he did not think he was below 550 feet. In *Lakeland R–3 School District v. United States,*[18] the United States was held liable for blast damage to a school when a Reserve Engineer unit violated quantity-distance standards established by both military and civilian manuals

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[9] 326 U.S. 256 (1946).

[10] 369 U.S. 85 (1962).

[11] *See also* Matson v. United States, 171 F. Supp. 283, 145 Ct. Cl. 225 (1959); Herring v. United States, 162 F. Supp. 769, 142 Ct. Cl. 695 (1958); Highland Park v. United States, 161 F. Supp. 597, 142 Ct. Cl. 269 (1958) (repeated low level flights were also ruled takings). *Contra* Batten v. United States, 306 F. 2d 586 (10th Cir. 1962) (jet plane operation). Note that these are old cases and are not of primary concern today as most installations resolved such problems long ago by acquiring additional land or easements. Where the overflights were high in the sky, a taking was not upheld. *See* Kirk v. United States, 451 F. 2d 690 (10th Cir. 1971); Gravelle v. United States, 407 F. 2d 964 (10th Cir. 1969); Grant v. United States, 326 F. Supp. 843 (W.D. Okla. 1970).

[12] 28 U.S.C. §§ 1346(a), 1491 (1982).

[13] This principle is equally applicable to the selection of firing points and impact areas for large caliber weapons or for the explosion of excess ordnance or duds by explosive ordnance disposal (EOD) personnel, although changes in existing firing points and impact areas is more difficult due to limitations of available terrain.

[14] For example, firing eight inch guns for the first time at an installation in a builtup area when no effort is made to determine whether a less congested area is available elsewhere.

[15] 430 F.2d 1264 (9th Cir. 1970).

[16] For other cases involving location of jet engine testing, see Schubert v. United States, 246 F. Supp. 170 (S.D. Tex. 1964); Nichols v. United States, 236 F. Supp. 2421 (S.D. Cal. 1964); Bellamy v. United States, 235 F. Supp. 139 (D. S.C. 1964).

[17] In Nevin v. United States, 696 F.2d 1299 (9th Cir. 1983), the decision to conduct a biological warfare test using a previously safe bacteria (serratia marcesons) was excluded under 28 U.S.C. § 2680 (a). A spray containing the bacteria was released from a Navy submarine following the coastline off San Francisco. The particular bacteria was chosen because it stained water red and could thus be easily detected in the water supply to determine the extent of distribution. In making his decision, General McAuliffe was presented with scientific evidence that serratia marcesons was considered harmless to humans. While this was correct at the time, it was no longer true after the test. Nevertheless, the case was excluded under § 2680(a).

[18] 546 F. Supp. 1039 (W.D. Mo. 1982).

by using excessive charges in blowing up a bridge as a training exercise.[19]

While careful planning is important prior to establishing flight routes or impact areas, it would be wise to also establish procedures requiring a periodic review or a review whenever major changes are made. The records of such reviews should be maintained as permanent files to ensure continuity in future reviews and availability of evidence. In such reviews, the senior judge advocate should assure that consumer advocacy is practiced, with the neighbors of the installation in question being viewed as the consumers.

Complaint and Response System

If consumer advocacy and preventative measures are viewed as the first line of defense, the second line is the institution of a complaint and response system. An effective claims program cannot be based on a system that investigates only after a claim is received. By then it is usually much too late to conduct a fair and adequate investigation; the ceiling crack that may have been there for some time and only widened when the explosion occurred will have aged to a point that the determination of its genealogy is not possible. The passage of time also inhibits the investigator from obtaining the precise time of occurrence, as memories have faded. The investigator is confronted with replies to the effect that the explosions "have been going on for years." Difficulty in establishing exact dates leads to difficulty in establishing what was fired or what was flown, and where and under what conditions, as well as establishing other possible sources of the problem, *e.g.*, other explosions, thunderstorms, seismic disturbances, heavy traffic, or other aircraft.

Each installation with regular firing or flying activities should designate an office to receive complaints and a telephone line dedicated to that purpose. The information concerning the phone number should be disseminated periodically in local publications and broadcasts. The office should be either at the headquarters or within a specially designated section, *i.e.*, the G–5 (civil affairs); the problem is not just a judge advocate problem but one for the entire command.

The information extracted from such complaints should be as precise as possible as to the exact hour, date, and location of the disturbance. A time should be established for the inspection of the damage. The information obtained should be passed along to interested units or staff sections, to include all those who might have created the noise. This should not be limited to those who fired large caliber weapons but should also include those who explode ordnance, *e.g.*, EOD detachments or those engaged in demolition training. The information obtained should pinpoint the location of the explosion, *e.g.*, firing point and its area of impact, if any, or the route of flight, and should be recorded on a topographical map of the area together with the location of the place of damage. If the damage is of the type that results from ground shock rather than air blast, *e.g.*, foundation, chimney, well, or concrete slab damage, the geological structure or formation of the intervening land should be obtained.

A damage control team should promptly respond to complaints by conducting an on-site survey. Such a team should include a person familiar with construction, a representative of the local claims office, and a photographer. All pertinent data concerning the damaged property should be obtained from the owner to include the date of construction, the extent and date of any additions, renovations, or repairs, and the name of the builder, where applicable. Efforts should be made to determine the extent of any preexisting damage, as only damage that occurred within the last two years is compensable. Inquiry of other property owners as to whether damage to neighboring property occurred should be made and recorded.

In overflight complaints, particular care should be taken with regard to aircraft identification. Army aviators should participate in such identifications. Silhouette charts should be shown to any ground eyewitnesses by an Army aviator. Direction of travel should be established, and altitude level should be subject of questioning. Similarly, the unit that was flying on the date in question should record direction and height of flight. Where a severe conflict exists between the information obtained from ground eyewitnesses and the flyers, re-investigation should be carried out immediately and efforts to resolve the conflicts should be made, *e.g.*, by having both witnesses confront one another. Whether the overflight was above or below minimum altitude level could be the key determinant in the application of FTCA and its negligence remedy as opposed to MCA and its noncombat remedy.

The foregoing is subject to many variables not the least of which is a delayed complaint, *e.g.*, the owner finds the damage upon return from vacation or the like. Difficulty may arise from the fact that the unit in question was on weekend or two-week training and has departed. To combat this problem, a register of firing or explosion and flying activities should be maintained to include minimal information, *e.g.*, date of time, place, type of weapon or aircraft, and type of activity.

One important consideration is the retention of files concerning the above. As previously indicated, records as to planning and selection of routes and locations should be retained indefinitely. Records as to various incidents should be retained three years, or longer where any property has been the subject of repeated complaints over a long period.

Most claims filed will be quite small in comparison to the time and effort expended to carry out the foregoing, and there will be the temptation to "settle a nuisance," particularly where the amount involved is less than $100. The trouble with this approach is that one little nuisance might quickly become a huge one. It is just as bad to pay unfounded claims as it is not to pay wellfounded ones.

There is every reason to continue the policy of paying for damage resulting from such "noncombat" activities, provided it is done fairly and uniformly. This has been

[19] The author knows of no case in which quantity-distance standards have been applied to the selection of firing points and impact areas and the caliber of weapon used thereon, or a successful suit for noise pollution based on an overflight above state or federal minimum altitude levels. As indicated *supra* notes 13 and 14, however, the selection of particular ranges for particular weapons, or the selection of particular aircraft for low level training sites where damage to the surrounding community is likely, is a matter for high level consideration with appropriate study and justification.

accomplished in firing claims, by and large, by requiring a scientific appraisal of airshock and ground blast damage allegedly caused by firing and explosions by the United States Army Ballistics Research Laboratories, Aberdeen Proving Ground, Maryland, prior to adjudication.[20]

Similar rationale should apply to property damage caused by air blast from helicopters. No uniform system has been created as such claims are not numerous, due to the fact that the damage is usually caused by hovering. Information concerning the amount of air blast created by various types of helicopters can be obtained from the Corps of Engineer Construction Engineer Lab, Environmental/Acrostic Team, ATTN: CERL-E, P.O. Box 4005, Champaign, Illinois 61820-1305. Here again, the claim can then be submitted for a technical opinion to Aberdeen Proving Ground as above once the degree of force caused by the air blast is established.

In regard to claims for the effect of noise on various livestock or poultry,[21] once the amount of noise created is known it becomes mainly an evidentiary question. Information concerning the amount of noise created by various types of aircraft can be obtained from the United States Army Aeromedical Research Laboratory Acoustical Research Section, Fort Rucker, Alabama, or the Environmental Noise Branch, United States Army Environmental Hygiene Agency, Aberdeen Proving Ground. It can also be obtained by conducting a sound test locally using post environmental hygiene personnel.

The adjudication of damages in noise pollution claims depends heavily on the evidence developed by persistent investigation into such matters as veterinary records, prior production records, and proof of the manner of death. This information can be developed by using local Army veterinarians to assist in questioning the owner or the veterinarian providing treatment. The local county agent also can be brought in, particularly concerning prior production rates and current prices. Appraisals should be made in the presence of the claimant or his or her representative. Finally, where financial records are available, an Army auditor from the post comptroller can assist with an audit.[22]

Off-Post Training

Many of the principles, procedures, and methods suggested herein are equally applicable to similar claims arising from off-post training. Land obtained under permit for such training by Corps of Engineers personnel usually contains a clause in the lease concerning repair of or reimbursement for any damage. This is a feasible alternative to a claim if troop labor is available and adequate repair can be effected by the unit. If the training is part of a maneuver and funding for repairs or damages has been budgeted therefor, payments can be made by Corps of Engineer personnel under Army Regulation 405-15.[23] Only if such methods fail should chapter 3, AR 27-20, be used.

Finally, a continuing review of claims for forced or "emergency" landings on private land indicates a callous disregard of property rights and the creation of unnecessary damage. From the number and location of landings, it would seem that the so-called emergency basis for such landings is dictated more by curiosity or an inability to walk from an alternate landing site than from an actual emergency.[24]

Conclusion

This article has attempted to stress that necessary firing, flying, and other training activities can be carried out with more regard to private property and personal rights. Proper planning of such activities and the selection of places and methods to carry them out is a matter of legitimate interest to and advice from senior judge advocates, and not one that can be delegated or ignored. As to the receipt and investigation of complaints, only senior judge advocates can assist in plans and procedures within the various commands and staff sections involved and encourage their implementation. Properly trained claims judge advocates and claims attorneys play a day-to-day role in the investigation of potential and actual claims, working in concert with others from the installation. The underlying thesis is that concern for our neighbors is not a subject to be raised only after a claim has been filed. Military activities that cause problems in daily living in nearby communities should be a matter of continuing concern to everyone in uniform.

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[20] AR 27-20, para. 2-8x. This requirement should be followed as it ensures fairness and uniformity. There are other experts on the effects of air blast available at many installations. It may be more convenient to use such experts; however, uniformity is the overriding factor. If all claims are denied or paid on the basis of an opinion from the same expert, it is much easier to explain why one was paid and another was not.

[21] Various studies have been conducted at the Beltsville, Maryland, Agricultural Research Farm concerning the effects of noise on livestock, poultry, mink, etc. Inquiries concerning these studies should be made to the United States Army Claims Service.

[22] Local producers can be questioned concerning proper production methods or inquiry can be made to the Beltsville farm (*supra* note 21). When it is necessary to use a damage appraiser who is not a government employee, efforts should be made to select an appraiser with the claimant's approval. A list of qualified appraisers can be obtained from a district office of the Corps of Engineers. Care should be taken to avoid confusing a damage appraiser with a real estate appraiser, as each has a separate and distinct role. Sometimes both may be necessary, provided the fee to be paid is warranted by the amount of the claim.

[23] Dep't of Army, Reg. No. 405-15, Real Estate—Real Estate Claims Founded Upon Contract (1 Feb. 1980).

[24] Why must helicopters always land immediately alongside of a downed aircraft? Better procedures could prevent paying for an entire field of crops instead of just a portion thereof.

Affirmative Claims

Rental Vehicles

A potential property damage recovery assertion exists in some accident situations involving rented vehicles. When a rental vehicle is damaged while in the possession of a soldier or government employee while on official business, all or part of the repair costs may be paid or reimbursed by the government in accordance with Joint Travel Regulations. In such situations, property damage assertions are not precluded where there has been third party liability. Therefore, recovery judge advocates should investigate all such cases and attempt to collect the amount of the government's loss from any third parties liable in tort. Caution: collection efforts should not be directed at the Army personnel who rented the vehicle damaged by a negligent third party.

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 advice on the recording and reporting of loss and damage to household goods. Set out below is a handout for soldiers to aid them in recording and reporting loss and damage noted after delivery of personal property shipments. The Office of the Deputy Chief of Staff for Logistics has requested major commands to distribute this handout to all transportation activities that counsel soldiers. A copy is to be provided to each soldier during counseling. To further assist in this effort, a copy of the handout was sent with the claims ADP Report to each staff and command judge advocate with claims approving authority. These claims approving authorities should ensure that the handout is being used by their local transportation office and have this information published periodically in local command information publications.

Recording and Reporting Loss and Damage to Your Household Goods

At the time of delivery of your household goods, the carrier will give you five copies of a two-sided pink form—DD Form 1840/1840R.

All damage and/or loss you notice at delivery should be identified on the front side of the DD Form 1840 by inventory number, name of item, and type of damage or loss.

The carrier will leave you three of the five copies of the completed form which you and the carrier must sign. (Both you and the carrier sign all five copies). As soon as possible, but not later than 70 days after delivery, you must examine every item in your shipment and record any additional damage or loss (which was not noted or listed at delivery) on the reverse side of the form (DD Form 1840R) by inventory number, name of item, and the type/extent of damage or loss. You must deliver those three copies of the completed form to the claims office within 70 days of the delivery. The claims office will retain two copies. The third copy will be returned to you, stamped with the date received, for your use when you submit your claim.

NOTE: If your destination is a Navy or Marine Corps installation, deliver your completed forms to the transportation office for processing your claim. If your destination is an Army or Air Force installation, deliver your completed forms to the claims office at that installation.

If you submit a claim against the United States for damage and loss of your household goods during shipment, and there are items on the claim which you have not previously identified on the DD Form 1840 or DD Form 1840R, or the DD Form 1840R is not received by the claims office within 70 calendar days of delivery, a reduction in the amount payable on your claim may result.

If, upon delivery of your household goods, you do not receive any copies of DD Form 1840/1840R, record loss and damage noted during delivery on your inventory. Immediately after delivery, notify your local claims office of nonreceipt of the forms. (As in note above, at Navy and Marine Corps installations, notify the local transportation office.)

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Position Vacancy

The Judge Advocate Guard and Reserve Affairs Department, The Judge Advocate General's School, has recently converted the Chief of Personnel Actions from a military position to a civilian position as a Military Personnel Specialist, GS–12. This position requires knowledge of the Army Reserve personnel management system, knowledge of the legal profession, and ability to prepare factual and analytical reports of controversial situations.

Interested persons should submit a Personal Qualifications Statement, Standard Form 171, to the U.S. Army Foreign Science and Technology Center, Civilian Personnel Office, ATTN: Mrs. Edwards, 220 Seventh Street, N.E., Charlottesville, Virginia 22903–5396. Additional information may be obtained from Lieutenant Colonel Bill Gentry, Judge Advocate Guard and Reserve Affairs Department, at 804–972–6380 or AUTOVON 274–7110, extension 972–6380.

1987 JAG Reserve Component Workshop

The 1987 Judge Advocate General's Reserve Component Workshop will be held at the Judge Advocate General's School in Charlottesville, Virginia, from 31 March through 3 April 1987. Attendance is by invitation only; attendees can expect to receive their invitation packets in mid-January 1987. It is imperative that invited officers notify TJAGSA of their intention to attend by 18 February 1987.

On-Site Schedule

The following changes to the On-Site Schedule contained in the August 1986 edition of *The Army Lawyer* should be noted. The action officer for the Columbia, S.C. On-Site has been changed from LTC Costa M. Pleicones to MAJ James Hill, P.O. Box 4706, Columbia, S.C. 29240, (803) 737–6458. The training site for the Louisville, KY On-Site is Ramada Inn East, 9700 Bluegrass Parkway, Louisville, KY. The host unit, training site and action officer's telephone number for the Chicago, IL On-Site have been

changed from the 86th ARCOM, the USAREC Conf. Room and (312) 858–6877 to the 7th MLC, the Consolidated Club Ballroom and (312) 790–3403, respectively. The address for the action officer for the Los Angeles, CA On-Site should be changed from Torrance, CA to Tarzana, CA. All other information regarding the above On-Sites remains unchanged.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 293–6286; commercial phone: (804) 293–6286; FTS: 928–1304).

2. TJAGSA CLE Course Schedule

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).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
Oklahoma	1 April annually starting in 1987
South Carolina	10 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the July 1986 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

March 1987

1–6: NITA, Advanced Trial Advocacy, Gainesville, FL.

1–6: NJC, Alcohol and Drugs and the Courts, Reno, NV.

1–7: NELI, Employment Law Briefing, Nassau, Bahamas.

1–13: NJC, Trial Techniques for the New General or Broad Jurisdiction Judge—NEW, Reno, NV.

5–6: PLI, Title Insurance, New York, NY.

5–6: ABA, Securities Litigation, Washington, DC.

7–14: NELI, Employment Law Briefing, Vail, CO.

8–13: NJC, Processing DWI Cases in High Volume Courts, Reno, NV.

9–10: NYUSCE, Legal Issues in Acquiring and Using Computers, New York, NY.

12–13: PLI, Age Discrimination, New York, NY.

12–13: UMLC, Medical Institute for Attorneys, Miami Beach, FL.

13–14: UKCL, Legal Issues for Bank Counsel, Lexington, KY.

18–20: ABA, Medical Malpractice, Orlando, FL.

19–20: FBA, Immigration Law Conference, Washington, DC.

21–27: PLI, Patent Bar Review Course, New York, NY.

21: NKU, Federal Practice and Procedure, Highland Heights, KY.

22–25: NCDA, Representing State and Local Governments, Colorado Springs, CO.

22–28: NITA, Midwest Regional Trial Advocacy, Chicago, IL.

26–27: LSU, Mineral Law Institute, Baton Rouge, LA.

26–27: PLI, Title Insurance, Chicago, IL.

26–27: ABA, Securities Litigation, Phoenix, AZ.

29–4/1: NCDA, Coakley National Symposium on Crime, Palm Desert, CA.

29–4/10: NJC, Special Court—Law Trained, Reno, NV.

29–4/10: NJC, Special Court—Non-Law Trained, Reno, NV.

29–4/3: NJC, Case Management Reducing Court Delay, Reno, NV.

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.*

Current Material of Interest

1. Constitution Bicentennial Packet

The Judge Advocate General's School, Army (TJAGSA) has prepared a resource packet to assist staff judge advocates in planning local celebrations of the bicentennial of the Constitution. The packet includes draft speeches suitable for presentation to lay civilian and military audiences, samples of articles and pamphlets, order forms for bicentennial materials, and addresses and phone numbers of points of contact. TJAGSA will forward copies of the packet to SJAs upon request. To obtain a packet, SJAs should write to TJAGSA, JAGS–DDL, Charlottesville, VA 22903–1781.

2. Changes to TJAGSA Telephone Numbers

A new telephone system has been installed at The Judge Advocate General's School. The AUTOVON access is still 274–7110. The new telephone numbers should be annotated in the JAGC Personnel and Activity Directory.

Commandant	972–6301
Deputy Commandant	972–6303
Director, Academic Department	972–6303
Administrative & Civil Law Division	972–6350
Legal Assistance Branch	972–6369
Contract Law Division	972–6360
Criminal Law Division	972–6340
International Law Division	972–6370
Nonresident Instruction	972–6307
Correspondence Course Office	972–6308
CLE Quotas	972–6307
Developments, Doctrine, and Literature	972–6390
Publications	972–6396
Army Law Library Service	972–6394
Combat Developments	972–6398
Judge Advocate Guard & Reserve Affairs Department	972–6380
School Support Department	972–6320
Post Exchange	972–6324
Community Club Office	972–6319
Post Judge Advocate	972–6322
Adjutant Division	972–6326
Logistics Division	972–6330
Transportation Branch	972–6332
Billeting Office	972–6334
Other Commonly Called Numbers	
Automation Management Office	972–6379
Lobby	972–6300
VOQ/BOQ/DVQ	972–6400
Library	972–6306

3. Maryland Tax on Lawyers

The State of Maryland has imposed a one-time tax of $150 on all lawyers (including federal, state, and local employees) licensed to practice in Maryland to support the Legal Mutual Liability Insurance Society of Maryland. The Society provides malpractice insurance to Maryland lawyers. Even though Army JAGC lawyers may not benefit from the malpractice insurance, they are required to pay the tax if they are licensed in Maryland. Failure to pay the tax subjects all of the lawyer's property to a first lien in favor of the state.

All lawyers licensed to practice in Maryland should have already received a bill. If you have not received a bill, or if you have questions, contact State Treasurer William James, Attention: Lawyer Tax Collection Section, P.O. Box 666, Annapolis, Maryland 21404. The telephone number is (301) 269–3533.

4. 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.

5. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC.

All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The Criminal Law—Jurisdiction publication has been superseded by DA Pam 27-174, Criminal Law—Jurisdiction (25 Sept. 1986).

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

Contract Law

AD B090375	Contract Law, Government 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 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.

6. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 5–20	Commercial Activities Program		20 Oct 86
AR 15–80	Army Grade Determination Review Board		28 Oct 86
AR 50–5	Nuclear Surety		1 Nov 86
AR 190–53	Interception of Wire & Oral Communications for Law Enforcement Purposes		3 Nov 86
AR 190–55	U.S. Army Correctional System: Procedures for Military Executions		27 Oct 86
AR 210–13	General/Flag Officer's Quarters (GFOQ) and Installation Commander's Quarters (ICQ) Management		30 Oct 86
AR 310–10	Military Orders		5 May 86
AR 340–25	Office Management Mailing Procedures for Certain U.S. Citizens, Army Activities, and U.S. Citizens Overseas		3 Dec 86
AR 600–55	Motor Vehicle Driver and Equipment Operator Selection, Training, Testing and Licensing		26 Sep 86
AR 600–61	Personnel Management Assistance System (PERMAS)		30 Oct 86
AR 600–83	The New Manning System COHORT Unit Replacement System		27 Oct 86
AR 600–85	Alcohol and Drug Abuse Prevention and Control Program		3 Nov 86
AR 611–75	Selection, Qualification Rating, and Disrating of Army Divers		16 Aug 86
AR 690–950	Career Management		29 Oct 86
DA Cir 11–86–2	Army Programs, Internal Control Review Checklists		3 Nov 86
DA Pam 27–153	Legal Services—Contract Law		25 Sep 86
DA Pam 27–174	Legal Services—Jurisdiction		25 Sep 86

7. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Adams, Herps & Abendroth, *Tax Reform 1986: Here Comes the Earthquake,* Tr. & Est., Oct 1986, at 10.

Anthony, *Defending Federal Contractor Fraud Actions at Trial and on Appeal,* A.L.I.A.B.A. Course Materials J., Aug. 1986, at 83.

Caminsky, *Rebuttal Use of Suppressed Statements: The Limits of* Miranda, 13 Am. J. Crim. L. 199 (1986).

Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 Wis. L. Rev. 1359.

Eisenberg, *Defending Government Contractors in Criminal Cases,* 12 Litigation 23 (1986).

Geldon, *New Developments in Government Contract Litigation,* Prac. Law., Oct. 1986, at 67.

Glennon, *United States Mutual Security Treaties: The Commitment Myth,* 24 Colum. J. Transnat'l L. 509 (1986).

Graham, *Evidence and Trial Advocacy Workshop: Hearsay Definition—Everyday Application,* 22 Crim. L. Bull. 445 (1986).

Grahl-Madsen, *Protection of Refugees By Their Country of Origin,* 11 Yale J. Int'l L. 362 (1986).

Harris, *Justice Jackson at Nuremberg,* 20 Int'l Law. 867 (1986).

Horan, *Admissibility of Hypnotically Enhanced Testimony at Trial,* 1986 Ark. L. Notes 9.

Johnson & Minch, *The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System,* 52 J. Air L. & Com. 93 (1986).

Kilgarlin, *Lawyers: Guardians of Democracy,* 38 Baylor L. Rev. 249 (1986).

Law and National Security: Access to Strategic Resources, 38 Okla. L. Rev. 771 (1986).

Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power,* 134 U. Pa. L. Rev. 1035 (1986).

Margo, *Recent Developments in Aviation Case Law,* 52 J. Air L. & Com. 117 (1986).

Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty,* 1985 Wis. L. Rev. 1305.

Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules,* 38 Baylor L. Rev. 331 (1986).

Redlich, *Ending the Never-Ending Medical Malpractice Crisis,* 38 Me. L. Rev. 283 (1986).

Rostow, *Nicaragua and the Law of Self-Defense Revisited,* 11 Yale J. Int'l L. 437 (1986).

Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce,* 64 Tex. L. Rev. 687 (1985).

Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example,* 53 U. Chi. L. Rev. 337 (1986).

Slawson, *The Right to Protection from Air Pollution,* 59 S. Cal. L. Rev. 667 (1986).

Spahn, *Dealing with the Witness-Advocate Rule,* Prac. Law., Oct 1986, at 25.

Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process,* 22 Crim. L. Bull. 405 (1986).

Symposium on Litigation Management, 53 U. Chi. L. Rev. 306 (1986).

Symposium on Family and Children, 1986 Utah L. Rev. 439.

Symposium on Family Law, 9 Hamline L. Rev. 381 (1986).

Weigel, *Punitive Damages in Medical Malpractice Litigation,* 28 S. Tex. L. Rev. 119 (1987).

Whitcomb, *Child Victims in Court: The Limits of Innovation,* 70 Judicature 90 (1986).

Note, *The Major Nicholson Incident and the Norms of Peacetime Espionage,* 11 Yale J. Int'l L. 521 (1986).

Note, *Social Host Liability for Guests Who Drink and Drive: A Closer Look at the Benefits and the Burdens,* 27 Wm. & Mary L. Rev. 583 (1986).

Comment, *Right of Concubines to Equal Protection Under the Laws of Louisiana,* 11 S.U.L. Rev. 65 (1985).

Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process,* 134 U. Pa. L. Rev. 1259 (1986).

The Army Lawyer 1986 Indexes

This edition contains a subject, title, and author index of all articles appearing in The Army Lawyer *from January 1986 through December 1986. Articles appearing in the USALSA Report and the Claims Report are indexed in the above indexes. In addition, there are separate indexes for Policy Letters and Messages from The Judge Advocate General, Opinions of The Judge Advocate General, and Legal Assistance Items. References to* The Army Lawyer *are by month, year, and page.*

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Reviewing Solicitations—A Road Map Through the Federal Acquisition Regulation, *by MAJ James F. Nagle,* Dec. 1986, at 19.

ACQUITTAL

Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments, *by MAJ Michael R. Smythers,* Apr. 1986 at 3.

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How Aggravating Can You Get? The Expanded Boundaries for Admission of Aggravation Evidence Under R.C.M. 1001(b)(4), *by CPT Michael S. Child,* Feb. 1986, at 29.

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Special Interest Items for Article 6 Inspections, Feb. 1986, at 5.

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Data Processing Systems—Do More With Less, *by LTC George D. Reynolds,* Apr. 1986, at 30.

JAGC Automation Overview, *by LTC Daniel L. Rothlisberger,* Jan. 1986, at 51.

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